



**MAM & another v RUM (Civil Appeal 90 of 2021)
[2023] KEHC 24419 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL 90 OF 2021
M THANDE, J
OCTOBER 31, 2023**

BETWEEN

MAM APPELLANT

AND

KMU APPLICANT

AND

RUM RESPONDENT

RULING

1. The facts of this case as can be gleaned from the record is that in Malindi Kadhi’s Court Divorce Cause No 19 of 2020, judgment was delivered in favour of the Respondent who was to get 90% of Plot No 10719/15 while the Appellant was to get 10%.
2. The Applicant averred that the Respondent died on 8.6.22 following a cardiac arrest, whereupon the Appellant began collecting rent from the suit property without disbursing the same to the true heirs of the Respondent. The Respondent was survived by the Applicant and Subira Musa, a minor. As a result of the Appellant’s unlawful collection of rent, the minor who is also his daughter has been unable to attend school due to lack of fees. The Applicant has thus filed an application dated 25.10.22, seeking the following orders:
 1. Spent.
 2. That this Honourable Court be pleased to issue a temporary injunction restraining the Appellant/Respondent, his agents, personal representatives, employees and/or any person acting under his authority from demanding, collecting rent ore levying distress from any of the tenants occupying Plot No 10719/15 situate at Maisha Mapya in Malindi pending the hearing and determination of this application.



3. That this Honourable Court be pleased to issue a temporary injunction restraining the Appellant/Respondent, his agents, personal representatives, employees and/or any person acting under his authority from demanding, collecting rent or levying distress from any of the tenants occupying Plot No 10719/15 situate at Maisha Mapya in Malindi pending the hearing and determination of this appeal.
 4. That this Honourable Court be pleased to appoint Nairobi Homes (mombasa) Limited manage and collect the rent from the property Plot No 10719/15 situate at Maisha Mapya in Malindi pending the hearing and determination of this appeal.
 5. That this Honourable Court be pleased to appoint Nairobi Homes (mombasa) Limited manage and collect the rent from the property Plot No 10719/15 situate at Maisha Mapya in Malindi pending the hearing and determination of this appeal.
 6. That this Honourable Court be pleased to issue a temporary injunction restraining the Appellant/Respondent, his agents, personal representatives, employees and/or any person acting under his authority from trespassing onto or harassing in any manner any of the tenants occupying Plot No 10719/15 situate at Maisha Mapya in Malindi pending the hearing and determination of this appeal.
 7. That costs be in the cause.
3. The Appellant/Respondent opposed the Application vide a preliminary objection dated 12.6.23. The Objections are reproduced below:
1. That the whole application is bad in law and the orders sought cannot be granted because it ought to have been brought in a separate suit when argued on merit would disclose a probable cause to grant an injunction.
 2. That the Appeal being a matter from the Kadhi's Court and involving property claimed under Muslim law. It was imperative for the applicant to first prove she is a Muslim and a person capable of inheriting the Estate of the deceased before the Kadhi court, before making such a claim in the Appeal as the Estate of a Muslim is usually divided to surviving heirs using koranic principles which is beyond the Jurisdiction of the High Court in the first instance.
 3. That once the application is determined and in any event maybe an injunction is granted, it would create substantial injustice to the appellant/respondent and be greatly prejudicial to the respondent claims in the appeal as there would be nothing left to determine in the applicants application yet the issues are substantial and require evidentiary proof.
4. The Appellant/Respondent urged the Court to dismiss the Application.
5. I have considered the submissions by the parties. The Appellant/Respondent contended that the Applicant is not a Muslim and is incapable of inheriting the property of a deceased Muslim. The paternity of the Applicant is in question and can only be determined in a substantive suit. Further that the Appellant's appeal against the decision of the Hon. Kadhi is yet to be determined and has stalled on account of the Respondent's demise. The Appellant submitted that the Applicant ought to have sought orders of injunction in a fresh suit and not in the pending appeal. Further that the Applicant has not applied to be joined as a party and that substitution has not been done properly as required by law. The Applicant's application is defective and ought to be dismissed with costs.



6. The Applicant’s submissions focused on the test for injunctive orders. Notably, no submissions were made on the preliminary objection and the challenge therein of the Applicant’s locus standi to bring the Application.
7. The law on preliminary objections is well settled. A preliminary objection must be raised on a pure point of law. In the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, Sir Charles Newbold rendered himself thus:

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.

And Law, JA stated:

So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

8. The issue raised by the Appellant/Respondent as to whether the Applicant is a Muslim is a question of fact and cannot form the basis of a preliminary objection. A preliminary objection cannot be raised where facts are to be ascertained. In this regard I am guided by the holding in the case of *Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others* [2015] eKLR where the Supreme Court stated as follows:

Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

9. The Court will thus focus on whether the Applicant has the locus standi to file the Application under consideration.
10. It is not disputed that the Respondent is now deceased. The Applicant has moved this Court pursuant to a grant of letters of administration ad litem dated 11.10.22 issued in respect of the estate of the deceased. The right to bring an action on behalf of the estate of a deceased person is restricted to such deceased person’s personal representative. Section 82(a) of the *Law of Succession Act* provides:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

11. The Applicant no doubt being aware of this requirement of the law obtained the grant to enable her have the locus standi to move the Court, following the demise of the Respondent. Indeed, a look at the exhibited grant indicates that the same is issued for the purpose of “defending Suit In Civil Appeal No 90 of 2021” in which the deceased is the Respondent.
12. The Court notes that the said grant was issued to the Applicant and one Ramadhan Ukasha Mwanjirani. Where a grant of representation is issued to more than 1 person, all administrators must act together in administering the estate of the deceased or as in the present case, enforcing or defending



an action in Court relating to the estate of a deceased person. An administrator may thus not delegate powers conferred upon him by the Court. Indeed, the wording of the grant is instructive. It states it is issued to the personal representatives, “they having undertaken faithfully to administer such estate according to law and render a just and true account thereof whenever required by law so to do.” A personal representative holds a fiduciary position in regard to the estate of a deceased person. He is required to act in the best interest of the estate and is therefore held to account. As such where more than one person is so appointed, they must act together as they will be held accountable for all acts done in their capacity as personal representatives. One personal representative cannot commit the other, to acts done singly, to the exclusion of the other.

13. The powers and duties of a personal representative(s) well spelt out in Sections 82 and 83 of *Law of Succession Act*. Such powers and duties cannot be delegated. In *In Re Estate of Krishan Murli Maini (Deceased)* [2011] eKLR Kimaru, J. (as he then was) had occasion to consider the issue of delegation of power bestowed by a grant of representation and stated:

It is therefore clear that when a court issues letters of administration or grants a probate of written will, such letters or grants are issued personal to the person applying to administer the estate of the deceased. The person applying for letters of administration or grant of probate cannot on his part delegate the powers granted to him by the court to someone else to administer the estate (in the case where the deceased died intestate) or to execute the will (in the case where the deceased left behind a written will) on his behalf.

14. And in his book “*Law of Succession*” Law Africa at page 246, Musyoka, W. M. (now a Judge of this Court) writes on the power of delegation thus:

The extent to which personal representatives can delegate their duties is the same as for trustees and is governed by the *Trustee Act*. Under the said Act, personal representatives may employ an agent to transact any business or do any act in the administration of the estate and may remunerate such agent out of the estate. Under Section 24 of the *Trustee Act*, the personal representative can engage an advocate or a bank to arrange the collection of the assets of the estate, discharge of debts and other liabilities, and distribution of the estate. It can also be used to employ an estate agent to sell land forming part of the estate, or to engage a stockbroker to value or sell shares. The provision does not allow personal representatives to delegate any discretion in matters relating to the administration of the estate. The decision making power of the estate remains with the personal representatives and not the appointed agent. The creation of a power of attorney may lead to a delegation of decision making power.

15. That the power of a personal representative cannot be delegated, was affirmed by the Court of Appeal in the case of *Abdisatar Haji Mohamed & another v Omar Ahmed & another* [2017] eKLR. The Court stated:

The Judge found and rightly so in our view, that, powers granted to personal representatives or executors cannot be delegated. An executor cannot delegate his authority but may engage the services of other experts or professionals, for instance, advocates, accountants, property valuers, managers, estate agents who may offer services which may be required in the administration of an estate.

16. The filing of the Application herein runs contra to the fiduciary duty imposed upon both personal representatives. The fact that the Applicant has acted alone renders the Application incompetent. Even if the 2nd Administrator had delegated his power to the Applicant to file the Application, the



same would still be incompetent for the reason that the power of a personal representative cannot be delegated.

17. Further, even if the Application had been filed by both administrators, the same would still have encountered headwinds. This is because after obtaining the limited grant of representation, the administrators did not file an application for substitution. Order 24 Rule 4 of the [Civil Procedure Rules](#) provides for procedure in case of death of one of several defendants or of sole defendant as follows:
 1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
 2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
18. Order 24 Rule 4 requires that where a sole defendant, or as in the present case, a respondent dies and the cause of action survives or continues, the court may cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. The Court must however be moved by way of an application in that behalf. There is no such application on record. Without the Applicant first seeking to be substituted for the deceased, she has no locus standi herein. As such, the Application for injunctive orders is made by a stranger; a person who is not a party herein and is thus incompetent.
19. In the end and in view of the foregoing, I uphold the preliminary objection dated 12.6.23 with the result that the Application dated 25.10.22 being incompetent, is hereby struck out. The circumstances herein do not call for an award of costs.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 31ST DAY OF OCTOBER 2023

M. THANDE
JUDGE

