



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 259 OF 2014 (O.S)

CHARLES OBIMBO.....PLAINTIFF

VERSUS

FLORENCE JANET ACHIENG' OTIENO.....1ST DEFENDANT

KATH ANYANGO OTIENO.....2ND DEFENDANT

RULING

1. By an Originating Summons dated 1st September, 2014, the Applicant, Charles Obimbo, seeks a determination on the question whether the estate of the Late Godwin Guya Otieno (hereinafter the deceased) is indebted to him in the sum of Ksh.2,000,000/= and prays that the said money together with interest be recovered from the estate of the deceased prior to the distribution of the estate to the beneficiaries.

2. The 2nd Respondent Kath Anyango Otieno filed the Preliminary Objection dated 30th January, 2015. The Originating Summons was objected to on the grounds that it is defective and in contravention of the Law of Succession Act Cap 160 Laws of Kenya, an abuse of the process of the court and does not lie as the matter raised herein is substantially before the court in HC (Nbi) Succession Cause No. 1862/12 in the estate of Godwin Guya Otieno (Deceased).

3. The Preliminary Objection was canvassed by way of written submissions which I have considered.

4. As stated in the celebrated case of **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) EA 696:**

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

5. It is clear that in the case at hand the claim of Ksh.2,000,000/= is said to have arisen during the lifetime of the deceased. The Respondents have been sued as the Administrators of the estate of the deceased. The Preliminary Objection raised is therefore on a point of law.

6. The Law of Succession Act Cap 160 Laws of Kenya provides the law relating to succession and the administration of estates of deceased persons. The estate of a deceased person must be distributed in accordance with the Law of Succession and the Probate and Administration Rules. (See for example Section 55,68,76,82 and 83 which provides for confirmation of grants; objections, revocations and powers and duties of personal representatives).

7. Although under Order 37 rule 1 Civil Procedure Act 2010 the Applicant herein who has described himself as a creditor in the estate of the deceased can apply to this court to determine his interest in the estate of the deceased, it is clear that the Respondents herein have been sued as the Administrators of the estate of the deceased. Indeed the Grant of Letters of Administration in HC Nbi Succession Cause No. 1872/12 has been exhibited by the Applicant.

8. Taking into account that the Applicant also seeks an order that the Respondents as the Administrators of the deceased be compelled to pay the money in question out of the estate of the deceased before the distribution to the beneficiaries, this court's view is that the correct forum for the dispute herein is the Probate and Administration Court.

9. With the foregoing, I find merits in the Preliminary Objection and uphold the same. Consequently, I strike out the Originating Summons with costs.

Date, signed and delivered at Nairobi this 4th day of Oct., 2018

B. THURANIRA JADEN

JUDGE