



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Probate & Admin. Cause 539 of 2007

In the Matter of the Estate of ISAKA MUTHEMBWA KITHOME

MAURICE KITUKU MUTHEMBWA.....PETITIONER

versus

DAVID WAMBUA MUTHEMBWA1ST OBJECTOR

SIMON MAKAU MUTHEMBWA.....2ND OBJECTOR

PATRICK NDOLO MUTHEMBWA.....3RD OBJECTOR

RULING ON A PRELIMINARY OBJECTION

1. Mrs Nzei, learned advocate for the Petitioner in this cause has raised an objection to the hearing of the Application dated 14.4.2008. Her point is that the Application offends Rules 44(1) and 59(5) of the Probate and Administration Rules because the same is not framed within the format envisaged by Form 107 of the Law of Succession Act since the same is not issued by the Deputy Registrar of this court and no directions have been given by the same Deputy Registrar. That being the case, she urges me to strike out the Application.

2. Mrs Mutua who appears for the objectors in this cause argues that the objection is misguided because the Application under attack was filed under certificate of urgency and the judge gave directions and there was no need for the Deputy Registrar to give other directions. In any event, that the issue being addressed is one of form and cannot be the basis for sticking out the Application.

3. The Application under attack is dated 14.4.2008 and seeks the following orders:-

“i) *That this Application be certified urgent and heard ex-parte in*

the 1st instance.

ii) *That interim orders of preservation of the deceased’s estate comprised of land parcels Nos. Donyo Sabuk/Koma Rock Block 1/470 and 1/178 that has now illegally and unproceduraly been subdivided and given Nos. 18570, 18571, 18572 and 18573 do issue against the Petitioner, his wife and children, any buyer or their agents or servants from subdividing the lands, selling of and transferring to unsuspecting third parties developing or in anyway dealing with the land in question pending distribution of deceased’s estate to all the beneficiaries in accordance with the law and hearing this application and*

determination inter-parties.

- iii) *That grant of letters of administration issued to Maurice Kituku Muthembwa on 3.4.2008 be revoked.*
- iv) *That letters of administration herein be issued jointly to the petitioner and the objectors and this case be consolidated with HCC Succession Cause No. 253/2007 – Estate of Isaac Muthembwa.*
- v) *That the Petitioner be called upon by this Honourable Court to account for all money he has so far collected from buyers of the deceased's estate without full consent from the other beneficiaries and the said amount be deposited with the court pending distribution of the estate.*
- vi) *That costs of this Application be provided for.*

4. When it first came before me on 15.4.2008 under certificate of urgency, I realized that H.C. Succession 253/2007 relating to the same deceased person's estate was also pending before this court. That whereas in one cause, a Will was annexed, in the other, proceedings were going on as if the deceased died intestate. I ordered suo motu that the grant of letters of administration issued in H.C. Succession 539/2007 be revoked and that the Will in H.C. Succession 253/2007 which was the earlier cause be probed first. By so doing, I had in effect granted prayers 1, 3 and 4 of the Application dated 14.4.2008 and what was left to be heard were prayers 2 and 5 which if read together, relate to the preservation of the estate and accounts of income from the estate.

5. Rule 44 and Rule 59(5) of the Probate and Administration Rules provide as follows:-

Rule 44.

“(1) 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.

(2) There shall be filed with the summons an affidavit of the applicant in Form 14 for revocation or annulment identifying the cause and the grant and containing the following particulars so far as they are known to him-

a. whether the applicant seeks to have the grant revoked or annulled and the grounds and facts upon which he application is based; and

b. the extent to which the estate of the deceased has been or is believed to have been administered or to remain unadministered, together with any other material information, together with any other material information.

(3) The summons and affidavit shall without delay be placed by the registrar before the High Court on notice in Form 70 to the applicant for the giving of directions as to what persons (if any) shall be served by the applicant with a copy of the summons and affidavit and as to the manner of effecting service; and the applicant, upon the giving of directions, shall serve each of the persons so directed to be served with a notice inform 68, and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds thereof.

(4) When the person (if any) so directed to be served (or such of them as the applicant has been able to serve) have been served with a copy of the proceedings, the matter shall be placed before the High Court

on notice by the court to the applicant and to every person so served, and the court may either proceed to determine the application or make such other order as it sees fit.

(5) Where the High Court requires that notice shall be given to any person of its intention of its own motion to revoke or annul a grant on any of the grounds set out in section 76 of the Act the notice shall be in Form 69 and shall be served on such persons as the court may direct.”

Rule 59 (5).

“(1)....

(2)....

(3)....

(4)....

(5) A summons shall be in one of Forms 104 to 110 as

appropriate and be signed by the applicant or his advocate.”

6. It is clear from what I have said above, that the matter of revocation of grant is spent and even if the Application dated 14.4.2008 may not have been formatted within Rule 44, there is nothing to be said now as the issue is water under the bridge.

7. The Application in as far as it relates to the pending issue of preservation of the state is a summons under Rule 59 above and cannot be attacked.

8. In any event, even if the Application is not strictly in the format of Form 107, I would not have struck it out because the Law of Succession Act generally was designed in such a way that “*its primary concern [would be] the distribution of a dead person’s estate in such a way as to achieve fairness among his immediate family, and in particular his dependants*” – see Report of the Commission on the Law of Succession, page 3. If that end is to be met, then technicalities should not hinder the determination of any question that is placed before this court. Forms are a technical matter and my humble view is that failure to follow a format should not stop the court from dealing with any clear issue regarding the estate. The objection raised is one of form and cannot be the basis for striking out an Application now only seeking preservation of the estate. Rule 73 of the Probate and Administration Rules provides as follows:-

“Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

9. With or without form, this court is obligated to decide all questions before it to meet the ends of justice and without undue regard to technicalities.

10. In the end the objection must fail and is overruled. I shall make no order as to costs but will implore parties to move with speed and go to the root issue which is distribution of the estate as soon as I have probed the Will said to have been left by the deceased.

11. Orders accordingly.

Dated and delivered at Machakos this 25th day of June 2008

Isaac Lenaola

Judge

In the presence of: Miss Musila for Petitioner

No appearance for Objector

Isaac Lenaola

Judge