



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI

FAMILY DIVISION-MILIMANI LAW COURTS

SUCCESSION CAUSE NOS. 989 and 1110 OF 1999 (CONSOLIDATED)

IN THE MATTER OF THE ESTATE OF GERISHON JOHN MBOGOH (DECEASED)

BETWEEN

MARGARET RACHAEL MUTHONI.....1ST APPLICANT

ARTHUR MUNENE MBOGO.....2ND APPLICANT

AND

VERONICA RWAMBA MBOGO.....RESPONDENT

RULING

INTRODUCTION

This Ruling relates to the Notice of Preliminary Objection dated 9th March 2016 filed by the Respondent, Veronica Rwamba Mbogo in response to an Application dated 9th November 2015, that had been filed by the 1st and 2nd Applicants. In the said Application, the 1st and 2nd Applicants have sought for the following orders:

- 1) That the Application be certified urgent and be heard ex parte in the first instance.***
- 2) That this Honourable Court be pleased to stay the distribution of the deceased's estate pursuant to the Certificate of Confirmation of Grant dated 30th January 2014, pending inter-partes hearing of this application.***
- 3) That this Honourable Court be pleased to stay the distribution of the deceased's estate as provided under the Certificate of Confirmation of Grant dated 30th January 2014, pending hearing and determination of this application.***
- 4) That this Honourable Court be pleased to review and/or set aside the Certificate of Confirmation of Grant and the distribution of the estate made on 30th January 2014.***
- 5) That this Honourable Court be pleased to grant any further orders that it may deem fit and just to grant in the circumstances.***

6) That costs be provided for.

In response to the Application, the Respondent filed the present Notice of Preliminary Objection in opposition on the grounds that:

1) The Application is bad in law and the same should be dismissed.

2) This Court lacks the jurisdiction to hear and determine the same.

THE RESPONDENT'S CASE

In her Written Submissions dated 24th March, 2016, the Respondent submits that the deceased died on 3rd March 1999, intestate, having two houses, the first house comprising of seven members and the second comprising of her. That, upon the demise, the first house filed Succession Cause No. 1110 of 1999 while the second house filed Succession Cause No. 989 of 1999. Additionally, that the administrators, Arthur Munene Mbogo and Margaret Rachel Muthoni, members of the first house, were appointed so by the Court and upon their appointment, they challenged the fact that she is a widow to the deceased.

The Respondent submitted further that the matter went to the Court of Appeal and by a Judgment rendered on 16th June 2006, the Court declared her a widow to the deceased and hence entitled to inherit from the deceased's Estate. That by Summons dated 12th November, 2013, the Administrators moved the Court seeking orders for confirmation of Grant and distribution of the Estate and she also filed an Affidavit in reply which she swore on 19th November 2013. That on 30th January 2014, the matter came up for hearing and the Court confirmed the grant and proceeded to distribute the Estate and a Certificate of Confirmation of the Grant was duly issued. Accordingly, the distribution was carried out in the presence of all the administrators and the Beneficiaries and no objection was raised thereto.

According to the Respondent, upon distribution being carried out, the Administrators filed a Notice of Motion Application dated 12th May 2014 and the same was dismissed by the Court. In that regard, she contended that the Administrators did not pursue the matter further and neither did they proceed to distribute the Estate to her despite them taking over their shares of the Estate.

Based on the foregoing, it was the Respondent's contention that the Summons dated 9th November 2015 is bad in law as this Court lacks the jurisdiction to set aside the Certificate of Confirmation of Grant and the distribution of the Estate, and to redistribute the Estate as urged by the Administrators. Further, that under **Section 71 of the Law of Succession Act**, this Court is beholden to confirm the grant to distribute the shares to the respective beneficiaries. In addition, it was her submission that if the Administrators do not discharge their duties diligently as required of them under section 83 of the Law of Succession, this Court would therefore be under a duty to revoke the grant that had been issued.

It was the Respondent's other argument that this Court is *functus officio* and lacks the jurisdiction to hear and determine the Summons dated 9th November 2015 and the prayers sought therein cannot as well issue, as the same can only be issued and redressed on appeal. Accordingly, that it is trite law that the Court can only exercise its jurisdiction to review if it is satisfied that the threshold set out in Order 45 of the Civil Procedure Act has been met.

In her view, the Applicants have not come to Court with clean hands in that as Administrators, they have already partially distributed the Estate and the said Application has been brought almost two years after the order sought to be reviewed was given. Additionally, they have not demonstrated that the evidence they now seek to rely on was not within their reach at the time of the distribution or that the same is now relevant. Finally, while relying on the holding in **ESTATE OF JOHN MUSAMBAYI KATUMANGA, SUCCESSION CAUSE NO. 399 OF 2007**, she submitted that the spirit of **Section 40 of the Law of Succession** envisages the principle of equal distribution and not equitable distribution and hence, the argument by the Administrators that the distribution herein if enforced would be unfair, ought to be disregarded. For the foregoing reasons therefore, she urged the Court to uphold his

Preliminary Objection and dismiss the Application dated 9th November, 2015.

THE APPLICANTS' RESPONSE

In response to the Preliminary Objection, the 1st and 2nd Applicants filed Written Submissions dated 18th April 2016. Their case was that the deceased was married to Mrs. Julia Mbogoh in 1958 but she died in January 1980. The marriage was blessed with seven children and that two months after the deceased's burial, Mrs. Veronicah Rwamba, filed an *ex parte* Notice of Motion Application seeking an interim grant of letters of administration *ad colligenda bona* being Succession Cause No. 989 of 1999. That Julia's children were not aware of the foregoing and they separately filed a Petition, being Succession Cause No. 1110 of 1999 and subsequently, the two matters were consolidated.

It was the Applicant's contention that on 13th January 2000, the Respondent filed an objection to the grant being made to them asserting that the 1st Applicant was a married woman and was further not a dependant of the deceased. As such, in her Cross-Petition, she sought to be the sole administratrix or a co-administratrix of the Estate and that upon hearing of the matter, the Court dismissed her Cross-Petition holding that she was not a wife to the deceased and that she did not appeal the decision in that regard.

The Applicants contended further that on 1st August 2001, the Respondent filed an Application for Review of the said decision but the same was however dismissed in a Ruling dated 14th November 2001. She however appealed against the same and the Court of Appeal held that she was a wife and in that regard, the Court of Appeal referred the matter back to the High Court for a determination on who would be the administrators of the deceased's Estate. Accordingly, the High Court held that she was entitled to be a beneficiary of the Estate of the deceased as the deceased widow but however her two children namely: Purity Wanja and Lenny Muthoni were not dependents of the deceased and hence were not entitled to be considered as beneficiaries.

It was the Applicants' other case that on 30th January 2014, the Court in the presence of all the parties distributed the Estate save to the beneficiaries from Juliah Mbogoh's house, who were not represented as their advocate applied to cease acting the same day. Further, that in an Application dated 12th May 2014, the Administrators sought for stay of the execution of the Certificate of Confirmation of grant pending hearing and determination of an intended appeal and that, on 31st July 2015, a Ruling was delivered in which the same was dismissed for technical reasons.

As a result of the foregoing, it was their submission that no authority or content has been laid before this Court in order to assist it to determine the questions raised in the present Preliminary Objection and that the matters raised in the Respondent's submissions go into the merits of the Application and not the Court's jurisdiction. Furthermore, in their view, the Grant was confirmed in the presence of the beneficiaries but that even though they were present, their advocates ceased acting on the same day and as such, they were unrepresented and yet the Court went on to distribute the Estate.

The Applicants argued that their Application dated 9th November 2015 seeks to point out to the Court that the distribution in question was erroneous because the Respondent, constituting a single unit, ended up with 40% of the Estate while the other seven beneficiaries got the remainder of the estate. In that regard, their argument was further that the distribution is erroneous and inconsistent with **section 40** of the **Law of Succession Act**.

In support of their application for review, the Applicants submitted that they have demonstrated that the distribution of the Estate was erroneous on account of unequal distribution and as such, **Order 45** of the **Civil Procedure Act** allows this Court to correct errors and since there is no appeal pending against the Ruling on the distribution, the matter remains fit for review by this Court.

While referring to the case of MUTAHI KIHARANGA VS MARGARET WANGARI WAWERU AND ANOTHER [2016] EKLR, it was their other submission that they deserve the discretion of the Court as the substance of their Application overwhelms the procedural technicalities of delay, as asserted by the

Respondent.

Additionally, that by dint of **Section 47 of the Law of Succession**, this Court is vested with jurisdiction over probate and administration matters, specifically to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders, as it may consider expedient. In that regard, they relied on **FRANCIS KAMAU MBUGUA AND ANOTHER VS JAMES KINYANJUI MBUGUA, NAIROBI HCCC NO. 111 OF 2004 (OS)** and urged the Court to overrule the Preliminary Objection and determine the Application dated 9th November 2015 on its merits.

DETERMINATION

After having considered the parties respective pleadings and submissions as reproduced above, the key issue for determination is whether the Preliminary Objection succeeds. In that regard, it should not be lost to the parties that a Preliminary Objection primarily **raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct** - See **MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EA 696.**

In **RAMATHANI MATHENGE KAMOZU AND 2 OTHERS VS ATTORNEY GENERAL AND 10 OTHERS, PETITION NO.325 OF 2011,** it was pointed out thus:

“[28] As elucidated above therefore, a Preliminary Objection must raise a point of law based on ascertained facts or evidence, without touching on the merits of the matter in consideration. It can never be premised on disputed facts or evidence.”

It therefore follows that a Preliminary Objection must be purely founded on the law and it is within such parameters that I shall determine the present matter. On that basis, the Objector primarily raises two key grounds in her objection. The first one being that the Application is bad in law and should be dismissed. In that regard, I am inclined to dismiss that ground on the basis that it is not a ground of law. Furthermore, in determining whether the said Application is bad in law, it would mean that this Court will have to go into the merits of the Application and to call for additional evidence in order to reach a conclusion. As such, the first ground must therefore fail.

On the second ground, the objector asserts that this Court lacks the jurisdiction to entertain the same. In that regard, the importance of jurisdiction cannot be gainsaid and I can do no better than to quote Nyarangi J. in **OWNERS OF MOTOR VESSEL ‘LILLIAN S’, VS CALTEX OIL (KENYA) LIMITED [1989] KLR 1** thus:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” (Emphasis added)

The question then that I must answer is whether this Court has the jurisdiction to determine the Application dated 9th November 2015. In that regard, I have perused the said Application and I note that the Applicants therein primarily seeks orders of stay pertaining to the distribution of the deceased's Estate and orders of review and setting aside the Certificate of Confirmation of Grant and the distribution of the deceased's Estate. Does this Court have the jurisdiction to grant such orders? My answer to that question is in the affirmative. I hold so because **Section 47 of the Law of Succession Act** grants this Court such jurisdiction in the following terms:

The High Court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient:

Provided that the High Court may for the purpose of this section be represented by Resident Magistrates appointed by the Chief Justice.

Furthermore, ***Order 45 of the Civil Procedure Act*** gives this Court the powers to entertain applications for review. ***Order 45 Rule 1*** provides that:

(1) Any person considering himself aggrieved-

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review or judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Order 45 Rule 2 further provides that:

(1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.

Based on the foregoing, it is clear that this Court is vested with the jurisdiction of entertaining and determining applications for review as the circumstances of a case may permit. As such, I am satisfied that the Application dated 9th November, 2015 is well before this Court in light of discovery of new and important matters regarding distribution of the deceased's estate and it is upon this Court to determine the same on merits.

DISPOSITION

Based on the issues discussed above, the Preliminary Objection dated 9th March 2016 is dismissed. In the circumstances of this case, I shall not make any orders as to cost. Let each party bear their own costs.

DELIVERED, SIGNED AND DATED IN OPEN COURT ON THIS 5TH DAY OF SEPTEMBER, 2016

M.W.MUIGAI

JUDGE

In the presence of;

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