



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE & ADMINISTRATION NO. 45 OF 2012

IN THE ESTATE OF:

MUGENI MAKONA OBORO.....DECEASED

BETWEEN

JUSTINE MUGENI alias JUSTINE MUNDOH.....1ST APPLICANT

PHILOMENA MUGENI.....2ND APPLICANT

EVERLINE MUGENI.....3RD APPLICANT

LILIAN BARASA.....4TH APPLICANT

MARY MUGENI 5TH APPLICANT

AND

VINCENT WABWIRE MUGENI1ST RESPONDENT

WEST KENYA SUGAR LTD.....2ND RESPONDENT

RULING

1. The five applicants herein moved the court by way of Notice of Motion brought under section 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law. They are seeking the following orders:

- a) That this honourable court be pleased to order that the notice of withdrawal dated 24th day of February 2015 be struck out and/or expunged from court record.
- b) That the application dated 17th June, 2013 be set down for hearing.
- c) That costs be provided for.

2. The application is premised on the following grounds:

- a) That the applicants are beneficiaries and/or heirs to the deceased's estate.
- b) That the applicants instructed their then advocate on record to file the application dated 17th June, 2013 to safeguard their interests in the estate of the deceased.
- c) The applicants were then approached by agents of the second defendant (sic) for an out of court settlement and were duped into discontinuing the matter without material disclosure.
- d) That the applicants have been unjustly disinherited and seek to pursue their claim in this court.

e) That the applicants were never granted their day in court and have been aptly advised on their legal status and position.

f) That the respondents will not be prejudiced as they will have their day in court.

2. The application was opposed on the followings grounds:

a) That the applicants are seeking to revive a matter that has already been settled.

b) That the application is an abuse of the court process.

3. It is settled law that the Law of Succession Act is a self-contained Act and provisions of the Civil Procedure Act, unless specifically imported into it are not applicable. Rule 63 of of the Probate and Administration Rules provides as follows:

1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

In the case of **Priscilla Vugutsa Kamaliki vs. Mary Runyanyi Ochieng [2016] eKLR** judge Ruth Sitati observed as follows:

A look at Rule 63 of the Law of Succession Act reveals that the provisions under which the present application is brought are not some of the provisions imported into the Law of Succession Act. What this means therefore is that the instant application is incompetent for want of form and is therefore fit for striking out.

I fully agree with the learned judge. The same fate will apply to the application which was brought under provisions that have not been incorporated into the law of succession.

4. It is doubtful whether the application even if it was brought under the provisions of the Law of Succession Act would have succeeded. A party cannot be allowed to change positions at will without regard to the fact that the earlier position may have led the other to act. The applicants were represented by an advocate and cannot claim they were duped. Equity will estop them from turning the wheel backward.

5. When a party seeks to withdraw a matter in court, he does not need the leave of court to do so. This was stated by the court of Appeal (Bosire JA) in the case of **Pil Kenya Limited vs. Joseph Oppong [2009] eKLR**

The plaintiff in that suit did not need the leave of the court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary.

Though the court was addressing itself to suit generally, the position in my view obtains in an application.

6. The upshot of the foregoing observations is that the application is struck out with costs.

DELIVERED and SIGNED at Busia this 21st Day of November, 2019

KIARIE WAWERU KIARIE

JUDGE