



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 2 OF 2019**

**MARY MORAA MAAKE and JEREMIAH MISIANI MAAKE**

**Suing as the legal representatives of the estate of**

**MAAKE AMENYA MISIANI Deceased).....PLAINTIFF**

**VERSUS**

**ISAIAH JUMA OMARI.....1<sup>ST</sup> DEFENDANT**

**MARY NYANCHOLA JAMES.....2<sup>ND</sup> DEFENDANT**

**ELMELDA NYANGARA ONGUSO.....3<sup>RD</sup> DEFENDANT**

**FRANCIS MIYORA ..... 4<sup>TH</sup> DEFENDANT**

**DOUGLAS MAJUMA.....5<sup>TH</sup> DEFENDANT**

**RONALD AORI .....6<sup>TH</sup> DEFENDANT**

**GEORGE MACHOKA.....7<sup>TH</sup> DEFENDANT**

**DOUGLAS NYAMBATI.....8<sup>TH</sup> DEFENDANT**

**JOHN OKINYI ..... 9<sup>TH</sup> DEFENDANT**

**DENIS OIRIGA .....10<sup>TH</sup> DEFENDANT**

**MARGRET TINGA ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect of the Defendants' Preliminary Objection which is based on the grounds that the defendants acquired the suit property which is registered in the name of a deceased person before a Grant of Letters of Administration was issued in respect of the estate of the deceased.

2. Counsel for both parties presented their oral submissions. Learned counsel for the Plaintiff submitted that the subject matter of the suit is the parcel of land known as MANGA SETTLEMENT SCHEME No. 207 which is registered in the name of Amenya Maake, Misiani – Deceased. The deceased died in 2017. The defendants purport to have purchased the suit property from a son of the deceased before a grant was issued in respect of the deceased's estate. They have not named the person who sold them the land nor have they indicated the size of the land they bought. Counsel relied on the provisions of section 45 of the Law of Succession Act which provides that no property of deceased person may be disposed off before a Grant of Letter of Administration has been issued as this amounts to intermeddling with the estate of a deceased person. He argued that the defendants who are strangers to the estate of the deceased cannot obtain an injunction against the beneficiaries of the estate of the deceased.

3. In opposing the Preliminary Objection, counsel for the defendants submitted that the Preliminary Objection was raised in bad faith and was intended to mislead the court into making a wrong decision. He submitted that the plaintiffs had not mentioned that the defendants were in occupation of the suit property and had lived there for more than 5 years. He submitted that the defendants purchased the suit property from the plaintiffs' siblings who have not been enjoined in the suit. He conceded that Section 45 of the Law of Succession Act forbids one from dealing with the estate of a deceased person without obtaining a grant. However he submitted that Article 159 (2) (d) of the Constitution of Kenya 2010 enjoins the courts to administer justice without undue regard to procedural technicalities. He further submitted that the defendants have a right to access justice as provided by article 48 of the Constitution. He reiterated that the defendants are in occupation of the suit property and their rights to property ought to be protected as provided by Article 40 of the Constitution.

#### ISSUE FOR DETERMINATION

4. The singular issue for determination is whether the Preliminary objection ought to be upheld.

#### ANALYSIS AND DETERMINATION

5. The starting point is to define what a preliminary objection is.

The case of **Mukisa Biscuits V West End Distributors Limited (1969) E.A 696** held as follows:

*“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit.*

*Justice Newbold in the said suit argues that*

*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 had to be ascertained or if what is sought is the exercise of judicial discretion”*

In **George Oraro v Barack Eston Mbaja Nairobi HCCC No. 85 of 1992** J.B Ojwang (as he then was) held as follows:

*“A Preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through evidence”.*

He further observed that:

*“...Any assertion which claims to be a preliminary objection and yet it bears factual aspects calling for proof or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true Preliminary objection which the court should allow to proceed”*

6. Counsel for the defendant conceded that the defendants purchased the suit property which is registered in the name of a deceased person before a grant of letters of administration was issued in respect of the estate of the deceased. This contravenes the provisions of section 45 of the Law of Succession Act which provides as follows:

S. 45 (1) **“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession of, or dispose of or otherwise intermeddle with any free property of a deceased person.**

**(2) Any person who contravenes the provisions of this section shall be**

**(a) guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or both such fine and imprisonment**

**(b) Be answerable to the rightful executor or administrator to the extent of the assets with which he has intermeddled after deducting any payments made in due course of administration”**

7. The above provision of the law is not a mere procedural technicality but a point of law that goes to the root of the validity of the sale of the suit property. The law takes very serious view of any intermeddling with the property of a deceased person. The section is clear that the status quo at the time of death of the deceased person ought to be maintained until such time as a grant has been issued by the court.

8. It is clear from the above legal provision that whoever sold the suit land to the defendants had no legal capacity to do so as they had not yet obtained a Grant of Letters of Administration and are in fact guilty of intermeddling with the estate of the late Maake Amenia Misiani. On this ground alone the defendants' application fails.

9. In the circumstances, I am persuaded that the issues raised by the plaintiffs are pure points of law. The Preliminary Objection is therefore upheld and the application is dismissed with costs to the plaintiffs.

Dated, signed and delivered at Kisii this 15<sup>th</sup> day of November 2019.

**J.M ONYANGO**

**JUDGE**