



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT EMBU**  
**MISC. APPLICATION NO. 161 OF 2014**  
**IN THE MATTER OF THE ESTATE OF NJAGI NJERU Alias MBUCHI BARAGU**  
**(DECEASED)**  
**JOHNSON MURIUKI.....APPLICANT**  
**VERSUS**  
**JERVASIO NYAGA NJAGI.....1ST RESPONDENT**  
**JANE NDEGI NJERU.....2ND RESPONDENT**  
**PATRICK NGARI NJERU.....INTERESTED PARTY**

**R U L I N G**

This is a ruling on a preliminary objection dated 20/5/2015 brought by the interested party against the hearing of the application of one Johnson Muriuki dated 11/9/2014. The application sought for orders for revocation of grant issued by Siakago court in Succession Cause No. 37 of 2011.

The applicant was represented by Macharia & Muraguri Advocates while the interested party was represented by Onyoni Opini & Gachuba Advocates.

The preliminary objection is based on the following grounds:-

- 1. The application is fatally defective and does not lie in law by virtue of Section 45 of the Law of Succession Act*
- 2. The application is time barred and does not lie in law by virtue of section 7 of the Limitation of Actions Act.*
- 3. The application is fatally defective and does not lie in law by virtue of Section 6(1) and 8(1) of the Land Control Act.*
- 4. The application is fatally incompetent and does not lie by virtue of the registration of documents act.*
- 5. The plaint as filed is fatally incompetent and does not lie in law by virtue of Section 5 and 19 of the Stamp Duty Act and Section 3(3) of the Law of Contract Act.*

The preliminary objection was canvassed by way of written submissions. The interested party was represented by Mr. Mwaniki Gachuba while Mr. Muraguri represented the applicant.

It was argued by the interested party that the application dated 11/9/2014 is based on purchase of the suit property from the 2nd respondent and that there is no evidence to show that the 2nd respondent was granted letters of administration intestate in the estate of the deceased. The interested party relied on the case of **GABRIEL MTWARA MUTHINI VS MARY CELLA KANINI MUTHINI & 3 OTHERS [2014] eKLR** where the court held that:-

*“Inter-meddling with the property of the dead person consists of taking possession, disposing or otherwise inter-meddling with the free property”.*

The interested party also attacks the application on grounds that the claim is time barred under Section 7 of the Limitation of Actions Act, Cap. 22. He states that it is more than 12 years since the cause of action arose and such a claim ought not to be entertained. The applicant relied on the case of **HENRY MAINA GATETE VS JANE NJOKI NGUGI & ANOTHER [2014] eKLR** where the issue of limitations of actions on land was discussed.

The applicant argues that the suit is fatally incompetent for failure to seek the consent of the Land Control Board contrary to Section 6(1) and 8(1) of the Land Control Act, Cap. 302. The interested party relied in the case of **EZEKIEL KISORIO TANUI VS JACINTA EKAI NASAK [2014] eKLR** where it was held that the provisions of the Land Control Act are of an imperative nature.

The interested party faulted the application as being incompetent for failure to register the sale agreement in accordance with Section 4 and 9 of the Registration of Documents Act, Cap. 285. Relying on the case of **RASHIDA RAJABALI GANJIJEE & ANOTHER VS HARVEEN GADHOKE & 3 OTHERS [2007] eKLR** it was argued that a document the registration of which is compulsory under the act is inadmissible in evidence if it has not been so registered.

The interested party contended that the applicant failed to comply with Section 5 and 19 of the Stamp Duty Act, Cap. 480 and Section 3(3)(b) of the Law of Contract Act, Cap. 23. There is no evidence that any stamp duty was paid as required by the law and that the signatures in the agreement were not attested to as required.

The interested party urged the court to uphold the preliminary objection and strike out the application dated 11/9/2014.

The applicant opposed the preliminary objection on the grounds that the summons for revocation of grant are yet to be given directions as to the mode of hearing and that it was premature for the interested party to raise the preliminary objection at this stage. The applicant further argued that deliberating on the notice of preliminary objection at this stage amounts to shutting out the applicant from being heard based on technicalities.

It was pointed out that the interested party has already filed a replying affidavit to the application sworn on 20/5/2015 and filed in court on the same day. In his reply, the interested party concurs with the applicant that the grant ought to be annulled. He is therefore estopped from making other allegations.

The applicant relies on Section 159(2)(d) of the Constitution which provides that courts should not have undue regard to technicalities and should focus on substantive justice.

The application is brought under Section 76 of the Law of Succession Act which provides grounds upon which a grant may be revoked. The interested party has completely ignored the provision of this section.

It should be noted that the interested party did not participate in the succession cause No. 37 of 2011 Siakago where the controversial grant was issued and confirmed. The applicant states that the respondents who were parties in the succession cause have not been enjoined in this objection.

The applicant faulted the filing of a supplementary affidavit by the interested party arguing that the procedure is applicable only in civil cases where the court will be required to grant leave.

It is argued that no inter meddling of the estate under Section 45 of the Act has taken place as alleged. It is the duty of the court to distribute the estate of the deceased where there is a dispute.

The interested party was faulted in his argument that the application is time barred. Time starts to run when a party comes to know that there is a breach. In this case the applicant came to know in the year 2011 that the grant had been obtained in concealment of facts material to the case.

The provisions of the Land Control Act are not applicable in a succession cause and the court should only apply the Law of Succession Act.

Similarly, it was argued that the provisions of the Stamp Duty Act and the Registration of Documents Act are not applicable to land sale agreement. The interested party did not make any attempt to explain the basis of his objection in this regard.

The court has thought through the issues raised in this preliminary objection. A preliminary objection may be brought at any time of the proceedings and is required to address issues of law.

The interested party is the registered proprietor of EMBU/KITHUNTHIRI/1477 which is the subject matter of this application. It is not in dispute that the interested party is entitled to defend his interests in this application. Any orders made in the application dated 11/9/2014 are likely to affect the interested party directly and may have a bearing in his proprietary interest.

The issue of whether the respondents had obtained letters of administration ad litem before filing the succession cause is a matter of fact which may require proof by evidence. Civil proceedings must be distinguished from succession proceedings in view of the provisions of the Limitation of Actions Act. Time starts to run in a civil case from the time the cause of action arose. All claims relating to land must be instituted within 12 years.

The applicant alleges that he bought land from the estate of the deceased in the year 2003 and his name was not included as a purchaser in the succession cause. The succession proceedings were filed in court in the year 2011 and the grant confirmed on 3/7/2014. The applicant after buying the land must have been expectant that he will get his entitlement during the succession proceedings. He came to learn later after the succession case was filed that that he had been left out in the cause. In the circumstances, the time started to run from the time he came to know that his interests as a purchaser were not protected in the proceedings. This distinction between civil and succession proceedings must be noted and the time computed differently. The twelve year period cannot be said to run from the time the agreement was made.

However, depending on when the applicant discovered that his interests had not been taken care of in the succession cause, this may still be a matter of fact requiring proof through evidence.

Section 6(1) of the Land Control Act requires that consent of land transactions be obtained within 6 months. Whether the consent was obtained is a matter of fact that may be proved during the hearing of the summons. It would not be in the interest of justice to assume at this stage that the consent of the land board was not obtained.

The interested party did not explain whether a land sale agreement falls within Section 4 of Registration of Documents Act. Even assuming that the document requires to be registered, it is a matter of fact whether registration took place or not. This may also require proof.

The same case applies to compliance with the provisions of the Stamp Duty Act.

On allegation that the applicant intermeddled with the estate of the deceased contrary to Section 45 of the

Law of Succession Act, it is noted that there was no response to this allegation from the applicant. It would be wrong to condemn the applicant before he is given a chance to be heard.

The interested party alleged that the sale agreement was not attested to by a witness. No provision of the law was cited to show that failure to attest to an agreement renders it null and void.

The interested party was not involved in the Siakago Succession cause. The parties in the cause were the respondents in this application. For that reason, the interested party should have enjoined the respondents in this objection so as to give their input. If any orders are given in this preliminary objection, the respondents are likely to be affected.

Section 76 of the Law of Succession Act provides that a grant may be revoked or annulled on the following grounds:-

- *That the proceeding to obtain the grant were defective.*
- *That the grant was obtained fraudulently, or by making a false statement, or by concealment of some material facts and by making an untrue allegation.*
- *That there has been failure to administer the estate.*

The application dated 11/9/2014 is based on the provisions of Section 76 of the Act and it is trite law that the applicant be given a chance to prove his summons through evidence.

The court must have regard of the principles of natural justice that no party shall be condemned unheard. No directions have been taken for hearing for the summons for revocation. Article 159 2(d) provides that justice shall be administered without due regard to procedural technicalities. It is in the interest of justice that the applicant and the respondents be heard in the summons for revocation of grant before any decision is made in the matter..

I find no merit in the preliminary objection and it is hereby dismissed with costs.

The parties are hereby directed to take directions of the hearing of the summons before the Deputy Registrar within 30 days.

**DATED, DELIVERED AND SIGNED AT EMBU THIS 3RD DAY OF NOVEMBER, 2015.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Gachuba for Interested Party**

**Mr. Ithiga for Muraguri for Applicant**

**Mr. Miano for Lee Maina for Respondents**