

IN THE HIGH COURT OF KENYA

AT MOMBASA

SUCCESSION CAUSE NO. 28 OF 2013

IN THE MATTER OF THE ESTATE OF GUNHILD GERLINDE OSER (DECEASED)

RULING

Before court is a Preliminary Objection dated 7th May, 2014 and filed in court on the same date. In it the petitioners **JEANINE NATALIE BOHLIGNE OSTER** and **RONNY PATRIL HERBERT OSER** seek the striking out of the summons for revocation of grant filed by the applicant **MAHILA JOSPHAT SAID** on the following grounds

“1. **THAT** in the summons for revocation of annulment of grant under Rule 44 (1) of the Probate and Succession Rules, the applicant **MAHILA JOSPHAT SAID** (“the Applicant”) seeks orders from the Honourable court that he be granted probate as per the will of the deceased.....”

Yet the applicant has not deposited the purported original will with the Honourable court pursuant to section 51 (3) of the Law of Succession Act (Cap 160 Laws of Kenya) and also in contempt of a previous direction to do so issued by the Honourable court on 31st October, 2013 and he is in disobedience of court orders, he has no right of audience until he purges his contempt.

2. **THAT** in view of the foregoing this summons is vexatious and an abuse of the court process; and

3. **THAT** the summons is therefore fatally flawed and should be dismissed/struck out with costs.”

The estate in issue in this Succession Cause is that of **GUNHILD GERLINDE OSER** (the deceased) who was a 57 year old German woman who passed away on 20th January, 2013 at the Pandya Hospital. At the time of her death she was domiciled in Kenya and lived at Bamburi within Mombasa County. The deceased was survived by her two children a daughter ‘*Jeanine Natalie Bohlignee Oser*’ and a son ‘*Ronny Patric Herbert Oser*’. She had divorced her husband ‘*Herbert Wilfred Gunter Oser*’ on 24th March, 1998. Assets left by the deceased included 200 shares in a company Hanos Kenya Limited (her two children held 50 shares each in the same company) which company owned a business Papillon Garden Bar Villa. On 6th February, 2013 the two children of the deceased filed a petition for letters of administration to her estate. There being no objection a Grant of Letters of Administration was made to the two on 13th August, 2013.

On 8th October, 2013 the applicant ‘*Mahila Josphat Said*’ filed a summons to revoke/annul the Grant issued to the deceased’s two children. He claimed in his supporting affidavit dated 25th September, 2013 that he had lived as man and wife with the deceased in Bamburi. He further claimed that the deceased had not in fact died intestate as alleged since after her death a written will had been recovered in a safe on the business premises. It is this summons for revocation that the petitioners now seek to have struck out by way of this preliminary objection. The preliminary objection was heard by way of written submissions. **MR. KENZI** Advocate appeared for the applicant whilst **MR. ASIGE** acted for the two petitioners.

I have perused and have given due consideration to the submissions filed by counsel. I have perused the summons for revocation of Grant filed on 8th October, 2013. I note that although the original copy of the alleged will has not been annexed, indeed a photocopy of the same has been so annexed. It is claimed that on 31st October, 2013 this court directed that the applicant deposit the original will in the registry. This is not correct. The proceedings of 31st October, 2013 in this file are clear. The directions given by the court were as follows

“Court

The directions of court is that this matter be heard by way of *vive voce* evidence. Hearing dates to be taken in the registry.”

No mention was made at all of a will. In any event I am in agreement with Mr. Kenzi that it is an unfortunate fact of some notoriety that in some cases original documents do tend to disappear from the court registries. As such a copy will suffice subject to the original document being availed in court on hearing date. I find there is no contempt and/or breach of court orders by this applicant. Failure to deposit the original will in the registry is not fatal to the summons for revocation. I therefore dismiss this preliminary objection with costs to the applicant Mahila Josphat Said.

Dated and delivered in Mombasa this 24th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Asige for Objector

Court Clerk Mutisya