

whether they choose to act through another lawyer or on their own or go as per information of Public Trustee.

Mrs. Nzei says that it is upon this direction by the court that the beneficiaries who the Public Trustee had identified instructed her to come on record to protect their interests. Rule 60 of Probate and Administration Rules provides that every interested person, who wishes to be heard upon or to oppose any application and has not already appeared in the proceedings, shall enter an appearance and may file such affidavits in reply. It means that the beneficiaries can come in and oppose the application field. There is no requirement that they file a substantive application as suggested by the counsel for applicants. They have come on record through representation by Mrs. Nzei. They are opposed to the application and have filed a preliminary objection on points of law. In my view the beneficiaries have a legal standing in the matter and are properly on record and have properly raised the preliminary objection. If indeed there is merit in their objection there is no way they would have filed affidavits in response to an improper application.

Another limb of the objection raised is that this application offends provisions of Rule 63 of Probate and Administration Act. Under that Rule only Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX shall apply to proceedings under the Probate and Administration Rules. The applicant has brought the application dated 29.11.2001 under Order 39 Civil Procedure Rules which is not one of the orders listed under Rule 63. Order 39 Civil Procedure Rules is not applicable under the said Probate and Administration Rules.

Provisions of Rule 63 are mandatory and have to be complied with.

From the foregoing observations, I do find that the application dated 29.11.2001 is fatally defective. A preliminary objection can be entertained by court at any stage of the proceedings and it is irrelevant that directions had been taken on how to proceed in this case. The courts will normally look at the substance other than the form but in this case the applicant will not be locked out as he can bring another application. Besides the defects in the application are so grave that it is proper that the application has to be struck out. Application dated 29.11.2001 is accordingly struck out with costs to beneficiaries.

Dated, read and delivered at Machakos this day of 2004.

R. V. WENDOH

JUDGE