



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**SUCCESSION CAUSE NO. 194 OF 2008**

**IN THE MATTER OF THE ESTATE OF RUTH MWONGELI MUTUA (DECEASED)**

**NZIOKA MUTUA.....1<sup>ST</sup> PETITIONER**

**MULI MUTUA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**SUSAN MUTUKU.....APPLICANT**

**AND**

**RUTH NGINA NZIOKA .....OBJECTOR**

**MARGARET SYOMBUA MULI.....OBJECTOR**

**RULING**

**Introduction**

The Petitioners herein and Applicant were issued with a grant of letters of administration intestate with respect to the estate of Ruth Mwangeli Mutua (hereinafter referred to as “the deceased”) on 23<sup>rd</sup> June 2008, which was later confirmed on 27<sup>th</sup> August 2008.

However, it became apparent that the Petitioners had not consented to the grant, and on 15<sup>th</sup> June 2012 the Petitioners and Applicant by consent agreed to the cancellation of the said grant and confirmation of grant. On 18<sup>th</sup> July 2012, the beneficiaries consented to the Applicant and John Muli Mutua being appointed the joint administrators of the estate of the deceased, and a fresh grant of letters of administration intestate was duly issued to the said administrators on the same date.

On 2<sup>nd</sup> September 2013, the Applicant filed summons dated 16<sup>th</sup> August 2013 seeking confirmation of the grant issue to her and John Muli Mutua on 18<sup>th</sup> July 2012. The Objectors, who are the wives of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, subsequently filed a Notice of Objection dated 4<sup>th</sup> March 2014 objecting to the grant of probate to the Petitioners and Applicant, claiming not to have been informed of the succession cause, and that the Petitioners have no family consent or abilities to administer the deceased’s estate among other grounds.

## **The Preliminary Objection**

The Applicant then filed a Notice of Preliminary Objection dated 12<sup>th</sup> May 2014 seeking to have the said Notice of Objection to be struck off with costs on grounds that:-

1. The objectors herein have no *locus standi* and their Notice of Objection to the confirmation of the grant is brought in contravention of the provisions of the Law of Succession Act and the Probate and Administration Rules.
2. The objectors are wives to the petitioners herein and are not direct beneficiaries to the state of the deceased .
3. The application is incompetent, bad in law, devoid of any form of merit, and is an abuse of this Court's process.

The preliminary objection was canvassed by way of written submissions. The Applicant's Advocates, Nzei & Company Advocates, filed submissions dated 25<sup>th</sup> January 2016 wherein it was argued that the objection by the Objectors was brought under Section 68 of the Law of Succession Act, which provides that notice of any objection may be made to an application for a grant of representation, and the court shall give notice to the objector to file an answer to the application and cross-application within a specified period.

However, that since a grant of representation was been made by this Court on 18/7/2012, the Objectors' purported Notice of Objection is an abuse of this Court's process. Further, that the Objectors, who have stated that they are wives of the 1st and 2nd Petitioners who are the deceased's sons, do not rank in priority over the 1st and 2nd Petitioners on matters of administration pursuant to Part V of the Law of Succession Act.

Wilfred K. Babu & Company Advocates for the Objectors filed submissions on 12th February 2016, and it was urged therein that the objectors have filed the objection because the Petitioners contrary to the provisions of section 45 of the Law of Succession Act secretly sold and disposed the estate of the deceased. Further, that there is a dispute between the family members which hasn't been solved and if the confirmation is granted , the objectors will suffer irreparably.

According to the Objectors, the preliminary objection therefore as raised doesn't address the family issues and the distribution of the property, neither does it address the issue of the Petitioners skills to manage the estate and account for it on behalf of the beneficiaries of the estate. That the issue of priority therefore doesn't arise, and that the Court should allow the objectors application to proceed so as to safeguard the interest of the beneficiaries.

## **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made herein. The issues to be decided in this preliminary objection are firstly, whether the Petitioners' preliminary objection raises pure points of law, and if so, whether the said preliminary objection has merit and should be upheld. The circumstance in which a preliminary objection may be raised was explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

***“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”***

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the present objection, it is not disputed that the Objectors are the wives of the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners, and that they have filed a Notice of Objection to the application for grant of administration. The provisions on the making of an objection are in sections 67 to 69 of the Law of Succession Act as follows:

**“67. Notice of application for grant**

**(1) No grant of representation, other than a limited grant for collection and preservation of assets, shall be made until there has been published notice of the application for such grant, inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication, and the period so specified has expired.**

**(2) A notice under subsection (1) shall be exhibited conspicuously in the courthouse, and also published in such other manner as the court directs.**

**68. Objections to application**

**(1) Notice of any objection to an application for a grant of 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.**

**(2) Where notice of objection has been lodged under subsection (1), the court shall give notice to the objector to file an answer to the application and a cross application within a specified period.**

**69. Procedure after notice and objections**

**(1) Where a notice of objection has been lodged under subsection (1) of section 68, or no answer or no cross-application has been filed as required under subsection (2) of that section, a grant may be made in accordance with the original application.**

**(2) Where an answer and a cross-application have been filed under subsection (2) of section 68, the court shall proceed to determine the dispute.”**

Rule 17(1) of the Probate and Administration Rules also provides as follows in this regard:

***“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”.***

In addition, Rule 17 sub rules 11 provides that so long as an objection which has been lodged has not been withdrawn, no grant shall be made by any registry to the estate of the deceased, prior to the expiration of the period for the filing by the objector of an answer and cross-application specified by the court under section 68 of the Act. Further, that no registrar shall make a grant if he has knowledge of the existence of an effective objection lodged in any registry in respect of the estate of the deceased.

It is evident from the above provisions that an objection can only be competently made before the issue of a grant and within the time limits set out in the published notice of an application. In the present case, the Objectors filed their Notice of Objection on 10<sup>th</sup> March 2014, almost two years after the grant had been issued to the Applicant on 18<sup>th</sup> July 2012. Objections proceedings are meant to deal with preliminary issues at the stage of an application of grant such as the validity of a will, and right to administration or entitlement to a grant. If an Objection is brought after the making of a grant, such objection proceedings

will be incompetent as held in **Re Estate of Mangece (2002) 2 KLR 399**.

This court notes and appreciates the arguments by the Objectors about the preservation and distribution of the estate of the deceased, however objection proceedings are not the proper procedure to be followed to secure their interests, and they should follow the proper procedures provided by law to deal with the issues they have raised. It is thus the finding of this Court that the Petitioners' preliminary objection does raise points of law for the foregoing reasons, and that the Objectors' Notice of Objection dated 4<sup>th</sup> March 2014 is in the circumstances not competently before the Court and is hereby struck out.

As this is a family dispute, each party shall bear their respective costs of the Notice of Objection and Preliminary Objection.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 14<sup>th</sup> day of December 2016.

**P. NYAMWEYA**

**JUDGE**