



In re Estate of Simon Sayalel Likimani (Deceased) (Succession Cause 3263 of 2014) [2024] KEHC 2913 (KLR) (Family) (21 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2913 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

SUCCESSION CAUSE 3263 OF 2014

HK CHEMITEI, J

MARCH 21, 2024

IN THE MATTER OF THE ESTATE OF THE LATE SIMON SAYALEL LIKIMANI(DECEASED)

BETWEEN

MUTHONI LIKIMANI APPLICANT

AND

MARGARET NJERI LIKIMANI & 3 OTHERS RESPONDENT

RULING

1. In her application dated 26th December 2022 the Applicant prays for the following orders:-
 - (a) That this court be pleased to grant an order restraining the respondents from subdividing, selling, transferring, charging or leasing or in any other way parting with land parcel numbers Ngong/Ngong/89249, 89250, 89251 and 89252 respectively pending the hearing and determination of the summons for revocation of grant herein.
2. The application is supported by the affidavit of the applicant sworn on the same date and the annexures thereto.
3. The Respondents have filed a preliminary objection dated 22nd February 2023 citing the following grounds;
 - (a) That this court lacks jurisdiction to delve into the estate of Dr. Jason Clement which suit is before brother court in succession cause number 354 of 1990.
 - (b) The applicant herein lacks the *locus standi* to institute proceedings in respect to the administration of the estate of the late Dr. Jason Clement and the late Simon Saiyalel.



- (c) The application as lodged is *res judicata* having been heard and determined by the court in Succession Cause No. 354 of 1990 vide its ruling dated 19th September 2017.
- (d) That the application is otherwise ill advised and an abuse of court process and its brought in bad faith.
4. When the matter came up for directions the court ordered the parties to submit on the preliminary objection first before considering the main application. They complied and I shall proceed to consider the same.
 5. The respondent while quoting the famous case of “*Lilian “s v Caltex Oil (k) ltd* (1989) KLR 1 submitted that jurisdiction is everything and that this court cannot handle the matter at hand for it was already handled in the Succession Case No. 354 of 1990. The respondent attached the copy of the court’s ruling dated 19th September 2017.
 6. In essence the Respondents submit that any dealing by this court over the same is *res judicata* an it amounts to sitting as an appellate court over a matter which this court has concurrent jurisdiction. They went ahead to submit that this court was functus officio.
 7. The Respondent submitted that the applicant did not have a locus standi in this matter as she does not come directly under the purview of section 29 of the *Succession Act*. That despite being step mother to the deceased herein, her degree of consanguinity is way below that of a beneficiary.
 8. The Respondent agreed with the ruling of Onyiego J that the applicant was a very litigious person and this court ought not to entertain her. They prayed for the application to be disallowed.
 9. The Applicant opposed the preliminary objection arguing that the parcels of land in question emanated from land parcel number Ngong/ Ngong /8962 which the deceased herein illegally transferred to himself. Consequently, the matter was not *res judicata* as it relates to the estate of the deceased herein whereas the matter under Succession Cause No. 354 of 1990 related to the estate of the late Dr Jason Clement.
 10. That the same are therefore separate causes and this court has the jurisdiction to deal with them separately under the provisions of section 47 of the *Succession Act*.
 11. As to locus standi the applicant argues that being a former wife of the late Dr. Clement Likimani, she has the right of instituting the current application as she has beneficial interest in the estate.
 12. She denied further that this matter was *res judicata* as described under section 7 of the *Civil Procedure Act*. She therefore prayed for the same to be dismissed and the application ought to be allowed.

Analysis and determination.

13. I have carefully perused the preliminary objection as well as the submissions on record. For such an objection to be considered it must pass the muster enunciated in the famous case of *Mukisa Biscuits Manufacturing co. ltd v West End Distributors Limited* (1969) EA 696 in which Sir Charles Newbold P observed as follows: -

“..... The first matter related to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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 issues. This improper practice should stop.

14. I think the first issue to consider is whether this court has jurisdiction to determine the application based on the fact that a similar court had already made a similar consideration.
15. I have perused the ruling of my brother Onyiego J in the Succession Case number 354 of 1990 and it is evident that the applicant's application was based on the same parcel of land namely Ngong/Ngong/8962. The court found that the said parcel of land did not form part of the deceased estate therein. For that reason, the applicant's application was disallowed.
16. I think the said court was right in its decision as there was no substratum to the applicant's application. The only two properties considered therein, namely Kajiado North Kaputiei/69 and 70 respectively did not include the current contentious property.
17. The net effect therefore is that the issue surrounding the impugned parcel of land was not litigated upon. In my view therefore this court will not be sitting as an appellate court as submitted by the respondents.
18. At the same time I do not think the same is res judicata. The issue was not dealt with in the Dr. Jason matter as it never forms part of the estate as found by Onyiego J. On the contrary that parcel of land is now appearing in this cause and which there is already a confirmed grant to that effect.
19. Section 7 of the [Civil Procedure Act](#) states as hereunder:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. Looking at the four or so grounds above I doubt whether the issue is res judicata or at all.
21. I think I have stated much to show that the preliminary objection is not merited. More importantly and as stated in the *Mukisa Biscuit case*(*supra*), to the extent that the court must look elsewhere for other reasons to consider before determining whether the matter is an objection on a point of law or not, the same cannot pass as a preliminary objection.
22. The question of *locus standi* is indeed a factual one. This court cannot determine such an issue based on the facts which needs evidence. It ceases therefore to be a preliminary objection on a point of law.
23. Looking at the objection herein I think the same cannot stand. This is for the reasons stated above. If it was one, then this court should not have shuttle between file number 354 of 1990 and other facts as contained in the file.
24. Consequently, the preliminary objection is hereby dismissed. Costs shall await the outcome of the application.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 21ST DAY OF MARCH 2024.

H K CHEMITEI

JUDGE.

