



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET**

P & A CAUSE 163 OF 2003

WILFRIDA OBADO MBULO:.....APPLICANT

AND

JANE VERONICA ASEMBO

BERNADETE AKINYI MBULO:.....RESPONDENT

RULING

This is a Preliminary Objection to a Summons for revocation or annulment of a grant dated 17th March 2005 filed by Wilfrida Obado Mbulo. The Summons objected to was said to have been filed under sections 47 and 76 of the Law of Succession Act (Cap.160) and rules 44 and 73 of the Probate and Administration Rules. The application seeks for the following orders –

- i) That the Letters of Administration intestate to the estate of Mathayo Mbulo (Deceased) who died on the 23rd January 2003 at Soy Sub-Location and granted to Jane Veronica Asembo and Bernadete Akinyi Mbulo on 9th March 2005 be and is hereby revoked and/or annulled.**
- ii) That costs of this application be provided for.**

Following the filing of the Summons on 18th March 2005, a notice of Preliminary Objection was filed by Messrs. A. G. N. Kamau & Company Advocates on behalf of the respondents, Jane Veronica Asembo and Bernadete Akinyi Mbulo on 11th May 2005.

At the hearing of the objections, Mr. Kigamwa for the respondent argued that the Summons was bad in law in that it did not comply with rule 44 of the Probate and Administration Rules, in that it was not brought under Form 107. He also argued that the application was not signed by the Registrar as required by law. He further argued that the affidavit accompanying the Summons did not state whether it seeks for revocation or annulment.

He also argued that rule 44(3) of the Probate and Administration Rules was not complied with. The application was not placed before the Registrar for directions to determine who were to be served. Also, the notice as required under rule 70 of the Probate & Administration Rules had not been complied with. Under rule 44(3) of the Probate and Administration Rules a notice under Form 68 had to be issued after directions of the Registrar. Without that notice, the proceedings were not competent. He further argued that a party in an Administration Cause cannot be served unless the Registrar has given directions.

The applicant, Wilfrida Obado Mbulo opposed the Preliminary Objections. She submitted that her sister did not get her consent in order to apply for Letters of Administration alone. She contended

that she wanted to know who had signed the consent as she did not sign any consent as had been purported in the documents in the court file.

This is a Preliminary Objection and it should be limited only to points of law. I will deal with each point of law raised by the respondents as I understand them.

The first point raised is that the application was not in accordance with Form 107 of the Law of Succession Act. I have perused the format of Form 107. In my view, the Summons for revocation or annulment of grant is in compliance with Form 107.

I have been told that the affidavit accompanying the Summons does not state whether it seeks revocation or annulment. I have not been referred to any requirement in law, that an affidavit in support of an application such as this one should state whether what is sought is an annulment or revocation. In my view, it is the Summons itself which should state the reliefs sought. I have perused the Summons and in fact it seeks that the Letters of Administration issued, be revoked or annulled. This objection therefore also fails.

Counsel for the objectors has also argued that the application was not signed by the Registrar. I have perused the summons and it was indeed signed by the Deputy Registrar of the High Court at Eldoret. Therefore, that objection also fails.

Counsel for the objectors has also argued that rule 44 (3) of the Probate and Administration Rules has not been complied with. He submitted that the application was not placed before the Registrar for directions before service was effected. In his view, the Registrar was required to give directions as to who was to be served.

I have perused rule 44 (3) of the Probate and Administration Rules. It states as follows –

“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 for effecting service; and the applicant, upon the giving of the directions, shall serve each of the persons so directed to be served with a Notice in Form 68 and every person so served may file an affidavit stating whether he supports or opposes the application and his grounds thereof.”

From my understanding of Rule 44 (3), placing of the Summons before the High Court for directions is the function of the Registrar. Its non-compliance, if any, is not a mistake of the applicant herein and she cannot be penalized for the same. I therefore find this objection also unmerited and I have to dismiss the same.

The final objection is that a notice under Form 68 was not issued to the objectors or served as required under rule 44(3) of the a Probate and Administration Rules. Counsel for the objectors argued that the application is incompetent as a party in Probate and Administration Cause cannot be served unless the Registrar gives directions.

As I have stated earlier, the responsibility of placing the application before the High Court for directions on who to be served and the manner of service, is the function of the Registrar for which no blame can be placed on the applicant herein. There is no requirement that the Registrar gives directions. In my view, the objection as to the service can only affect parties who have not been served if they claim that they should have been served. The objectors were served and that is why they filed these Preliminary Objections. In my view, once the objectors herein were served as the respondents, they cannot come to court to complain in a Preliminary Objection as they did. This ground of objection can only assist persons who were not served, not those who have been served. In this particular case I do not see any basis for upholding this objection on behalf of the respondents. That objection also fails.

In conclusion, I find that the Preliminary Objections raised by the respondents lack merit and I dismiss the same. I order that the Summons dated 17th March 2005 be heard and determined on its merits. The costs of this Preliminary Objection will be in the cause.

Dated and delivered at Eldoret this 3rd day of October 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Kigamwa h/b for Mr. Kamau for the respondents

No appearance for applicant