



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSE NO. 399 OF 2011

In the matter of the Estate of NJAGI MAGUTASAMUEL MUNDU WAIGANE (Deceased)

EUNICE IGANDU S. NJAGI.....ADMINISTRATOR/APPLICANT

V E R S U S

MARGARET KARIMI SAMWEL.....RESPONDENT

R U L I N G

1. This is a ruling on a preliminary objection raised by the respondent in his notice of objection dated 5th February, 2015. The issues raised therein are against the hearing of the summons for revocation filed by the applicant dated 28/02/2013 are as follows:-

(a) That the summons as filed herein is time barred and does not lie in law by virtue of Section 30 of the Law of Succession Act, Cap. 160.

(b) That the summons as filed herein is time barred and does not lie in law by virtue of section 68(1) of the Law of Succession Act Cap. 160 and Rule 40(6) of the Probate and Administration Rules.

2. The first ground is based on Section 30 of the Law of Succession Act which provides:-

No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71.

3. The respondent argues that the filing of objections in this cause closed on 19/12/2011 and that the applicant did not file any such objection within the time allowed by the law. She opted to file her summons about 14 months after gazettement of the cause.

4. It is further submitted that the applicant is not a dependant of the deceased's estate as defined under Section 29 of the Act. Her summons are based on the fact that she is a dependant and her claim cannot stand.

5. On perusal of the summons, I note that the applicant claims to be the widow of the deceased which issue can only be determined by way of evidence.

6. It is trite law that a preliminary objection should be based purely on points of law and not evidence. Both parties herein have included evidence in their submissions in arguing the objection which is a misdirection.

7. The respondent cited the case of **LENA MULIRO VS SIAN MULIRO [2015] eKLR** in support of his argument. This case is distinguishable from the facts of this case in that the latter was hearing an application for rectification of grant and not one for revocation of the grant.

8. The applicant in that case was a daughter in law of the deceased while in this case the applicant's claim is based on grounds that she was married to the deceased.

9. The second point in the objection is based on Section 68(1) of the Act which provides:-

(1) Notice of any objection to an application for a grant representation shall be lodged with the court, in such form as may be prescribed, within the period specified by such notice as aforesaid, or such longer period as the court may allow.

10. The section limits the period within which an objection against grant of representation which is 30 days after gazettement. Rule 17(1)

relates to the same period and provides for a window of extension of time which must be sought for within the said 30 days.

11. The respondent argues that no extension of time has been sought by the applicant in this case thus rendering her summons incompetent.

12. The respondent prays for dismissal of the summons which has been invalidated by the limitation of time and failure to follow procedure stipulated in Section 30 and 68(1) of the Act.

13. The applicant has filed a summons for revocation of grant under Section 76 of the Act. The provisions of Section 76 as were discussed in the matter of the estate of **JOSEPH MULIRO (sic)** where it was observed that the provision does not give limitation of time for filing a summons for revocation of grant. The application can be made by any interested party before or even after the grant has been confirmed. This is the kind of application the applicant has brought before the court. It is not subject to the provisions of Sections 30 and 68(1) of the Act which limits time of filing an objection against grant of representation.

14. The case of the **SPEAKER OF THE NATIONAL ASSEMBLY VS NJENGA KARUME [1992] eKLR** deals with a specific procedure provided by the law which the applicant overlooked and instead filed a judicial review application. This case has different facts from the latter. The applicant has followed the correct procedure and is seeking a remedy under Section 76 of the Act. This case of **SPEAKER OF NATIONAL ASSEMBLY** was decided in 1992 long before the country got its current Constitution which has expanded litigation and departed from the strict interpretation of the law which often resulted in dismissing cases on technicalities.

15. Article 159(2)(d) of the Constitution calls upon courts to hear matters in disregard of technicalities. In other words the court should deliver substantive justice to the parties and as much as possible avoid technicalities. In this case too, the parties ought to be given a chance to be heard to articulate their issues before the court.

16. It is my finding that the preliminary objection has no merit and it is hereby dismissed with costs to the applicant.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JULY, 2017.

F. MUCHEMI

J U D G E

In the presence of:-

Mr. Macharia for R. Njeru for applicants