



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT VOI

IN THE MATTER OF THE ESTATE OF ERNEST MJALA NYANGE (DECEASED)

SUCCESSION CAUSE NO 46 OF 2016

CHRISTINA WAWUDA SENGE.....1ST PETITIONER

EMMA WUGHANGA NYANGE.....2ND PETITIONER

VERSUS

BRADLEY SENGE MNJALA.....OBJECTOR

RULING

INTRODUCTION

1. On 14th October 2016, the Objector herein filed a Chamber Summons application dated 14th September 2016 pursuant to the provisions of Section 74 of the Law of Succession Act Cap 44 of (sic) the Probate and Administration Rules. He sought the following orders:-

- 1. THAT the proceedings to obtain the grant be declared defective in substance.**
- 2. THAT this Honourable Court be pleased to appoint BRADLEY SENGE MNJALA the Objector herein in the petition as a co-applicant/administrator of the deceased (sic) estate herein.**
- 3. THAT the Objector has never signed any documents nor consented to the said Respondents filing the said petition by the respondents herein though it appears from the court record that he appended his signature which was a forgery (sic).**
- 4. THAT the 2nd Respondent despite filing her objection against the 1st Respondent, which was allowed by the Court failed to inform the Objector herein of the existence of a succession cause in this court.**
- 5. THAT the Objector became aware of the said succession cause when he heard from another person who wanted to purchase one of the deceased (sic) estate that there existed a succession cause in Voi Law Courts vide succession cause NO (sic) 31 of 2005.**
- 6. THAT the Respondents herein had already disposed one of the property (sic) located in Voi Town to a Real Estate Developer and shared the proceeds amongst themselves and other beneficiaries and excluded the Objector herein.**
- 7. THAT the said Respondents are now on the verge of selling all the remaining properties of the estate and the Objector will be denied his right by the Respondents if (sic) orders herein are not granted.**
- 8. THAT the Hon Court on 13th August 2014 granted the Respondents herein letters of administration intestate and the said administrators have failed to render a just and true account of the deceased estate hence this application.**

2. He reiterated the same facts in his Supporting Affidavit that he swore on 14th September 2016. The 2nd Petitioner did not file any pleadings and fully associated herself with the 1st Petitioner's Replying Affidavit that was undated and filed on 12th June 2016. Despite having been given an opportunity to do so, none of the parties filed any Written Submissions in support of their respective cases.

3. When the matter came up for mention on 13th November 2017 to confirm the filing of the Written Submissions by 1st Petitioner herein, her counsel sought to Cross-examine the Objector on his Supporting Affidavit. This court rejected the said request as it came after seven (7) court attendances and on the date it had intended to reserve the Ruling of the aforesaid application as it observed that the same would only

delay the resolution of the matter herein.

LEGAL ANALYSIS

4. As a preliminary issue, this court found it prudent to address its mind to the 1st Petitioner's Replying Affidavit that was undated. Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya) provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

5. In the case of **Talewa Road Contractors Limited v Kenya National Highways Authority [2014] eKLR** where an Affidavit had not been dated, this very court had the following to say:-

“24. It must be understood, that whereas Article 159 (2) (d) of the Constitution of Kenya, 2010 comes to the aid of litigants to cure procedural technicalities, it cannot cure substantive issues. This was a conclusion that was arrived in the case of Raila Odinga vs IEBC & Others (2013) eKLR where the Supreme Court held that Article 159 (2) (d) of the Constitution of Kenya, 2010 simply meant that a court shall not pay undue regard to procedural technicalities at the expense of substantive justice but that the same was not intended to oust the obligations by litigants to comply with procedural imperatives.

25. For the reason that the said Supporting Affidavit did not comply with the statutory and mandatory provisions of the law, the court hereby expunges and strikes out the said Supporting Affidavit of John Kihonge Wainaina. The Plaintiff's Notice of Motion application stands automatically dismissed as it has no limb to stand on. The effect of this striking out of the said Supporting Affidavit is that all the exhibits attached to the said Notice of Motion application are also hereby struck out.”

6. While also dealing with a similar issue in the case of **Stephen Wanyee Roki v K-Rep Bank Limited & 2 others [2013] eKLR**, this very court also rendered itself as follows:-

19. The court takes the view that a Supporting Affidavit presented to the court which is not dated is not a mere technicality. It goes to the root of the Plaintiff's application as Section 5 of the Oaths & Statutory Declarations Act is couched on mandatory terms. It is a question of substance and not form.

20. In arriving at the said holding, the court has had due regard to the case of Rajput vs Barclays Bank of Kenya Limited & 3 others [2004] 2 KLR where Emukule J dealt with a similar issue and held as follows:-

“... failure to comply with the provisions of law, the Oaths and Statutory Declarations Act and the Rules thereunder is a matter of substance and not form. It is not a matter that is curable about which the court should take a lenient view...”

21. On that basis alone, the court finds that the Plaintiff's application would fail in its entirety. However, as Article 159 (2) (d) of the Constitution of Kenya, 2010 mandates the court to be guided by the principle that “.....justice shall be administered without undue regard to procedural technicalities”, the court will proceed to determine whether or not the court can grant the Plaintiff the orders that he had sought in his application by considering the facts in the Plaintiff's Supporting Affidavit.

7. This court's conclusion regarding failure by the 1st Petitioner to date her Replying Affidavit was not any different. The failure and/or omission to date the same was not a technicality that could be cured under the provisions of Article 159 (2)(d) of the Constitution of Kenya, 2010 that mandates courts to administer justice without undue regard to procedural technicalities. It was a substantive issue that went to the root of the case due to the mandatory couching of Section 5 of the Oaths and Declarations Act.

8. As this court did not deem such omission as a technicality of form but rather of substance, it found and held that it could not consider the contents of the said Replying Affidavit rendering the Objector's application technically unopposed.

9. The above notwithstanding, that did not imply that the Objector's application could be allowed as a matter of course and/or without first being interrogated. Far from it. It was the responsibility of this court to consider its merits or otherwise with a view to coming to a just determination of the same.

10. It was apparent from his application that he had only sought one (1) prayers which was that this court ought to appoint him as Co-administrator of the deceased's estates. The rest of the prayers appeared to have been grounds in support of his said prayer.

11. He contended that he was the deceased's son in support of his argument that he was entitled to be a Co-administrator of the deceased's estate. He relied on the provisions of Section 74 of the Law of Succession Act Cap 160 (Laws of Kenya) that provides as follows:-

“Errors in names and descriptions, or in setting forth the time and place of the deceased's death, or the purpose in a limited grant, may be rectified by the court, and the grant of representation, whether before or after confirmation, may be altered and amended accordingly.”

12. Clearly, that was the wrong provision of the law. However, as he was a layman in terms of legal matters, the court excused the omission

in citing the correct provision of the law. Indeed, Article 159 (2)(d) of the Constitution of Kenya, 2010 mandates courts to administer justice without undue regard to procedural technicalities.

13. The correct provision of the law under which he ought to have premised his application seeking to have the proceedings for obtaining the Grant of Letters of Administration Intestate herein deemed defective was of Section 76 of the Law of Succession Act. The said Section provides as follows:-

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—

(a) that the proceedings to obtain the grant were defective in substance...”

14. This court noted that he had contended that his signature had been forged in obtaining the Grant of Letters of Administration Intestate. A perusal of the court file showed that there was a signature against his name in Form 38 that was filed on 16th May 2016. Form 37 that was filed on 27th March 2017 did not, however, bear his signature. He did not submit a specimen signature or a Report from a Handwriting expert to demonstrate that his signature had been forged as he had contended.

15. In the premises foregoing, in the absence of a specimen signature or a Report from a Handwriting expert showing that his signature in Form 38 that was filed on 16th May 2016 had been forged, this court was unable to confirm the veracity of his assertions.

16. Turning to the question of whether or not he was entitled to execute the necessary consents, this court noted that he did not adduce any evidence to demonstrate that he was a child to the deceased within the meaning of Section 3(2) of the Law of Succession Act. The same defines a “child” as follows:-

“References in this Act to "child" or "children" shall include a child conceived but not yet born (as long as that child is subsequently born alive) and, in relation to a female person, any child born to her out of wedlock, and, in relation to a male person, any child whom he has expressly recognized or in fact accepted as a child of his own or for whom he has voluntarily assumed permanent responsibility.”

17. It is important to point out that he ought to have adduced documentary evidence to demonstrate that he was a child of the deceased. A Birth Certificate or any other document to show his relationship to the deceased would have sufficed to prove that he was his biological son. This was crucial because as a biological son, he would have been equal or be in priority to the 1st and 2nd Petitioners in applying for a Grant of Letters of Administration or be enjoined as a Co-Administrator to the deceased's estate.

18. Be that as it may, a perusal of the letter dated 22nd February 2007 by David W. Sowa, Chief of Wundanyi showed that he was a son to the 1st Petitioner herein who was a second wife to the deceased. He was therefore a step-child to the deceased herein.

19. Clearly, as the deceased was not his biological father, the Objector did not have an equal right or have priority over the 1st and 2nd Petitioners who were the deceased's second wife and biological daughter respectively in being Administrators to the deceased's estate as he was not as close to the degree of consanguinity to the deceased as they were.

20. Indeed, Rule 26 of the Probate and Administration Rules provides as follows:-

“(1) Letters of administration shall not be granted to any applicant without notice to every other person entitled in the same degree as or in priority to the applicant.

(2) An application for a grant where the applicant is entitled in a degree equal to or lower than that of any other person shall, in default of renunciation, or written consent in Form 38 or 39, by all persons so entitled in equality or priority, be supported by an affidavit of the applicant and such other evidence as the court may require.”

21. It was therefore the considered view of this court that as the Objector was not a biological child of the deceased, he did not fall under the category envisaged for giving their consent before personal administrators applied for a grant of letters of administration intestate. Consequently, he was not entitled to notice of the petition for the grant of letters of administration. He could therefore not be heard to claim that the grant was filed without his notice or knowledge or secretly.

22. Indeed, the wisdom in having persons in the same degree or priority as petitioners being the preferred petitioner to apply for a grant of letters of administration intestate was properly thought out because if it was not so, step and fathers, step and mothers, step and half children could easily disinherit wives, husbands and biological children of a deceased person.

23. The danger of making it a condition for step children to execute the consents required in applying for a grant of letters of administration intestate could have the potential of frustrating the biological children of a deceased as it is common knowledge that most biological and step-children never see eye to eye.

24. Consequently, this court took the considered view that a child for whom a deceased had assumed parental responsibility as contemplated in Section 3(2) of the Law of Succession could only lay claim to a deceased's estate as a dependant under Section 29 of the Law of Succession but not as an heir to such deceased's estate.

25. The said Section 29 (b) of the Law of Succession Act provides as follows:-

“For the purposes of this Part, "dependant" means—

such of the deceased’s parents, step-parents, grand-parents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death...”

26. It therefore followed that as the Objector did not provide proof that he was an heir to the deceased’s estate or a child within the definition of a “child” under Section 3 of the Law of Succession Act, he could only claim as a dependant to his estate as envisaged in Section 29 of the Law of Succession. This court came to the said conclusion because he had been recognised as a beneficiary to the deceased’s estate in the Chief’s aforesaid letter.

27. In dealing with a similar case, in the case of Naomi Watiri Githuku v Naphtali Kamau Githuku & another [2006] eKLR, Koome J (as she then was) stated as follows as regards Part V of the Law of Succession Act:-

“In this provision there is no inclusion of stepchildren to as heirs of a deceased. Parliament in its own wisdom left out stepchildren of a deceased as heirs. I believe that was a deliberate move because if the deceased is survived by stepchildren, they fall within the category of dependants under Section 29 of the Act.”

28. It is, however, important to point out that a step-child’s claim to a deceased’s estate is not automatic. The Objector herein was required to prove and/or demonstrate that he was being maintained by the deceased immediately prior to his death and that he was entitled to the deceased’s estate in his individual capacity and not through the 1st Petitioner, who was his biological mother. This could be done at the time of confirming the Grant of Letters of Administration Intestate in the event the same was contested by the other beneficiaries of the deceased’s estate.

29. Accordingly, having considered the Affidavit evidence by the Objector herein, this court came to the firm conclusion that the Objector did not demonstrate that the proceedings in which the 1st and 2nd Petitioners obtained a Grant of Letters of Administration Intestate were defective or that he was entitled in equal priority to apply for the said grant of letters of administration intestate to the deceased’s estate by virtue of him having been his step son. He who asserts a fact must prove the same. This court therefore had no option but to conclude that he failed to convince this court and/or demonstrate what had made the proceedings herein defective.

DISPOSITION

30. The upshot of this court’s decision was that the Objector’s Chamber Summons application that was dated 14th September 2016 and filed on 14th October 2016 was not merited and the same is dismissed. This being a family matter, each party bear shall bear its own costs.

31. It is so ordered.

DATED and DELIVERED at VOI this 27th day of February 2018

J. KAMAU

JUDGE