



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

SUCCESSION CAUSE 81 OF 2002

IN THE MATTER OF THE ESTATE OF TERESIA WANJIRU WANG'ERA (DECEASED)

WILFRED NJOGU MBUTHIA.....APPLICANT/OBJECTOR

VERSUS

ELIZABETH WAIRIMU THIMBA

KENNETH MAITEMEI THIMBA.....RESPONDENTS/ADMINISTRATOR

TERESA WANJIRU THIMBA

RULING

The Petitioner filed an application by way of a Notice of Motion brought under Order III Rule 1 and Order L Rule 1 of the Civil Procedure Rules asking the court to strike out the objection proceedings herein.

The main ground in seeking the aforesaid order was that the objection proceedings were filed by the objector's counsel before he was formally appointed. The petitioners stated that the objector's counsel had not, either before or simultaneous with the filing of the objection proceedings filed any process to signify his entry on record on behalf of the objector.

The petitioners contended that the succession cause was of a civil nature and therefore the proceedings herein fell within the province of the Civil Procedure Act and Rules. They therefore submitted that the objection proceedings were incompetent.

The objector's counsel opposed the said application and in his affidavit sworn on 7th February, 2005 deposed that the issue of impropriety of the application for revocation of the grant was *res judicata* having been orally raised by Mr. Musangi advocate and canvassed and adjudicated upon by the Honourable Mr. Justice Muga Apondi on 3/3/2004.

He further stated that the application was misconceived and was based on misinterpretation of Order I of the Civil Procedure Rules and miscomprehension of the Succession Act and the rules made thereunder.

Rule 60 of Probate and Administration Rules states as follows:-

“Every interested person (whether or not he has been served with notice hereof) who wishes to be heard upon or to oppose any application, and has not already appeared in the proceedings,

shall enter an appearance in form 26 in the registry in which the application is made giving his address for service, and may file such affidavits as he considers proper, to each of which the applicant may with leave of the court file an affidavit in reply.”

The aforesaid provision of the law is clear beyond any peradventure. The objector should have entered an appearance as in form 26 before taking any other step in the proceedings.

On 21st November, 2003 the objector through his advocate filed summons for revocation of grant but a notice of appointment of advocates was filed on 20th May, 2004. This was after the issue of omission in filing the same was raised in court by the petitioners' advocate.

When that issue was raised before Hon. Justice Apondi, he ruled that before the objector's counsel filed any application or addressed the court he should have satisfied that basic requirement. The court therefore stood over the matter generally to enable him file the necessary papers. Counsel did not however withdraw the summons for revocation of Grant which had been filed prematurely and in contravention to rule 60 aforesaid.

The objector's counsel argued that the issue of impropriety of the said summons was *res judicata*, the same having been raised orally by the petitioners' counsel, pursuant to which the matter was adjudicated by my brother. I do not think so. No final decision was made as the matter was stood over generally. It cannot be said that the issue was heard and finally decided. That is why the petitioners' advocate filed a formal application to strike out the objection proceedings. In my view, the objector's counsel, upon realising that he had jumped a vital procedural step, should have either withdrawn the application that was filed prematurely and file another one after coming on record properly or file an application to seek validation of the same.

I therefore strike out the objection proceedings filed on 21st November, 2003 and award the costs of the application to the petitioners.

DATED, SIGNED & DELIVERED at Nakuru this 10th day of February, 2005.

DANIEL MUSINGA

JUDGE

10/2/2005