



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION CAUSE NO. 568 OF 2014**

**IN THE ESTATE OF THE ARMETTA BENITO VITOTORIO GUISEPPE (DECEASED)**

**CLINTON DE BALMA..... APPLICANT**

**VERSUS**

**EVANGELINE KALINGU STEPHEN .....1<sup>ST</sup> RESPONDENT**

**PHILIPINE KATHURE MICHOKO.....2<sup>ND</sup> RESPONDENT**

**Partial Ruling**

1. On the 18/01/2021 it was directed that the objector files and serves a detailed witness statement not later than 19/01/2021 to enable the petitioner also file and serve own detailed witness statement within 14 days after being served.
2. Directions on hearing were then given that at trial the petitioner would call four witnesses who would have filed witness statements to adopt such witness statements as evidence in chief then be cross examined. Nothing was said about the objectors and how to avail evidence on its side and the matter was then fixed for hearing on the 7/6/2021.
3. Come the date set for hearing, the objector counsel then informed the court that he was not calling any witness nor relying on any statement as evidence as he did not have any witness in court because his client resides outside Kenya and could not be expected to only come to Kenya for the limited purpose of adducing oral evidence. He asked the court to take his objection as presented (in his words as is) because he took the view that documents exhibited are clear and sufficient to found and prove his objection.
4. For the petitioner, a rather awkward and contradictory position was taken by the two counsels on record Ms. Kaume and Mr. Munene. While Mr. Mwenda took the position that being an objection the practice was that the objector begins, leads evidence and then cross examined before the petitioner takes the stand, Ms. Kaume sided with Mr. Gitonga that it had been agreed that the only issue being whether the petitioner was married to the deceased, the objector would not lead evidence but would rely on the documents filed and evidence to be led by the petitioner. That untidy position was however resolved when the court reconvened and Ms. Kaume did not attend even as the petitioner kept interjecting to distance herself from representation by Ms. Kaume.
5. At that juncture it became apparent that Mr. Gitonga was insisting on an agreement him and the former counsel for the petitioner had entered into and reduced into directions by the court on 20/2/2019. The matter was then adjourned to enable both counsel peruse the court file. When the court reconvened, court was referred to the orders of 20/2/2019 when it is recorded in the court file -;

***“Hearing on 20/5/2019. Issues now agreed: Marriage of Evangeline to the deceased.”***

6. Mr. Gitonga then told the court that the only reason he had filed a witness statement was to reply to the four witness statements filed by the petitioner and that he wished not to call any witness as his documents filed were clear that the deceased died leaving behind a will and was married to a person other than the petitioner as disclosed by the annexed will and marriage certificate.
7. Mr. Munene for the petitioner insisted on the direction of 8/7/2021 and averred that there was no specific direction that no evidence be called by the objector. He reiterated that having brought the objection it was their duty and obligation to begin the production of evidence and that in objection proceedings, when the objector fails to attend the same is subject to dismissal.
8. At that junction the court then asked counsel to take a position on the provisions of section 61 of the Act whether it was of any guidance and help.
9. Mr. Gitonga took the position that that provision was only applicable when a probate had issued unlike here where none exists. He said that the objection rested with the court to establish whether or not the petitioner was a wife to the deceased. He reiterated that his documents

were sufficient without more and that he would not have filed the objection in its current form had the registry not declined to accept his petition for probate on the basis that this cause was pending.

10. For petitioner, Mr. Munene took the position that it is acceptable for two causes to be filed on seeking to prove it will while the other on the basis of intestacy and that in the instant matter the petitioner takes the view that the deceased died intestate.

11. I have had the benefit of reading the court file and the proceedings so far taken and I have noted that there was a misstep that ought to have been detected earlier.

12. While I do not expect the registry to stand on the way of litigants particularly those presented by counsel by advising them on how improper the papers they intend to file are, I also do not expect counsel to be bound by gratuitous advice by the registry staff. The registry staff have the singular duty to accept the papers presented by the litigants and their counsel in the manner deemed fit by such litigants or counsel. Whether or not the papers are properly drawn falls for determination by the judicial officer to determine the matter and not by the registry staff. If I was wrong in this view then I would still take refuge in rule 9(b) of the probate and administration rules which provide:-

***“ No legal advice shall be given to a personal applicant by an officer of the registry”***

13. That notwithstanding, however, the objector chose to object to the petition by the petitioner. When he did that and before the court was moved to consider hearing the objection, the objector was obligated by the law to file not only the objection but also the answer to petition, in form 25, and a cross application in form 84 supported by an affidavit, for grant to the estate of the deceased to be made to the objector. That is what I understand the law to dictate pursuant to Rule 17 (5), probate and Administration Rules. The rule provides-;

***The registrar of the registry in which the objection is lodged shall forthwith upon the lodgement of the objection cause a notice in Form 67 to be sent to the objector, by registered post or otherwise as he may think fit, requiring him to file in the registry within such period as the registrar may specify in the notice an answer in Form 25 to the petition for a grant together with a petition by way of cross-application in Form 84, supported by affidavit, for a grant to the estate of the deceased to be made to the objector.***

14. Here I have noted that the objection was simultaneously lodged with a petition for probate of a written will (form 78) pursuant to Rule 7 and 13 of the Rules. That seems to have been the first misstep with the consequence that the papers filed are incomplete to constitute an objection according to the law.

15. That having happened, and in order that we retrace our steps for matter to properly proceed, I direct that-;

a. These directions shall serve as form 67 and directing the objector to move the objection forward.

b. The objector shall within 15 days from today caused to be filed and served, upon the petitioner’s counsel, the following-:

i. An answer to the petition for a grant in form 25,

ii. Cross- application for a grant to the estate of the deceased to be made to the objector, in form 84 supported with an affidavit in that regard.

16. This matter be mentioned in court on 29/9/2021 to confirm compliant and for direction on how the hearing of the objection shall proceed.

**DATED, SIGNED AND DELIVERED AT MERU BY MS TEAMS THIS 29<sup>TH</sup> DAY OF JUNE 2021.**

**PATRICK J O OTIENO**

**JUDGE**

**In presence of**

Mr. Munene for petitioner

No appearance for Gitonga for objector

**PATRICK J O OTIENO**

**JUDGE**