REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

SUCCESSION CAUSE NO. 64 OF 1995

IN THE MATTER OF THE ESTATE OF M' MARANYA M' KIERWA

ROSE MATARIA KIREMA……PETITIONER/RESPONDENT

Versus

JULIUS BUNDI MANYARA…….....OBJECTOR

MICHAEAL KOOME M'MARANYA……1ST APPLICANT

FRANCIS GITONGA M'MARANYA……...2ND APPLICANT

JOSEPH MUTHAMIA M' MARANYA……..3RD APPLICANT

RULING

Revocation of Grant

[1] I have before me a Summons for Revocation of Grant filed in court on 11th August 2015. It is seeking the Grant issued to the Petitioner to be revoked on the grounds inter *alia that* the proceedings to obtain the Grant were defective in substance. But, before the Application could be heard on its merits, the Petitioner filed a Notice of Preliminary Objection raising the following points:

1. ***That the matter is res judicata.***

2. ***That the application is an abuse of court process because the grant was revoked on 20th January 2001 on the application by the 1st objector herein. Therefore, the objector ought to either seek the review of or appeal against the judgment of Honourable Anyara Emukule dated 1stApril 2009 rather starting the matter afresh.***

3. ***That the applicant's application is a deliberate misrepresentation of the true fact that the wheels of justice have rolled and cannot be reversed for the applicant's selfish gain and ought to be dismissed with punitive cost.***

[2] On 7th December 2015, the court directed that the Preliminary Objection be canvassed by way of written submissions. I will now consider those submissions. The Petitioner submitted that the Petitioner and the Objector are sister and step brothers as the deceased had two wives. The Petitioner was born of the 1st wife while the Objector was of the 2nd wife. He stated that he had

been issued with a Grant of Letters Administration on 26th March 1996 which Grant was confirmed on 13th September 1996. But this Grant was revoked on 20th January 2001 at the behest of the 1stObjector. Consequently, the Applicants application before the court is an abuse of the process of court for it does not meet the threshold required by law. As such, the Applicants should not be allowed to hide behind the 1st Objector actions as he represented the 2nd wife's house to which they all belonged.

[2] The Applicants took a different view of the matter. They submitted that as the record is quite clear that;(1) the Petitioner and the Objector one Julius Bundi had been involved in a dispute over some of the estate of the deceased except the Applicants were never involved in the said dispute; and (2) that the allegation that the Objector represented their mother's house in the said dispute was baseless as he had no such authority. Consequently, they urged the court to find that the preliminary objection was not sustainable and dismiss it.

DETERMINATION

[3] Are the points taken out by the Petitioner true preliminary objection in the sense of the law? I do not wish to re-invent the wheel on this subject, for it is now a well-settled principle that a preliminary objection consists of a point of law which should be straight forward, and with the potential of decimating the entire case or application. Therefore, any point which will require probing of evidence in order to prove is not a true preliminary objection; such issue should be tried at the hearing. Towards this end, I am content to cite a very apt statement on preliminary objection which was expressed in sheer simplicity in the case of **ORARO vs. MBAJA [2005] 1 KLR 141**by**Ojwang, J** (as he then was) as follows:

> ***"…The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence''.***

But see the origins of this principle as was set out in the case of **MUKISA BISCUITS MANUFACTURING COMPANY LIMITED. v. WEST END DISTRIBUTORS LIMITED [1969] E.A. 696** by Law J.A. (as he then was) as follows:

> ***"So far as I am aware, 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, President of the Court at the time stated in the same caseas follows:-

> ***"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."***

[4] I will apply this test to this case. It would appear that the gist of the Petitioner's Preliminary Objectionare two; that the Application dated 11thAugust 2015, seeking Revocation of Grant is and abuse of the court and is also *Res Judicata*. In support of the said position, the Petitioner argued that she was issued with a Grant of Letters Administration on 26th March 1996 but the said Grant was revoked on 20th January 2001 at the behest of the Objector. She posits that the Applicants are merely hiding behind the Objector actions as he represented the house of the 2nd wife to which they all belonged. I note that the Applicants have submitted that they did not participate in the earlier proceedings between the Petitioner and the Objector, and therefore, urged the court to

dismiss the Preliminary Objection as unsustainable. It is not in dispute that the Grant of Letters of Administration issued to the Petitioner on 26th March 1996 was revoked on 20th January 2001 at the behest of the Objector. But, this being a succession cause, I will hesitate to strictly apply *res judicata*. See the case of **WILLIE V MUCHUKI& 2 OTHERS [2004] 2 KLR 357**on application of the doctrine of *res judicata* in succession cases. My view is that, in succession cases, a court of law is clothed with wide powers and discretion to ensure that justice is done in the matter. I do not think, although I could be wrong, that there is any legal restriction that once a grant of representation is revoked any subsequent application for revocation of grant becomes *res judicata* irrespective of the circumstances. I am not aware of such peremptory command of law in succession matters. However, this does not mean that parties should apply for revocation at whims as any such application should be based and decided on the law and facts of the case. My comfort is that the court should draw from its inherent powers to prevent abuse of its process. Abuse of process has been urged here and I should be guided by the circumstances of this case to see whether the application in question is an attempt to revisit the case [which is concluded] as when they feel like. Such conduct would violate public policy that litigation must come to an end and a party should not be vexed twice on same litigation without good cause. Looking at the arguments by the Applicants, they have not exactly shown thatthe circumstances of their application are different from and could not even have been anticipated in the earlier application for revocation. Again, it is not in dispute that this court***(Emukule J)*** delivered a judgment on 1st April 2009 and issued a Grant on 28th May 2009 distributing the three parcels of the Estate as follows:

1. ***NYAKI/MUNITHU/913***

1. ***MARGARET KANJIRA-0.38 ACRES***
2. ***ROSE MATARIA KIREMA.0.038 ACRES***
3. ***LUCY MAKENE-0.38 ACRES***
4. ***LUCY NKIMA-0.38 ACRES***

2. ***NYAKI/MUNITHU/461***

1. ***ROBERT GIKANDI M'MARANYA- 0.06 Ha***
2. ***STANELY KIMATHI- 0.06 Ha***
3. ***MICHAEL KOOME- 0.06 Ha***
4. ***JOSEPH MUTHAMIA- 0.06 Ha***
5. ***FRANCIS GITONGA- 0.06 Ha***
6. ***JULIUS BUNDI- 0.06 Ha***

3. ***NYAKI/MUNITHU/1075***

1. ***ROBERT GIKANDI M'MMANYARA- 0.06 Ha***
2. ***STANELY KIMATHI M'MANYARA- 0.06 Ha***
3. ***MICHAEL KOOME M'MANYARA- 0.06 Ha***
4. ***JOSEPH MATHAMIA M' MANYARA- 0.06 Ha***
5. ***FRANCIS GITONGA M' MANYARA- 0.06 Ha***
6. ***JULIUS BUNDI M' MANYARA- 0.06 Ha***

[5] The aforesaid judgment has not been appealed against; the Applicants are named beneficiaries in the cause and judgment. I should also state that this cause was filed in 1995 and I do not think it will be in the interest of justice to sustain the application for revocation in view of the circumstances of this cause. I agree it is an abuse of process of the court and is not the right course to have been taken in these proceedings. I should invoke the inherent jurisdiction of the court to prevent the abuse. These parties should not be allowed to litigate forever unless they do so in the right forum as a way of showing they are in pursuit of legitimate cause. If they desire to pursue the matter, they ought to engage the appellate gear. I think this court is now functus officio in and I refuse to re-open this matter. For the above reasons, I find the Applicants Application dated 11th August 2015 to be without merit. Accordingly Iuphold the Preliminary Objection dated

2nd December 2015 and dismiss the application dated 11th August 2015.

On costs

[6] I award costs to the Petitioner for she is the successful party who should be recompensed for expenses she has had to incur in defending the application. It is so ordered.

Dated, signed and delivered in court at Meru this 11th day of April 2016

F. GIKONYO

JUDGE

In the presence of:

Mutegi advocate for Gatari Ringera advocate for applicant

Ndorongo advocate for the petitioner - absent

F. GIKONYO

JUDGE