



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CASE NO 197 OF 2017

IN THE MATTER OF THE ESTATE OF MOSES ONGUSO KAYANDA (DECEASED)

GERISHOM MULEHI KAYANDA.....PETITIONER/APPLICANT

VERSUS

ONGUSO KAYANDA.....OBJECTOR/RESPONDENT

RULING

1. **ONGUSO KAYANDA (the objector)** filed a notice of preliminary objection to the application dated 16th May 2017 on grounds that the **applicant (GERISHOM MULEHI KAYANDA)** is not one of the beneficiaries nor a dependant of the estate of the late **MOSES ONGUSO KAYANDA**, and is therefore an unauthorized person to institute the application for substitution. He urges this court to dismiss the application

2. The crux of this objection as contained in the supporting affidavit is that the applicant is not the biological son of the deceased, and therefore lacks the *locus standi* to seek to substitute the late **REBECCA MWENESI ONGUSO**. That by the same token he is not entitled to a share of the estate.

3. In a replying affidavit by the applicant, he insists that he is a biological son of the deceased, thus a dependant. He explains that the deceased had two wives, and his late mother **REBECCA MWENESI ONGUSO** (his biological mother) was one of the wives who had petitioned for grant of letters of administration of her late husband's estate. The said **REBECCA** has since died, and he wishes to substitute her in his capacity as her legal representative, so he has the legal capacity to make the application.

4. The matter was disposed of through written submissions where the objector submitted that the applicant had fraudulently and secretly filed for grant of letters of administration, and omitted his name as the lawful beneficiary, and the only heir to the estate. He maintains that the deceased only had 5 children who do not include the applicant, and refers to section 38 of the Law of Succession Act which provides that:

Where an intestate has left a surviving child or children but no spouse, the net intestate estate shall, subject to the provisions of sections 41 and 42, devolve upon the surviving child, if there be only one, or shall be equally divided among the surviving children

5. The applicant submits that the application does not fall within the spectrum of those matters for which substitution is prohibited under section 76 of the Law of Succession Act, as it does not involve a sole petitioner. That in any event, the applicant has documents to prove that he is the deceased's biological son.

6. Do the matters raised here constitute a preliminary objection in the strict legal sense? The case of **Mukisa Biscuits Manufacturing Ltd Vs West End Distributors Ltd (1969) E.A 699** set the threshold in a preliminary objection thus:

"... so far as I am 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 Objection 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."

In the same case, **Sir Charles Newbold**, President stated:

"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 I

sought is the exercise of judicial discretion.”

7. More recently, I think **Ojwang (J)** (as he then was put it more succinctly in the case of **ORARO v Mbaja [2005]**) that:

“...A preliminary objection correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details, liable to be contested, and in any way to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual assertions, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where the court needs to investigate facts, a matter cannot be raised as a preliminary objection. Anything that purports to be a preliminary objection must not deal with disputed facts. And it must not itself derive its foundation from factual information which stands to be tested by rules of normal evidence

In my view, the matters raised here are issues of fact which would require evidence. It is not enough to simply announce that the applicant is not the deceased’s biological child, and therefore does not qualify to seek to substitute the deceased’s late wife as an administrator. There is need for the objector to present tangible evidence to support such an assertion. The preliminary objection does not meet the threshold set in the various judicial pronouncements that I have referred to. Consequently, I hold and find that the preliminary objection lacks merit and is dismissed with costs to the applicant.

Delivered and dated this 22nd Day of MAY 2020 at Eldoret

H.A. OMONDI

JUDGE