



In re Estate of Douglas Ngatia Kirungie (Deceased) (Succession Cause 391 of 2010) [2024] KEHC 7821 (KLR) (Family) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7821 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 391 OF 2010
MA ODERO, J
JUNE 28, 2024**

BETWEEN

**TABITHA WANJIRU 1ST PLAINTIFF
JACINTA NJERI GITAU 2ND PLAINTIFF
ROSA WANJIKU WAWERU 3RD PLAINTIFF**

AND

**JACINTA WANJIRU 1ST DEFENDANT
JOEL NJOROGE 2ND DEFENDANT
ELIZABETH MUTHONI 3RD DEFENDANT
ZACHARY MWAURA 4TH DEFENDANT
JAMES MUIGAI 5TH DEFENDANT
JANE NJERI NGATIA 6TH DEFENDANT
CATHERINE WANJIKU 7TH DEFENDANT
CHARLES THUO 8TH DEFENDANT**

RULING

1. Before this court is a notice of preliminary objection dated April 5, 2023 filed by the Public Trustee. The 1st to 8th respondents opposed the preliminary objection.



Background

2. This matter relates to the estate of the late Douglas Ngatia Kirunge who died on April 26, 2005. A copy of the Death Certificate Serial Number xxx is annexed to the petition for grant of probate dated March 3, 2010.
3. The Deceased died testate having left behind a written will dated May 23, 1987. Grant of Probate was issued to the Public Trustee as Executor on 28th June, 2021.
4. On February 13, 2023 the Applicant Geoffrey Njoroge Ngatia filed an application seeking to have Gatundu ELC No. E039 of 2021 withdrawn from the Chief Magistrates Court and transferred to the Milimani High Court.
5. This application was opposed by the respondents through a replying affidavit dated April 4, 2023, whilst the public trustee filed a notice of preliminary objection arguing that this court lacked jurisdiction over the matter and arguing that the application was *res judicata*.
6. The matter was canvassed by way of written submissions.

Analysis And Determination

7. I have carefully considered the Notice of Preliminary Objection filed in this matter as well as the written submissions filed by both parties.
8. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] E.A in which the court stated as follows;

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued as a Preliminary point may dispose the suit. Examples are an objection of the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A Preliminary Objection is in the nature of what is used to be a demurrer.

It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

9. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated that

“a Preliminary Objection may only be raised on a “pure question of law”

10. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record”
11. Therefore in order for a preliminary objection to succeed, the following tests must be satisfied;-
 - i. The preliminary objection should raise a pure point of law.
 - ii. The preliminary objection must be argued on the assumption that all the facts pleaded are correct.



- iii. The preliminary objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - iv. A valid preliminary objection ought if successful dispose of the entire suit.
12. Therefore a genuine and proper preliminary objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
 13. The Public Trustee has challenged the jurisdiction of this court to hear and determine this matter. As has been stated severally jurisdiction is everything and without requisite jurisdiction a court must immediately down its tools [See *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR].
 14. The matter which was before the Gatundu Magistrates Court was a Land dispute. This court is sitting as a Probate Court whose mandate is to oversee and supervise the distribution of the estate of the Deceased to the genuine beneficiaries.
 15. In the case of *In re Estate of Julius Ndubi Javan (Deceased)*(*supra*) the court had this to say;

“The primary duty of the probate court is to distribute the estate of the deceased to the rightful beneficiaries. As of necessity, the estate property must be identified. Thus, where issues on the ownership of the property of the estate are raised in a succession cause, they must be resolved before such property is distributed.
 16. Section 13 of the *Environment and Land Court Act* provides for the jurisdiction of that court as follows:-
 13. Jurisdiction of the Court
 - (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162 (2) (b) of the *Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment under the land.
 - (2) In exercise of its jurisdiction under article 162(2) (b) of the *Constitution*, the court shall have power to hear and determine disputes –
 - a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.

[Rev. 2012] No. 19 of 2011 Environment and Land Court 9 [Issue 1]



17. Therefore, the correct and proper forum before which the applicants ought to ventilate any claim to estate property is the ELC. The Environment and Land Court is the only court exclusively mandated by law to determine the question of ‘ownership’ of the suit land.
18. In *Re Estate of Stone Kathubi Muinde (Deceased)* [2016] eKLR Hon. Justice William Musyoka held that:-
- “Such claims to ownership of alleged estate property, as between the estate and a third party, should be resolved through the civil process in a civil suit property brought before a civil court in accordance with the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules*. This could mean filing suit at the magistrates’ courts, or at the Civil or Commercial Divisions of the High Court, or at the Environment and Land Court. If a decree is obtained in such suit in favour of the claimant then such decree should be presented to the probate court in the succession cause so that the court can give effect to it.” [Own emphasis]
19. The case ELC No. E039 of 2021 was a land dispute. Moreover it is manifest that the said suit was dismissed by the Gatundu, Senior Principal Magistrate on March 21, 2023. (see page 11 of the Replying Affidavit dated April 4, 2023). A suit which has already been dismissed cannot be transferred to another court. I do agree with the Public Trustee that the matter is now Res Judicata. The only option available to the Respondents is to appeal the decision dismissing the Gatundu ELC Case.
20. I do agree with the Public Trustee that this court has no jurisdiction over the matter. In the premises I find merits in this notice of preliminary objection. The same is allowed. The application dated February 13, 2023 is hereby struck out. Each party to bear their own costs.

DATED IN NYERI THIS 28TH DAY OF JUNE, 2024.

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MAUREEN A. ODERO
JUDGE

