



**Athman & another v Land Registrar, Lamu County & another; Firdosh
Jamal & Associates Advocates & another (Interested Parties) (Environment &
Land Case 24 of 2021) [2023] KEELC 95 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 95 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 24 OF 2021
MAO ODENY, J
JANUARY 20, 2023
IN THE MATTER OF: LAND TITLE APPLICATION NUMBER
LAMU/BLOCKIV/15
AND
IN THE MATTER OF: SECTION 150 OF THE LAND ACT NO. 6 OF 2012
AND
IN THE MATTER OF: LAND REGISTRATION ACT NUMBER 3 OF 2012
AND
IN THE MATTER OF: AN APPLICATION FOR REMOVAL OF A CAUTION
AND RESTRICTION UNDER SECTION 73(1) AND
78(2) OF THE LAND REGISTRATION ACT NO. 3 OF
2012
AND
IN THE MATTER OF: ORDER 37 RULE (1)(A) AND(G) OF CIVIL
PROCEDURE RULES CAP. 21 LAWS OF KENYA
AND
IN THE MATTER OF: MASHASHI KITANO A JAPANESE NATIONAL
PRESUMED DEAD

BETWEEN
AMINA OBO ATHMAN 1ST PLAINTIFF
MOHAMED BWANA OBO ATHMAN 2ND PLAINTIFF



AND

LAND REGISTRAR, LAMU COUNTY 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

AND

FIRDOSH JAMAL & ASSOCIATES ADVOCATES INTERESTED PARTY

MASHASHI KITANO INTERESTED PARTY

RULING

1. This ruling is in respect of a notice of preliminary objection by the interested party dated January 12, 2022 on ground that there is a rebuttable presumption of death, non-existence of a succession cause, that the plaintiffs have no *locus standi* and that there is failure to exhaust other statutory mechanisms.
2. On June 20, 2022 counsel for the plaintiff/applicant abandoned the application dated December 20, 2032 and urged the court to give directions for the hearing of the main suit. The same was marked as abandoned and parties agreed to canvas the preliminary objection *vide* written submissions which were duly filed.

Interested Party's Submissions

3. Counsel submitted that on December 16, 2021, Mashashi Kitano appeared virtually for the hearing of the application and his appearance was confirmed by the 1st defendant and the plaintiffs.
4. Counsel gave a detailed background to the case and submitted that the High Court neither issued the letters of administration nor the certificate of confirmation in respect of succession cause number 70 of 2013 in favour of the plaintiffs.
5. That counsel had carried out investigations and found out that succession cause No 73 of 2013 was in respect of the Estate of Sahlaan Said , P & A of 2013 in respect of the Estate of Jefferson Muema Kosvi, cause No 70 of 2013 at the Kadhi's Court was in respect of the estate of MSH and finally that miscellaneous application No 10 of 2010 (Mombasa) In the Matter of Mishahi Kitano presumed dead) in respect of a matter involving Members of Kenya Transport Association vs Kenya Revenue Authority.
6. Counsel also submitted that the plaintiffs have no locus standi as they are not survivors, heirs or dependants and or any category of persons listed in the table of consanguinity in the third schedule of the *Laws of Succession* cap 160.
7. Counsel relied on order 2 rule 9 of the *Civil Procedure Rules* which provides that a party may by his pleadings raise any point of law and cited the cases of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696, *Thomas Openda v Peter Martin Ahn* [1984] eKLR, *B v Attorney General* (2004) 1 KLR 431 *Albany Taylor & Another v Christopher Taylor & Another* (2008) eKLR, *Kiungani Famers Co Ltd v Mbugua* [1982] eKLR and *Reuben Kioko Mutyaene v Hellen Kiunga Miriti & 4 others; Ntalala Eric Mutura & another (interested parties)* [2021] eKLR where the court laid down the principles in respect of preliminary objections.
8. According to counsel, the uncontested facts are that the intended interested party is alive, that he appeared virtually at the hearing on December 16, 2021 and that no documents have been produced by the plaintiff to illustrate the death of the intended interested party.



9. Counsel further submitted that since the interested party is alive, there is no estate within the meaning of the law of succession and that the High Court neither issued the letters of administration dated May 3, 2013 nor the certificate of confirmation of grant dated December 8, 2014 in favour of the plaintiffs.
10. On whether the plaintiffs have *locus standi*, counsel submitted that the plaintiffs did not meet the qualifications of personal representatives or administrators as they are *prima facie* strangers who are nowhere near his lineage or blood line, or survivors, heirs or dependants and or any category of persons listed in the third schedule of the *Law of Succession* Cap 160.
11. It was counsel's further submission that there was no estate within the meaning of the *Law of Succession Act* capable of being transferred to the plaintiffs or any other person by way of transmission or assent and that there was no suit property acquired by the plaintiffs under any valid succession proceedings. Further, that the relationship that existed between the plaintiffs' late father who was a caretaker of the suit property and the intended party was one of licensee-licensor relation thus no proprietary interest was transferred or capable of being transferred to the plaintiffs.
12. Counsel therefore submitted that the plaintiffs had not exhausted the statutory avenues available under sections 73 and 78 of the *Land Registration Act*, 2012 and relied on the cases of *Openda v Abin* (1983) KLR 165, *Kiungani Farmers Co Ltd v Mbugua* KLR (1984) 476 and that of miscellaneous civil application number 1091 of 2007: In the matter of an application by Indo Company Ltd and others. (supra)

Plaintiff/respondent's Submissions

13. Counsel submitted on whether there was an estate capable of being transferred to the plaintiff by virtue of the declaration of presumption of death, and relied on the case of *In Re Jacinta Wangiri Nyaga* (2016) miscellaneous civil application 72 of 2016 eKLR where the court allowed the applicant's prayer to issue a declaration of death against a party who disappeared for 25 years as per the presumption of death established by section 118A of the *Evidence Act*.
14. Mr Omwanja submitted that the plaintiffs have *locus standi* within the law of succession, and that being the children of one Bwana Obo Lali (deceased), who was entrusted with the property including documents of title, hence assumed the responsibility of caretaker upon the death of their father.
15. According counsel, the plaintiffs acted in good faith and legitimately to procure a grant of letters of administration in the capacity of rightful representatives and/ or sole guardian of the estate of the person presumed dead. That the declaration of presumption of death was procedurally and reasonably issued, the succession cause was completed judiciously and the court exercising its discretion was satisfied that the plaintiffs fit to be granted letters of administration.
16. Counsel relied on the case of *Attorney General & another v Andrew Maina Gitinji & another* [2016] eKLR where the court held that a preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion and further that improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
17. Counsel therefore urged the court to dismiss the preliminary objection and set down the case for hearing.



Analysis And Determination.

18. The issue for determination is whether the current preliminary objection is purely on points of law as required by the principles of preliminary objections.
19. Under order 2 rule 9 of the *Civil Procedure Rules*, a party may by his pleadings raise any point of law. In the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“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 objection point may dispose the suit”.
20. The applicant has raised many issues which are contested by the respondent. I had earlier stated that the applicant gave a detailed background as to what transpired in cases in the Kadhi’s Court. Mombasa High Court and alluded to investigations that unearthed that there were neither letters of administration nor confirmation of grant for the purported estate of Mishashi Kitana as he is still alive.
21. These are weighty issues which cannot be dealt with by way of a preliminary objection. More evidence is required to be adduced during the hearing to establish the allegations raised by both parties. These issues also lean towards criminality if what is stated that the interested party is still alive and might have been presumed dead illegally. If that is the case then, such presumption has to be revoked the relevant court that gave such orders of presumption of death.
22. During the virtual hearing of the application which was later abandoned by the plaintiffs, the court also had an opportunity of seeing virtually the purported Mishashi Kitano and documents notarized by Osaka Legal Affairs Bureau in Osaka Japan of his existence.
23. I note that the plaintiffs are claiming beneficial interest over the suit property as the children of Bwana Obo Lali (deceased) who had been a caretaker and was entrusted with the suit property including documents of title, and since the owner had not been seen for the last 22 years. They filed applications to presume him dead and inherit the property.
24. As much as there are glaring irregularities in this case, the court would not terminate it at this stage by way of a preliminary objection. It would be prudent to hear all parties to come to the root of the “killing” of a person who is allegedly alive. This would also unearth other cases where people prepare fraudulent documents to enable them acquire other peoples’ properties.
25. I find that this is not a case suitable for being dismissed *vide* a preliminary objection. The preliminary objection is therefore dismissed with each party bearing their own costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF JANUARY, 2023

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M.A. ODENY __JUDGE__

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

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