



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT VOI**

**SUCCESSION CAUSE APPLICATION NO 2 OF 2017**

**IN THE MATTER OF THE ESTATE OF LEVY NYANGE WARUGHA (DECEASED)**

**RULING**

**INTRODUCTION**

1. On 18<sup>th</sup> October 2017, Everlyne Shelyne Anyango Oketch Nyange (hereinafter referred to as “the Applicant”) filed a Summons dated 17<sup>th</sup> October 2018. The same was filed pursuant to the provisions of Section 76 of the Law of Succession Act, Cap 160 (Laws of Kenya) and Rules 44 (1) and 73 of the Probate and Administration Rules). It sought the prayer that the Grant of Letters of Administration intestate that was granted to Zipporah Mutunge Nyange and Francis Mbughu Mwikamba (hereinafter referred to as “the Respondents) on 21<sup>st</sup> September 2017 be revoked on the ground that the said grant was obtained fraudulently and/or untruthfully by concealment from the Honourable Senior Principal Magistrate’s Court of material facts in respect to all of deceased dependants.

2. On 15<sup>th</sup> November 2017, the Respondents filed a Notice of Preliminary Objection of even date. It raised the following points law:-

1. **THAT the application Succession Cause No 2 of 2017 herein was neither an appeal nor a review application against the Succession Cause No 21 of 2017 before Principal Magistrate Court Voi and as such it could not purport to challenge and seek to address the grievances by the applicant.**
2. **THAT the application herein being not an appeal and/or review, and coming as an independent and separate suit, it therefore offended the doctrine of Res judicate and/or the provisions of Section 6 and 7 of the Civil Procedure Act Cap 21 Laws of Kenya.**
3. **THAT the proper procedure to address the grievances by the applicant herein was not by filing a fresh application but to file objection proceedings against Succession Cause No 21 of 2017 before the Lower Court.**
4. **THAT the Honorable court was moved to act in vain as the orders of an independent suit as was the case herein could not in law and procedure, revoke the grants in another separate suit.**
5. **THAT the applicant herein being not a party to the proceedings in Succession Cause No 21 of 2017 before Senior Principal Magistrate Voi, could not in law and procedure file an appeal against the case and/or purport to answer and/or object to the proceedings by way of this application.**

3. In response to the Respondents’ Notice of Preliminary Objection, on 16<sup>th</sup> November 2017, the Applicant filed Grounds of Opposition of the same date. The said Grounds were as follows:-

1. **THAT as matter of law the Civil Procedure Rules as formulated, presented and/or ably captured in the Civil Procedure Rules 2010 did not in any way whatsoever apply to succession matters and/or succession proceedings before any Court of Law and so was the Civil Procedure Act, Chapter 160 of the Laws of Kenya and Probate and Administration Rules applied instead.**
2. **THAT in light of paragraph 1 herein and further was that the Notice of Preliminary Objection dated 15<sup>th</sup> November 2017 as brought or filed before the Honourable court was speculative, misconceived, misplaced or misinformed and unfounded in law as it purported or implied that the aspects of Civil Procedure Rules should be applicable to the subject succession proceedings or succession cause in blatant and total disregard of the clear provisions of Section 76 of the Law of Succession Act, Cap 160 of the Laws of Kenya and Rule 44 of the Probate and Administration Rules.**
3. **THAT in light of paragraphs 2 and 3 herein was that the Notice of Preliminary Objection dated 15<sup>th</sup> November 2017 as brought or filed before Honourble court was therefore baseless, ill-advised, lacking in substance and law, tantamount to an abuse of the court process and one which ought to be dismissed in its entirety with costs to the Applicant herein.**

4. This court directed that the Respondents' Preliminary Objection be heard first. Their Written Submissions were dated 13<sup>th</sup> December 2017 and filed on 14<sup>th</sup> December 2017 while those of the Applicant were dated 20<sup>th</sup> December 2017 and filed on 22<sup>nd</sup> December 2017.

### **LEGAL ANALYSIS**

5. The Respondents argued that the Applicant could not file separate proceedings to revoke the orders that were granted by the lower court in **Succession Cause No 21 of 2017** because the filing of the application herein only served as a multiplication of suits contrary to the law. They submitted that the Applicant ought to be directed to deal in the file that was pending in the lower court.

6. On her part, the Applicant submitted that she filed the present application in line with the provisions of Section 76 of the Law of Succession and that under Rules 44(1) and 73 of the Probate and Administration Rules, such summons for revocation could only be filed at the High Court.

7. She added that the Respondents could not purport to aver that Sections 6 and 7 of the Civil Procedure Act Cap 21 (Laws of Kenya) were applicable herein because the relevant rules and section seeking revocation of a grant were Rule 44 of the Probate and Administration Rules and Section 76 of the law of Succession. She relied on the case of **Wangari Gichuki vs Daniel Wanjigo Muchemi [2014] e KLR** where the court held that:

**“...the provisions of the Civil Procedure do not apply in Succession matters save as expressly provided under the law of Succession and the Probate and Administration Rules...”**

8. A perusal of the Summons that was filed by the Applicant shows that the same was brought pursuant to the provisions of Section 76 of the Succession Act and Rule 44(1) and 73 of the Probate and Administration Rules for the revocation of the Grant of the Letters of Administration Intestate that were issued to the Respondents on 21<sup>st</sup> September 2017 on the ground that the same were obtained fraudulently and/or untruthfully by concealment of material facts.

9. The Applicant's application was therefore properly filed in the High Court by virtue of Rule 44 (1) of the Probate and Administration Rules which provides as follows:-

**“Where any person interested in the estate of the deceased seeks pursuant to the provisions of Section 76 of the Act to have a grant revoked or annulled he shall, save where the court otherwise directs, apply to the High Court for such relief by summons in Form 107 and, where the grant was issued through the High Court, such application shall be made through the registry to which and in the cause in which the grant was issued or, where the grant was issued by a resident magistrate, through the High Court registry situated nearest to that Resident Magistrate's registry.”**

10. In that respect this court fully associated itself with the holding in the case of **Wangari Gichuki vs Daniel Wanjigo Muchemi** (Supra) and agreed with the Applicant herein that on that ground alone, the Respondents' Preliminary Objection dated and filed on 15<sup>th</sup> December 2017 was misplaced.

### **DISPOSITION**

11. For the foregoing reasons, the upshot of this court's Ruling was that the Respondents' Preliminary Objection that was dated and filed on 15<sup>th</sup> November 2017 was not merited and the same is hereby dismissed with costs to the Applicant.

12. It is so ordered.

**DATED at NAIROBI this 12<sup>th</sup> day of June 2018**

**J. KAMAU**

**JUDGE**

**READ, DELIVERED and SIGNED at VOI this 20<sup>th</sup> day of June 2018**

**F. AMIN**

**JUDGE**