



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT HOMA BAY

CIVIL APPEAL NO. EO18 OF 2021

IN THE MATTER OF THE ESTATE OF: JAMES OKELLO OTIENO ALIAS JAMES OKELLO DECEASED

BETWEEN

CAROLINE ANYANGO OKELLO.....APPELLANT

VERSUS

SALOME OTIENO KOJIEM & 5 OTHERS.....RESPONDENTS

JUDGMENT

1. On the 28th January, 2021 the trial court delivered a ruling in which appellant's preliminary objection was dismissed. The appellant had raised a preliminary objection on 2nd November, 2020 on grounds that the objection application was time barred under the mandatory provisions of section 68 (1) of the Law of Succession Act as read with Rule 17(1) of the Probate & Administration Rules. The appellant was dissatisfied and filed this appeal through the firm of M/s Apondi & Company Advocates. She raised the following grounds of appeal:

- a. That the learned trial magistrate erred in fact and law in finding that no application for grant had been applied for or made to any of the parties.
- b. That the learned trial magistrate erred in law and fact in deciding that the administratrix preliminary objection could be resolved by the provisions of article 159 of the constitution of Kenya, 2010.
- c. That the learned trial magistrate erred in law and fact in upholding the objection filed by the objectors.
- d. That the learned trial magistrate erred in law and fact in dismissing the administratrix preliminary objection.

2. The appeal was opposed by the respondents who was represented by the firm of H. Obach & Partners Advocates.

3. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanour. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

4. Article 159 of the Constitution of Kenya is not a remedy for all manner of apparent legal deficiencies. It has however its place in order to stem any miscarriage of justice. The Law of Succession Act is self-sufficient. **In re estate of Agnes Ogolas Akoth (Deceased) [2016] eKLR** Makau J. on the same issue expressed himself as follows:

The Law of Succession is a self-contained Act of Parliament which has clearly set out provisions on how matters of succession cause can be dealt with. An aggrieved party cannot ignore the express provisions of the law like in the case in raising any matter regarding specific provisions in the Act and claim that he is doing so, so as to get substantive justice in respect of his claim. In my view even when a party is seeking substantive justice, such justice must be attended to through some definite process. Article 159 (2) (d) of the Constitution in regard to administration of justice without undue regard to procedural technicality do not therefore mean we do away with all rules of procedure, as doing so would breed anarchy and would mean injustice to those who are vulnerable or weak or uncanning. Procedures and rules are in my view good, and makes things move in an orderly and predictable manner and cannot be wished away.

Section 76 of the Law of Succession Act ensures that justice is not compromised and operates in similar manner as Article 159 (2) (d) of the Constitution. Even if I find that Article 159 (2) (d) of the Constitution was erroneously invoked, the court would still have arrived at the same conclusion.

5. The parties herein appear contended in chasing a red herring instead of the real issues. Once the issue of the objection to making of the grant has been addressed, the other issues will automatically fall in place.

6. The appeal herein is dismissed and each party to bear own costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF FEBRUARY, 2022

KIARIE WAWERU KIARIE

JUDGE