



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

SUCCESSION CAUSE NO. 129 OF 1987

IN THE MATTER OF THE ESTATE OF SABINA NAMUKURU OKERE (DECEASED)

BETWEEN

JOHN MAKOKHA OKERE.....PETITIONER/RESPONDENT

AND

TIMOTHY JUMA.....1ST OBJECTOR/APPLICANT

FRED OKERE.....2ND OBJECTOR/APPLICANT

JUDGMENT

1. The applicants have filed an application dated 27th April, 2016 seeking that the grant of letters of administration issued to the respondent/Petitioner on the 10th June, 1988 be revoked. The application is based on the grounds on the face of the application and is supported by a joint affidavit of the Objectors.

2. The application was opposed by the respondent.

3. The objection was heard by way of *viva voce* evidence. After the objectors had testified in the case it came out that they had not obtained grant of letters of administration on behalf of the estates of their respective fathers prior to the filing of the objection proceedings. The petitioner then filed a preliminary objection dated 10th March, 2017 on the grounds that:-

1. At the time of the objectors' filing of the application dated 27/04/2016 they lacked capacity to bring it on behalf of the estate of their deceased fathers i.e. Simon Mukanda and Nicholas Juma.

2. The application dated 27/04/2016 does not reveal that the applicants have brought the said application on behalf of the estates of deceased Simon Mukanda and Nicholas Juma.

3. The application dated 27/04/2016 violates section 82 (a) of the Law of Succession Act Chapter 160 of the Laws of Kenya hence it ought to be struck out with costs.

4. Upon the objectors being served with the preliminary objection they filed an application dated 16th May, 2017 seeking for orders that:-

(i) That the Hon. Court invokes its powers under r. 73 of Succession Act (inherent powers) to allow the ad litem grants in favour of the applicants herein in proceedings hereby.

(ii) That upon such order being granted, the same ad litem grants to be deemed proper on record.

(ii) That there be an order on costs.

5. The application dated 16th May, 2017 is supported by a joint affidavit of the objectors in which they state that they have now obtained a limited grant ad litem which grant was obtained on 29th March, 2017 a copy of which is attached to the application. That the court has inherent discretionary powers to grant the orders sought. Further that no prejudice will be occasioned to the respondent.

6. The respondent/petitioner has opposed the application dated 16th May, 2017 on the grounds that the limited grant was obtained way later after the succession cause had been filed. That the said grant cannot act retrospectively and neither can it be used to validate an illegality of

filing the succession cause while not in possession of a grant of representation.

Submissions –

7. The advocates for the petitioner/respondent, **Marisio Luchiyya & Co. Advocates**, submitted that the objectors lacked capacity to file the succession proceedings. That the grant herein was issued to the objectors after they were served with the preliminary objection. That the application dated 16/5/2017 is not based on any specific rule under the Law of Succession Act and is an abuse of the process of the court. The advocates cited the case of **Nancy Waithira Mburu –Vs- Catherine Kathoni Marete & Another in Meru High Court Succession Cause No. 305 of 2013 (20...)** eKLR where the objector had obtained a limited grant of letters of administration ad litem almost two months after filing her objection. In the matter Makau J. held that the objector lacked capacity to commence objection proceedings.

8. The advocate for the objectors, **G. Ombito Advocate**, submitted that the court has under rule 73 of the Probate & Administration rules inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of process of the court. That the objectors have since obtained a limited grant. That the orders sought out to be granted.

Analysis and Determination –

9. The objectors have filed these objection proceedings on behalf of the estates of their respective fathers. It is not in dispute that the objectors did not possess grants of letters of administration to their respective father's estates when they filed the objection proceedings. They however obtained a grant in respect to the estate of Nicholas Juma Okere after the respondent had filed the preliminary objection seeking for the objection proceedings to be struck out for lack of grants of letters of administration. The question for determination then is whether the court should strike out the objection proceedings as the objectors had no capacity to file them when they did so or allow the ad litem grants and deem them to be properly in record.

10. Rule 73 of the Probate and Administration Rules provides as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

11. The Objectors contend that the failure to obtain ad litem grants before filing the objection proceedings was a technicality not wholly within their ambit. That the alternative to the court not admitting the grant would be filing of fresh proceedings which would be costly and impertinent to justice. That no prejudice will be suffered by the petitioner/respondent. That the policy of the court is to pursue direct tenets of justice and not favour technicalities.

12. The dispute herein relates to the estate of the late Sabina Namukuru Okere who had three sons – Simon Mukanda Okere, Nicholas Juma Okere and John Makokha Okere. The 1st objector in the objection proceedings, Fredrick Anthony Okere, is the son of the late Simon Mukanda Okere while the 2nd objector Timothy Namukuru Juma is the son of the late Nicholas Juma Okere. The grant ad litem which the objectors have filed herein is in respect to the estate of the late Nicholas Juma Okere that was issued in the names of the two objectors. The objectors have filed the objection proceedings on behalf of the estates of their late fathers, Simon Mukanda Okere and Nicholas Juma Okere. Whereas they have since obtained a grant ad litem in respect to the estate of Nicholas Juma Okere, they have not obtained a grant in respect to the estate of Simon Mukanda Okere. They then have no locus standi to proceed with the succession proceedings on behalf of the estate of Simon Mukanda when they have no grant of letters of administration in respect to his estate.

13. That notwithstanding, the objectors did not possess grants of letters of administration to the estates of their respective fathers when they filed the objection proceedings. The applicants are imploring the court to import its inherent powers under rule 73 of the P&A Rules to admit their grant of representation that was obtained in the cause of the hearing of these objection proceedings.

14. Rule 73 of the Probate and Administration Rules provides that:-

“Nothing in these Rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

15. The said rule does not oust out the requirement to comply with the law. The rule is only applicable where there is no law to cater for a particular situation or where there is an ambiguity in the law. It cannot be applied in the case for the applicants where they deliberately or by ignorance failed to comply with the law. A person without a grant of representation has no capacity to file a claim on behalf of an estate of a deceased person. Only a personal representative can do so as provided by Section 82 (a) of the Law of Succession Act that provides that:-

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative.

16. In the premises the objection proceedings were invalid ab initio. A grant of representation obtained in the middle of a hearing cannot validate the proceedings. The court thereby declines to allow the application dated 16th May, 2017 which is accordingly dismissed with costs to the petitioner/respondent. The preliminary objection dated 10th March 2017 is thereby upheld. Consequently the objection dated 27th April, 2016 is struck out with costs to the petitioner/respondent.

Delivered, dated and signed in open court at Kakamega this 25th day of September, 2019.

J. NJAGI

JUDGE

In the presence of:

No appearance for petitioner/respondent

Mr. Ombito for objectors/applicants

Petitioner/Respondent - absent

Objectors/applicants - absent

Court Assistant - George

30 days right of appeal.