



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 391 OF 2013**

**IN THE MATTER OF THE ESTATE OF MUTIO MUTWII KAMWILU (DECEASED)**

**MBATHA MUTIO MUTWII.....1<sup>ST</sup> PETITIONER**

**ALPHONSE NZIOKA MUTIO.....2<sup>ND</sup> PETITIONER**

**FERDINARD MATILU MUTIO.....3<sup>RD</sup> PETITIONER**

**VERSUS**

**PATRICK KAVINDYO MUASYA.....INTERESTED-PARTY**

**RULING**

1. The deceased, **Mutio Mutwii Kamwili** passed away on the 2<sup>nd</sup> of May 2004. The three petitioners herein petitioned the court for the grant of letters of administration on the 5<sup>th</sup> June, 2013.
2. The Interested Party, **Patrick Kavindyo Muasya** entered appearance and filed an affidavit in these proceedings under Rule 60 of the Probate and Administration Rules. The interested-party claims to be entitled to a share of the estate of the deceased as a purchaser from the deceased of land parcel No. Machakos/Konza/North/Block 1/382 and the deceased's shares No. 527 in Konza Ranching and Farming Co-operative Society Limited.
3. According to the aforesaid affidavit, the Interested-Party purchased the property in question from the deceased on 16<sup>th</sup> November, 1987 during the lifetime of the deceased. The sale agreement (*annexture "PKM 1"*); a letter dated 12<sup>th</sup> September, 1995 from the Konza Ranching and Farming Co-operative Society Limited (*annexture "PKM 2"*) and a letter dated 10<sup>th</sup> April, 2012 from the Chief's office, Kangara Location (*annexture "PKM 3"*) were annexed to the said affidavit.
4. The Petitioners then filed a preliminary objection objecting to the interested-parties pleadings on the following grounds:-

***“(a) That this Honourable Court lacks jurisdiction to hear the objections of the Interested Party.***

***(b) That this Honourable Court lacks jurisdiction to hear the claims raised by the Interested Party.***

***(c) That the entire claim raised by the Interested Party is an abuse of the process of the court.***

***(d) That the entire claim raised by the Interested Party offends the mandatory provisions of the Land Control Board Act, (Cap. 302), Laws of Kenya.***

***(e) The entire claim raised by the Interested Party offends mandatory provisions of the Law of Limitations Act (Cap. 22) Laws of Kenya.***

***(f) The jurisdiction of this Honourable Court is not invoked at all.”***

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

6. In **Mukisa Biscuits Ltd v West End Distributors Ltd [1969] E.A.** on the scope and meaning of preliminary objections, at page 700 Law J.A. laid down the law 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 the pleadings, and which if argued as a preliminary objection 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.”***

***And to the same effect Newbold, P stated (p 701):***

***“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”***

7. This court is also enjoined under Article 159 of the Constitution to administer justice without undue regard to technicalities of procedure.

8. The core of the dispute between the petitioners and the interested-party is the ownership of the aforesaid property. To answer the question who is the owner of the said property, the court would need to look at both the facts and the law relating to the same.

9. The preliminary objection raises both matters of law and disputed facts. The issues raised are therefore not appropriate for disposal by way of a preliminary objection.

10. Rule 60 of the Probate and Administration Rules provides as follows:

***“Every interested person (whether or not he has been served with notice thereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings, shall enter an appearance in Form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the Applicant may with leave of the court file an affidavit in reply.”***

11. The entry of appearance by the interested-party is therefore provided for by the law and the matter ought to go through the due process of the law. Whether or not the dispute between the Petitioners and the Interested-Party will be resolved through this Succession Cause or through the Environment & Land Court is a matter to be determined by this court after the objection herein has been heard on merits.

12. With the foregoing, I find no merits in the preliminary objection and dismiss the same with costs.

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**B. THURANIRA JADEN**

**Dated and delivered** at Machakos this 7<sup>th</sup> day of October, **2015**

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**B. THURANIRA JADEN**

**JUDGE**