



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**Succession Cause 300 of 2002**

**IN THE MATTER OF THE ESTATE OF MUSOMBA KIOKO – (DECEASED)**

**1. BEATRICE KATHINI KIILU ..... PETITIONER**

**VERSUS**

**1. BEATRICE NZEVE MUSOMBA**

**2. JONATHAN KIETI MUSOMBA**

**3. KILONZO MUSOMBA**

**4. SAMUEL MUTINDA MUSOMBA**

**5. RUTH MUSOMBA**

**6. KIOKO MUSOMBA ..... RESPONDENTS**

**AND**

**FRANCIS MUTULA MUTISO ..... INTERESTED PARTY**

**RULING OF THE COURT**

1. From the record, BEATRICE KATHINI KIILU petitioned for grant of Letters of Administration Intestate to the estate of MUSOMBA KIOKO vide the Petition duly filed in court on 28/11/2002. The Petitioner filed the application in her capacity as daughter in-law of the deceased. The two other beneficiaries, ROSEMARY KAVINYA KIILU and WILSON MUTHUI KIILU, both grand children of the deceased gave their consent for the Petitioner to take out the Letters of Administration. The grant was issued on 8/07/2003 and subsequently confirmed on 30/01/2004. On confirmation, the whole of the deceased's estate comprised in plot numbers MACHAKOS/MATUU/4110, 4111, 4112, 4116, 4134, 4109, 4108, 4105, 4106, 4092, 4091, 4090, 4079, 4080, 4081, 4088, 4089, 4050 AND 4061 was to be inherited by one FRANCIS MUTULA MUTISO.

2. By an application dated 28/02/2006, being summons brought under Rule 73 of the Probate and Administration (P & A) rules, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Objectors namely JONATHAN KIETI MUSOMBA, KILONZO MUSOMBA and MUTINDA MUSOMBA, prayed for an order preserving the deceased's estate pending the hearing of the application for revocation and/or annulment of the Grant of Letters of Administration. According to the applicants, the order sought is meant to:-

- i. preserve the estate of the deceased and to maintain the status quo as is at the time of making this order;
- ii. stop the Interested Party from disposing of, transferring to Third Parties or in any other way dealing with the properties listed in the Grant of Letters of Administration confirmed on 10/01/2004 (sic) until further orders of this Honourable Court;
- iii. stop the Petitioner and the Interested Party from abusing this Honourable Court;
- iv. pending the hearing of this application, an order do issue prohibiting the Lands Registrar, Machakos District, from registering any dealings with the subject properties;
- v. the costs of this application be provided for.

3. The application, filed by the firm of L.M. WAMBUA & CO. ADVOCATES was brought under Certificate of Urgency, the reason for the urgency being that all the properties in issue had been transferred to the Interested Party who was now likely to transfer the same to other Third Parties and thereby complicate the issue further.

4. On the same 28/02/2006, the applicants appointed the firm of L.M. WAMBUA & CO ADVOCATES to be their advocates and to represent them in the matter. The firm of LM. WAMBUA & CO. ADVOCATES accepted the appointment. Both the notice of Appointment and the Acceptance of Appointment were filed on 28/02/2006. On 1/03/2006, the court issued interim orders of injunction and prohibition pending inter partes hearing of the application on 8/05/2006.

5. On the 28/07/2006, the Petitioner through the firm of NZEI & COMPANY ADVOCATES, filed a Notice of Preliminary Objection dated 27/07/2006 attacking the applicants' application on grounds that:-

a. the application dated 28/02/2006 and brought under Rule 73 of the Probate and Administration Rules is incompetent, bad in law and an abuse of this Honourable Court's process in that:

- i. the said application fatally offends the provisions of Rule 59 (5) of the Probate and Administration Rules and must be struck off.

- ii. the said affidavit is NOT supported by a valid affidavit and cannot stand.

b. The two applications dated 28/2/2006 and brought under Rule 73 of the Probate and Administration Rules, and under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules respectively, are neither drawn and filed by the applicants themselves nor by an Advocate duly appointed by the applicants as by law provided. The applicants are incompetent, null and void ab-initio, and ought to be struck off with costs.

6. The second application to which Mrs Nzei for the Petitioner raised a Preliminary Objection is a Summons for Revocation and Annulment of Grant under Section 76 of the Law of Succession Act and Rule 44 of the Probate and Administration Rules. The application was filed by the 2<sup>nd</sup> Objector, JONATHAN KIETI MUSOMBA, the 3<sup>rd</sup> Objector, KILONZO MUSOMBA and the 4<sup>th</sup> Objector, SAMUEL MUTINDA MUSOMBA who described themselves as "the lawful representatives of the beneficiaries of the estate of MUSOMBA KIOKO who died on 9<sup>th</sup> August 1995", and allege that the grant issued to the Petitioner was obtained fraudulently by the making of false statements and concealment from the court of matters material to the case; that the proceedings to obtain the grant were defective in substance and finally that the grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant. The application was drawn and filed by L.M. WAMBUA & COMPANY ADVOCATES and signed by APPLICANT/ADVOCATE without any name(s).

7. At the hearing of the Preliminary Objection, Mrs Nzei for the Petitioner urged the court to find that the first application seeking preservation of the deceased's estate, and brought under Rule 73 of the

Probate and Administration Rules was fatally defective for not complying with Rule 59 (5) of the Probate and Administration Rules. Rule 59 generally provides for the form of proceedings and subrule 1 thereof provides that save where otherwise provided in the Rules, every application to the court or to a registry shall be brought in the form of a petition, caveat or summons as may be appropriate and subrule (5) provides as follows:-

**“59 (5) A summons shall be in one of Forms 104 to 110 as appropriate and be signed by the applicant or his advocate.”**

8. It was contended on behalf of the Petitioner that since Rule 73 of the Probate and Administration Rules is silent on the format of the application, then the applicants should have brought their application in Form 104 which is the general form for applications of this nature. Mrs Nzei relied on the decision in Probate and Administration Cause No. 38 of 2000 – DANIEL MUTISO KUNGU and BEATRICE M MUTISO.

9. Regarding the appointment of the firm of L.M. WAMBUA & CO. ADVOCATES to act for the applicants, Mrs Nzei submitted that the said appointment was not in tandem with the provisions of Rule 9 (5) of the Probate and Administration Rules since Mr L.M. Wambua Advocate was not personally appointed. The relevant subrule provides as follows:-

**“9(5) If a personal applicant desires, at any time after making his application but prior to the issue of the grant applied for, to cease to be a personal applicant in relation to that application and to continue with such an application through an advocate he may do so by filing in the registry at which the application was made a notice in Form 63 of intention to act through an advocate and containing an express appointment of some person to be his advocate in the matter, together with the name and address of the advocate and his acceptance in writing of such appointment.”**  
*(Emphasis mine).*

10. Two issues arise from the provisions of Rule 9 (5): the appointment must be made prior to the issue of the grant applied for and it must be made to an express person which I interpret to mean a human person and not a corporate person. In the present case, the appointment was made after the grant had not only been issued, but confirmed and the appointment was that of a firm of advocates and not an individual advocate.

11. Further, it was contended on behalf of the Petitioner that the appointment of the advocate was by one applicant only, namely JONATHAN KIETI MUSOMBA and also that apart from this particular applicant, the other applicants did not swear any affidavits in support of the application, since the application is not covered under Rule 7 (8) of the Probate and Administration Rules which provides:-

**“7 (8) Where a grant of administration is sought jointly by more persons than one (but not exceeding four) the provisions of this rule shall apply to all applicants save that the affidavit need be sworn by one only.”**

12. Mrs Nzei also argued on behalf of the Petitioner that the appointment of M/S MAKAU & COMPANY ADVOCATES for the 1<sup>st</sup> Objector, was as defective as that of L.M. WAMBUA & CO. ADVOCATES.

13. Mr Makau for the 1<sup>st</sup> Objector submitted that the purported Preliminary Objection against their appointment to act for the 1<sup>st</sup> Objector was misplaced since the 1<sup>st</sup> Objector had never at any stage acted in person.

14. Mr L.M. Wambua for the 2<sup>nd</sup> – 6<sup>th</sup> applicants/objectors submitted that Rule 9 (5) of the Probate and Administration Rules was inapplicable in this case. He also submitted that both applications were properly before the court and urged the court to use the powers conferred upon it by Rule 73 of the Probate and Administration Rules to ensure that there is no obstruction of justice on grounds of

technicality.

15. The provisions of law upon which counsels on both sides of the divide have relied are clear as to the procedure to be followed and the format to be adopted in matters such as the ones now before me. I have perused the pleadings that are now being disputed and make the following findings:- (a) that the application for Revocation of Grant is not clear as to whether it is the applicant or his advocate who has signed it; (b) that since the appointment was made after the issue of the grant applied for, the applicants did not have to comply with Rule 9 (5) of the Probate and Administration Rules; (c) that the 3<sup>rd</sup> and 4<sup>th</sup> applicants did not file their own separate affidavits in support of the applications and; (d) that Order 3 of the Civil Procedure Rules is not saved into Cap 160 Laws of Kenya; (e) that there is no Preliminary Objection raised against the appointment of M/S Makau & Co. Advocates for the 1<sup>st</sup> Objector.

16. I have also found that Rule 73 of the Probate and Administration Rules gives this court unlimited power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of this court. Applying the said provisions to the facts before me, and noting that the applicants may have a genuine case to put forward regarding the deceased's estate, I find it necessary to ask the applicants of the two applications to regularize the appointment of their advocate and also to file proper applications that are duly signed. In the meantime, the two applications are struck out with leave granted to the applicants to file proper applications in accordance with the Rules and in particular Form 104 of the Probate and Administration Rules.

17. As for the objection against the firm of MAKAU & COMPANY ADVOCATES, the objection is dismissed since it was raised while counsel for the Petitioner was on her feet and also because it was not well founded.

18. The applicants have fourteen (14) days from the date of this ruling to comply. Each party shall bear their own costs.

19. Orders accordingly.

Dated and delivered at Machakos this 16<sup>th</sup> day of April 2008.

**R.N. SITATI**

**JUDGE**