



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAROK**

**CIVIL APPEAL NO 2 OF 2019**

**IN THE ESTATE OF THE DECEASED EMMANUEL MOKIRE OLE KIU**

**JOSEPHINE PEYIAN KIU.....APPELLANT**

**VERSUS**

**MALOI OLE KIU.....1<sup>ST</sup> RESPONDENT**

**NAROK HIGHWAY TOWERS LTD.....2<sup>ND</sup> RESPONDENT**

**RULING**

*(Being an appeal from the ruling of the Hon. H. Ng'ang'a,SRM, delivered on 28/12/2019*

*in Narok CMC SUCCESSION CAUSE NO. 25 OF 2016, Josephine Peyian Kiu v Maloi Ole Kiu)*

1. The appellant has appealed against the ruling of the lower court that held that the shares held in Narok Highway Towers Ltd is not the free property of the deceased namely Emmanuel Mokire Kiu. That court also held that Narok Highway Towers Ltd was at liberty to deal with the said shares in accordance with the Companies Act. That court finally held that the parties were at liberty to file proceedings in respect of the estate of their late mother Sorora Ole Kiu.
2. The respondent has opposed the appeal.
3. In this court the appellant has raised seven (7) grounds in her memorandum of appeal.
4. In ground 1 the appellant has faulted the trial court in law and fact in allowing the objection dated 30/6/2017 for it was not lodged in the correct form contrary to the provisions section 68 of the Law of Succession Act. In this regard, Messrs Maina Ng'aruiya & Co. Advocates submitted that once a grant has been issued, an objection under section 68 of the Law of Succession Act is no longer viable. Based on the decision of the court *In re Estate of Esther Francis Thoya (Deceased) [2018] e-KLR*, counsel submitted that where a grant has been issued an objection under section 68 of the Law of Succession Act is no longer available.
5. The said objection has been overtaken by events according to *Re Estate of Agnes Ogola Akoth (Deceased) [2016] e-KLR*, as the court cannot stop what already has been passed and the objector has to look upon the other remedies available under the act.
6. Counsel further submitted based on *re Estate of Grace Nyambura Waweru (Deceased) [2017] e-KLR*, that the objection has to be filed within 30 days failing which the objector has to seek leave within which to lodge the objection, failing which the objection becomes time barred.
7. Based on *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others [2013] e-KLR*, counsel submitted that the provisions of article 159 of the 2010 Constitution of Kenya were not intended to do away with rules of procedure. They only require the courts to administer substantive justice without undue regard to rules of procedure.
8. Mr. Masikonde has submitted based on *In re estate of Mary Karugi Mwangi (Deceased) [2018] e-KLR*, that the court should administer substantive justice rather than unwarranted attention to procedural technicalities. Based on the decision of the court *In re estate of Lesinko Sokorte Kirayio (Deceased) [2017] e-KLR*, counsel submitted that even if the objection was defective the court should invoke its inherent powers under Rule 73 of the Probate and Administration Rules and find that the objection was properly filed in the magisterial court.

9. I have considered these rival submissions of the parties and the authorities cited by them. I find that the objection was filed on 29/6/2017. I also find that the grant of letters of administration were issued on 13/12/2016. I further find that the objection ought to have been filed within 30 days from 13/12/2016.

10. I therefore find that the objection was filed after 30 days' period had expired and without leave of the court.

11. I further find that the provisions of article 159 of the 2010 Constitution cannot be called in aid in the circumstances of this appeal; since the objector still has an opportunity to challenge the grant by way of seeking its revocation. I also find as persuasive the decision of the Court of Appeal in *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others*, in which that court observed that the provisions of article 159 of the 2010 Constitution of Kenya were not intended to do away with rules of procedure.

12. In the premises, I find that ground 1 of the appellant's appeal succeeds and I hereby uphold it.

13. In the circumstances of this appeal, I find that it is moot to consider and determine the other grounds of appeal.

14. In view of the fact that this is a family dispute in succession proceedings, I make no order as to costs.

15. The upshot of the foregoing is that appellant's appeal succeeds with the result that the appeal is hereby allowed with no order as to costs. The judgement and/or decree of the lower court is hereby set aside.

Judgment signed, dated and delivered at Narok this 26<sup>th</sup> day of October, 2020 in the presence of Ms. Mburu holding brief for Mr. Maina for the applicant and Mr. Masikonde for the 1<sup>st</sup> respondent.

**J. M. BWONWONG'A.**

**J U D G E**

**26/10/2020**