



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 122 OF 2013 (O.S)

IN THE MATTER OF : GEERT DERERE (Deceased)

IN THE MATTER OF : A DECLARATION OF A RESULTING TRUST

IN RESPECT OF FUNDS DEPOSITED IN BANK ACCOUNTS AT KENYA COMMERCIAL BANK LIMITED ACCOUNT NO. 1143613384 and 1143613163 FOR THE LATE GEERT DERERE (Deceased)

BETWEEN

AMELIE DERERE.....PLAINTIFF

V E R S U S

AMINA MARDER.....1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

RULING

1. The Plaintiff filed an Originating Summons dated 8th November 2013. By that Originating Summons Plaintiff stated that GEERT DERERE (Deceased) is her late father. He died intestate in Mombasa on 23rd October 2013. Before his death he held a joint account with AMINA MARDER (AMINA). Plaintiff seeks the Court to determine who between her and AMINA is entitled to the funds in that joint account.

2. Plaintiff annexed to her Originating Summons what is entitled Succession Certificate issued by a Notary in Belgium certifying that she is the sole surviving heir of Derere (Deceased).

3. A Preliminary Objection has been filed by Amina seeking that this suit be stayed on the ground that-

a. THAT the jurisdiction of this Court has not been properly invoked in respect to the prayers sought the same being issues which instead fall squarely within the exclusive jurisdiction of the Law of Succession Act, Chapter 160 of the Laws of Kenya as read together with the Constitution of Kenya hence to that extent this Court lacks the jurisdiction to in anyway deal with the aforesaid prayers or at all.

4. Learned Counsel Mr. Kinyanjui submitted in support of that Objection by stating that the Plaintiff ought to have gone to the Succession Court for authority to file this case. He cited Section 4 of the

Succession Act Cap 160 in support. Section 4 provides-

“Law applicable to succession

1. Except as otherwise expressly provided in this Act or by any other written law-

(a) Succession to immovable property in Kenya of a Deceased person shall be regulated by the law of Kenya, whatever the domicile of that person at the time of his death;

(b) Succession to the movable property of a Deceased person shall be regulated by the law of the country of the domicile of that person at the time of his death;

2. A person who immediately before his death was ordinarily resident in Kenya shall, in the absence of proof of domicile elsewhere, be presumed to have been domiciled in Kenya at the date of death.”

5. Learned Counsel Mr. Kinyanjui proceeded to submit that Amina has filed a Citation over the Estate of Derere (Deceased) in the Family Division of this Court being **Citation Cause No. 16 of 2013**. The Plaintiff according to that submission has been cited in that matter.

6. Mr. Mohamed, learned Counsel for the Plaintiff opposed that Objection on the ground that this present case is not a Succession and that the Plaintiff has moved under Order 37 of the Civil Procedure Rules. Further he submitted that Plaintiff had not indicated that she wanted to inherit the funds held in the joint account.

7. The case that set out clearly what a Preliminary Objection is **MUKISA BISCUIT MANUFACTURING CO. LTD –Vs- WEST END DISTRIBUTORS LTD [1969]E.A. 696** has often been quoted and I will likewise quote it here to remind us of what is considered a proper Preliminary Objection-

“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 stated in the same judgment as 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.”

8. Amina’s Objection does not fit the above definition in my view. This is because it calls upon this Court to carry out an investigation on whether a grant has been issued to the Plaintiff. The Plaintiff attached to her Originating Summons a Succession Certificate. The question is, is the Succession Certificate from Belgium Court a Grant as we understand it? If indeed it is Section 77 of Cap 160 will apply. And if it is, the Plaintiff can then apply to seal the Grant as provided under Section 77.

9. Further Section 4 Cap 160 that Amina relied upon has provision that Succession of movable property, such as in this case, is governed by the Law of the Country of domicile of the Deceased. The Succession Certificate from the Belgium Court stated that Deceased was residing at Marbella in Spain but died in Kenya. It is therefore not clear whether Kenya was the Deceased’s domicile.

10. That above unanswered questions is the reason that I find that the Objection raised by Amina must

fail. The Objection does not raise a pure point of law and requires the Court to enter into investigations.

11. For the above reasons Preliminary Objection dated 18th November 2013 is hereby dismissed with costs to the Plaintiff.

DATED and DELIVERED at MOMBASA this 5TH day of JUNE, 2014.

MARY KASANGO

JUDGE