



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 50 OF 2019

EKWIY MOSES ALANYI.....APPLICANT

VERSUS

SHABAAN EDI LEPOSO.....1ST RESPONDENT

HASSAN IDDI MALAMBU.....2ND RESPONDENT

(Sued on Behalf of the Estate of the Late Iddi Malambu Hassan)

RULING

What is before Court for determination is the Respondents' Notice of Preliminary Objection dated the 28th June, 2019 in respect to the Originating Summons dated 6th June, 2019 on the following point of law:

1. That the estate of the deceased has already been distributed in Kajiado Succession Cause No. 64 of 2016 and as such there is no Estate on behalf of whom the Respondents can be sued.

The Applicant filed a reply to the Notice of Preliminary Objection where he explained that he is the owner of plot NO. Ngong/ Ngong/ 4437 hereinafter referred to as the 'suit land', having lived thereon for more than 12 years. Further, that the said land was given to him by the registered owner the late Iddi Malambu Hassan more than twenty seven years ago and since then he has been in quiet possession thereon. He confirms that Respondents filed Succession Cause No. 64 of 2016 at the Kajiado High Court and Certificate for confirmation of Grant was issued on the 10th May, 2019. He claims the Respondents are administrators of the deceased estate and have carried out distribution of the said estate. Further, that the estate had already been subdivided by the late Iddi Malambu Hassan but transfers were not yet effected. He contends that the 1st Respondent has been allocated the suit land but the same is still registered in the deceased name as no transfers have been effected since the 10th May, 2019 as purported by the Respondents.

Both the Applicant and the Respondents filed their respective submissions.

Analysis and Determination

Upon consideration of the Notice of Preliminary Objection dated the 28th June, 2019 including the Applicant's reply as well as parties' submissions, the only issue for determination is whether the Respondents can be sued in their capacity as administrators after the Estate has distributed.

The Respondents in their submissions contended that one of the effects of distribution of an estate of a deceased person is that no one can bring a claim against the said estate or its administrators. They have relied on the cases of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; **Aviation and Allied Workers Union Kenya V Kenya Airways Limited & 3 Others (2015) eKLR**; **Titus Mutuku Kasuve V Mwani Investments Limited & 4 Others (2004) eKLR**; and **The Estate of the late Annelies Anna Graff (2019) eKLR** to support their arguments.

The Applicant in his submissions insisted the suit land had not been transferred to the beneficiaries and the Respondents were intermeddling with the said estate. He relied on the case of **Gitau and 2 Others Vs Wandai & 5 Others (1989) KLR** to buttress his argument.

In the case of **Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696**; the Court held 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 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.'**

Further in the case of **Independent Electoral and Boundaries Commission V Jane Cheperenger & 2 Others Civil Application No. 36 of 2014**, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: ' A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained of if what is sought is the exercise of judicial discretion. '

The fulcrum of the suit herein revolves around adverse possession. In the copy of the Certificate of Title annexed to the originating summons, the deceased was actually registered as owner of Ngong/ Ngong/ 27038 on 20th September, 2001, from which the suit land was excised from. It is trite law that adverse possession is a doctrine which attaches on the land irrespective of whether the title to the said land has changed hands or not. In this instant case, the Applicant has sued the Administrators of the deceased estate as they represent the owner of the suit land. From the certificate of confirmation of Grant, it confirms that the Respondents are indeed administrators as well as beneficiaries of the deceased estate. The Respondents have cited the case of **Titus Mutuku Kasuve v Mwaani Investments Limited & 4 others [2004] eKLR** to support their averment that since the estate of the deceased has been distributed no one can bring a claim against the estate or its administrators. I however beg to distinguish this decision with the instant case. In the said decision the Appellant only sued some of the beneficiaries and not the estate. The Court of Appeal held as follows: '**In our view, the proper defendant to the plaintiff's claim should have been the estate of Ndolo through the executrix of the will and not the beneficiaries. The appellant filed the suit after the estate left the hands of the executrix and after the administration of the estate had been wound up. In our view, the suit to recover land by adverse possession was not maintainable against some of the beneficiaries of the estate of Ndolo.**'

In associating myself with the above cited decisions and facts as presented, I find that the suit herein is properly before Court as the Applicant sued the Administrators as well as beneficiaries of the deceased estate. Further, I opine that some of the facts in respect to this preliminary objection had to be ascertained. It is my considered view that the Respondents simply seek to rely on technicalities which is a defeated avenue as stipulated in Article 159 (2) (d) of the Constitution which requires that '**in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.**'

In the circumstance, I find the instant Notice of Preliminary objection dated the 28th June, 2019 unmerited and will disallow it.

Costs will be in the cause

I urge the parties to set down the suit for hearing on its merits.

Dated signed and delivered in open court at Kajiado this 16th day of December, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Maina for the applicant

No appearance for the respondent

Court assistant-Mpoye