

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Prob & Admin 1B of 2004

KITEMA MUTISO DECEASED

VERSUS

MULONDU KITEMA APPLICANT

R U L I N G

By a Notice of Preliminary Objection dated 6/1/05, the petitioner took an objection that the objection to grant of issuance of letters of representation dated 2/3/04, be struck out for being incompetent and bad in law because the drawer is improperly on record and that it is filed in bad faith and not merited as it is an abuse of the court process and that the objector has failed to take any steps to prosecute the objection.

Mrs Mutua who appears for the petitioner contends that Mr Ngolya Advocate who filed the notice of objection on 3/2/04 flouted the procedure of filing of the appearance which is provided under Rule 60 of the Probate and Administration Rules in that the objector did not give consent. Counsel further submitted that Section 2 (1) Law of Succession Act provides procedure that applies to all cases of succession and that Rule 63 sets out the provisions of the Civil Procedure Rules which are applicable in matters of succession.

The petitioner urges that since the objection was filed, the objectors have not taken the necessary steps as per provisions of Section 68 Law Succession Act as they should have filed a cross or answer to petition and this has blocked the petitioner from proceeding with prosecution of the petition.

Mrs Mutua also argued that the objection is brought in bad faith because the objector is listed as one of the beneficiaries of the deceased's estate and that in any case, Section 66 Succession Act gives preferences on whom to apply for letters of administration.

In contrast, Mr Ngolya argued that the Preliminary Objection is an abuse of court process as he filed his appearance after appointment and that the objection is an afterthought since they have had several applications with the petitioner and there was no objection to the notice of appointment. That the form of the appearance is proper and the court should disregard the form and consider the spirit of the documents. He cited Section 72 of interpretation and General provisions Act which provides that mere deviation from the form does not render the document a nullity. He denied that there was any indolence on his part but that it was because the petitioners filed other applications.

I have seen that the appearance filed by the counsel does not conform to form 26 Law of Succession Act. There is provision that the said appearance may or may not be signed by the objector or advocate. That appearance flouts provisions of Rule 60 Probate and Administration Rules.

It is also true that this appearance was filed on 4/2/04. That is over a year since the said filing of appearance and it is also true that the petitioners never challenged the said notice of entry of appearance. However, the fact that the appearance was not challenged for being unprocedural does not cure the defect of the notice of appearance. However, the court will look at whether it was mere deviation the substance of the application. The objector has taken no steps to file an answer or cross petition. The objection was filed on 4/3/04 and I find that there has been inordinate delay in filing an answer or cross petition to the application. The explanation given by Mr Ngolya that other applications were made by the petitioners cannot be accepted. Whether other applications were filed or not, it was upto the objector to ensure the answer to petition or cross petition was filed in good time.

I have considered the petitioners argument that the objection is an abuse of court process because the objector is already a beneficiary to this estate. From form P & A 5 the objector is not included as a beneficiary. It is in the chief's letter that she was named but the petitioner left the objectors name out of Form P & A 5. During an application dated 28/1/05 the petitioner admitted that the objector was one of the beneficiaries. By the mere fact of leaving out the objector from the list of beneficiaries it may have raised concern as to why the omission. In my view, despite the delay in filing an answer to petition and filing of a defective appearance the court is interested in seeing that justice is done and this court will decline to strike out the objection and appearance but order that the counsel do file a compliant appearance within 14 days of today's date and have the answer or cross petition filed within 15 days of today's date.

Objector to bear costs of this objection.

Dated at Machakos this 5th day of May 2005

Read and delivered in the presence of

R.V. WENDOH

JUDGE