



REPUBLIC OF KENYA

IN THE HIGH COURT AT KENYA AT KISII

SUCCESSION CAUSE NO. 3 OF 2018

IN THE MATTER OF THE ESTATE OF KENYARIRI KENYARIRI (DECEASED)

RULING

1. On the 16<sup>th</sup> March 2018 **Christopher Kenyariri** and **Vincent Mosongo Kenyariri** petitioned for a letters of grant intestate. The affidavit in support of the petitions the persons whom the deceased left surviving him, 11 persons at paragraph 4. The affidavit also lists the deceased's assets at paragraph 6. The petition was also accompanied by form P & A 57, Guarantee of personal sureties. The guarantees named are Stephen Makana and William Maugo. On the 27<sup>th</sup> May 2016 the cause was gazetted and a grant of letters of administration issued on the 6<sup>th</sup> day of July 2016. This petition was originally filed in the High Court at Nairobi as Succession Cause No. 490 of 2016 and was transferred to Kisii by a Court order dated the 14<sup>th</sup> March 2018.

2. On the 9/11/2017 **Edward Obino Kenyariri** filed an application to annul or revoke the grant of letters of administration. He states that he is the eldest son of the deceased by his 2<sup>nd</sup> wife Elizabeth Nyaboke who is now deceased. That the co objector Zachary Osano Kenyariri is the eldest son of the 1<sup>st</sup> wife Monchari Kenyariri. He claims that the letter which is purported signed by the assistant chief was a forgery.

3. The application was opposed by the petitioners. The affidavit of Monchari Kenyariri and Zachary Osano Kenyariri were filed by the respondents. They explain that the 2 petitioners were authorised by them to file the petition and that the objector Edward Obino Kenyariri is not a biological son of the deceased but an adopted son and that he is a beneficiary in the estate. Zachary depones that he is not an objector. The petitioners also filed grounds of opposition stating that the deponent of the supporting affidavit has no locus standi to challenge the administration and should be held liable for perjury, that the petitioners have the blessing of the surviving spouse, the grant issued was not opposed and that there is no merit in the application.

4. On the 24<sup>th</sup> October 2018 a **Notice of Preliminary Objection** was filed by the petitioners on the application dated the 7<sup>th</sup> November 2017. The point of law raised was that the objector Edward Obino Kenyariri is **intermeddling** with the administration of the estate of the deceased and the following to be expunged from the record the name of the 1<sup>st</sup> Objector Zachary Osano Kenyariri who the said objector introduced as an objector; that the purported copies of identity cards of the sureties whose introduction into the court file is fraudulent because the petitioners never filed copies and they are not even required on application for grant.

5. Directions were given by this court on the 2/7/2018 that the objection proceeds by way of viva voce evidence. Counsels argued the preliminary objection by way of oral submissions. I have considered the said submissions.

6. Law JA in Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd [2][1969] E.A 696 AT PAGE 700 held as follows on what constitutes a preliminary objection.

***"...so far as I am aware, a preliminary objection consists of a pure 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."***

Sir Charles Newbold P at page 701, B held as follows:-

***"...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. [Emphasis mine] "***

7. The petitioners states in their preliminary objection that the objector is intermeddling with the administration of the estate of the deceased. When one alleges intermeddling with an estate that calls for facts to be ascertained, evidence to be adduced on the alleged intermeddling. Section 45 of the Law of Succession Act cap. 160 provides for no intermeddling with the deceased's property. It is not a point of law that can cause a Court to dispose off an Objection application. The objection raises issues of failure to obtain consent from the objector, allegations of forgeries and that the petition as filed is incompetent.

8. Further what the petitioners seek to expunge from the record cannot be done by way of raising a preliminary objection. This cannot be done in the manner sought. The petitioner is at liberty to file a formal application seeking to have the said documents expunged or call the deponent of the affidavit to deny the facts deposed. I find no merit in the objection raised. It is dismissed. Since the parties are family members each party to bear its own costs.

**Dated signed and delivered at Kisii this 30<sup>th</sup> day of April 2019.**

**R.E.OUGO**

**JUDGE**

**In the presence of;**

**Mr. Kenyariri For the Petitioners**

**Mr. Nyariki For the Objector**

**Rael Court Clerk**