



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

SUCCESSION CAUSE NO.98 OF 2016

IN THE MATTER OF: THE ESTATE OF GEORGE BARUA (DECEASED)

AND

IN THE MATTER ON: AN APPLICATION TO REVOKE GRANT ISSUED TO ELIZABETH BARUA AND CHIWAI CHIRIBA AMANI

GEORGE CHIWAI BARUA (DECEASED).....APPLICANT

VERSUS

MIRIAM JEROP CHUMO..... RESPONDENT

RULING

Background

1. On 11th March 2018 the objector Miriam Jerop Chumo filed summons for revocation of Grant against the administrators to the Estate of George Chiwai Barua in terms of **section 76** of the law of the constitution and **Rule 44 (1)** of the probate and administration Rules.
2. During the pendency of the revocation proceedings the respondent filed a preliminary point of law in the connection with the revocation of the grant letters of administration.
3. The point turns on whether in all the circumstances the objector complied with the mandatory provision of **68(1)** of the Law of succession and **Rules 17 (1), 17 (4) 17 (5) and 67** of the probate Administration Rules.
4. The question is whether the preliminary objection establishing that the present summons for revocation of grant in dispute is maintainable as it's in violation of **section 68 (1) of cap 160** as read together with Rules **17 (1), (4) (5) and 67** of the probate and administration Rules.
5. The approach taken by the courts on a preliminary objection is as determined in the case of **Mukisa Biscuits Manufacturing Co. Ltd v Westend distributors Ltd** 1969 EA 696 where the court held as follows;

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implications out of pleadings and which if argued as a preliminary point may dispose of the suit. A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct.”

6. The application contends that in regard to the filed objection proceedings the fundamental provisions as used in the specified sections were not complied with, a fact which renders the summons for revocation totally defective. The starting point in light of the context pursued by the applicant is to define and strike the meaning of Rules of procedure in the administration of justice.
7. The position in our law remains as expressed in the case of **Abdalla Mohammed vs Ahmed Bin S. Makharral** 1956 23 EACA 260 where the court held;

“That Rules of Procedure are intended to serve as the hand maidens of justice not to defeat it.”

5. The interpretation meaning of words in a statute or any instrument for that matter is to give effect to the intent of the legislature. That intention as held in the case of **Natal Joint Municipal Pension Fund v Endumini Municipality** 2012 **section A 593 13** gleaned from the language of the statute, instrument or document as a whole not from a particular provision only. The fundamental consideration on the

canons of interpretation of words and phrases in a statute is to presume the legislature intended a just, fair and reasonable result. According to Singh in his book on the principles of statutory interpretation 11th Edition Wadhwa Nagpur (2008)

“When the material words are capable of two constructions, one of which is likely to defeat or impair the policy of the Act whilst the other construction is likely to assist the achievement of the said policy, then the words would prefer to adopt the later construction”

6. Whereas the meaning of the statutory words must be accorded their plain meaning certain doctrines and rule of interpretation is of great importance to deal with ambiguities.

7. In the instant preliminary objection the recourse this Court is being asked to contend with is that of inferring that the words and phrase shall in terms of **section 67 (1)** as read together with **Rule 17 (1), (4) and (b)** of the law of succession having been couched in a mandatory nature any matters in issue in the summons for revocation proceedings are *null and void*. In determining the legislative intent and purposive approach to statutory construction the persuasive authority in **Glaisdale in Mannsell v Olins 1975 AC 373**.

8. The court expounded on the principles applicable on interpretation of words in a statute.

“In looking for the meaning of the word shall and give it its proper construction a judicial mind must take into account the purpose for which the relevant provision is made and its nature considered. In its setting, the connected provisions and other similar matters, the serious general inconvenience or injustice to the person resulting from the reading the provisions as directory or mandatory, whether the cause of justice is promoted or retarded as a consequence of construing the provision one way or the other.”

9. On the bases of law and statutory interpretation I am fully persuaded by the legal principles in the above dicta that the courts should construe the language of a statute in fair and liberal manner to give effect to the intention of the legislature which ensures or fulfills the best of the objectives. A recent decision of the Court of Appeal in **David Njenga Ngugi v Attorney General 2016 ECLR** summed up the purposive approach to statutory interpretation as stated in the following text;

“On the use of the word shall in section 13 A of the Government Proceedings Act, the word shall is used in this section in relation to time for filing suit. The section prohibits filing of suit before the notice prescribed has run its course.

The canons of interpretation of statutes show that where the word shall is used, it connotes mandatoriness if it confers a power and a duty to act. It stands that the rule must be enforced. But like other statutes, the provisions of the government proceedings Act must be construed so as to carry out the intention of parliament, read as a whole, nowhere does the Act manifest any intention to deprive an intending litigating of his or her cause of action on account of failure to fully comply with section 13 A.

The principles of construction of statutes show that where the use of the word shall in a statute does not confer a power to act it is not imperative. It is directory.”

10. The Importance of this approach to understand the legislatures’ intent is to fundamentally act to safeguard the course of justice and not to defeat or prejudice the determination of the issues arising in the dispute. It is clear from the foregoing that the preliminary objection as expressed by the applicant has laid excessive reliance on a strict literal meaning of the word/phrase shall in the impugned provisions of the Act.

11. I am satisfied that from the elaborate principles on Judicial interpretation of statutes in the cited cases its critical that courts adopt an approach which gives effect to every word of the statute.

12. The preliminary objection turns on this purposive approach to statutory interpretation and its obvious and doubtful whether indeed the preliminary objection satisfied the threshold in **Mukisa case (supra)**. I think it is fair to say that this was a side show to distract the court from the core business of determining the real issues in the summons for revocation of grant of letters of administration. Accordingly, the preliminary objection is dismissed with costs.

Dated, signed and delivered at Malindi this 28th day of May, 2019.

REUBEN NYAKUNDI

JUDGE

Representation:

Mr. Obaga for the respondent/objector

Mr. Odhiambo for the applicant to the Preliminary objection.