

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
PROB & ADMIN CAUSE 89 OF 2003**

IN THE MATTER OF THE ESTATE OF MICHAEL KIILU MUSOMBA

AND

BEATRICE KATHINI KIILU PETITIONER

R U L I N G

The chamber summons dated 12.7.2004 is brought pursuant to Order 39 Rule 1(a) Civil Procedure Rules, Section 76 (b) and C and Rule 44 (1) and 63 of the Probate and Administration Rules. The application was brought under certificate of urgency seeking to restrain the petitioner Beatrice Kathini from disposing of and interfering in any manner with the assets and estate of the deceased Michael Kiilu pending hearing and determination of this application and that the grant dated 30.5.2002 made to the petitioner be revoked.

Mrs. Nzei representing the petitioner/respondent filed a notice of preliminary objection dated 18.10.2004 which is to the effect that Order 39 does not apply to proceedings commenced under the Law of Succession Act and secondly that it contravenes Rule 44 of the Probate and Administration Rules and is therefore incompetent and bad in law.

Mrs. Nzei for petitioner urged that Rule 63 of Probate and Administration Rules limits the application of Civil Procedure Rules to proceedings commenced under the Law of Succession Act and that since this application is brought under Order 39, it is incompetent and should be struck out.

The second limb of the objection is that the application contravenes Rule 44 of Probate and Administration Rules as Form 107 should have been used in a prayer seeking revocation of grant and it has to be issued by the Deputy Registrar which was not done in this case.

In opposition of the preliminary objection, Mr Mutua Mboya for the applicant conceded that some forms were not complied with but that Rule 44 was complied with and that under Section 76 of Succession Act, the court can on its own motion annul a grant where proceedings were defective or where material particulars were omitted. He further argued that the court has to ensure that justice is done and that even if there is want of form Section 72 of Interpretation and General Interpretations Act cures it. The said section provides that if some form which is provided for is not complied within an instrument, it shall not be void by reason of a deviation there on which does not Affect the substance of the instrument or document or which is not calculated to mislead and that there is no evidence that one has been prejudiced. I do agree with counsel for petitioner that Rule 63 of the Probate and Administration Rules is very specific on what provisions of the Civil Procedure Act and Rules are applicable to proceedings commenced under the Succession Act and Probate and Administration Rules. The said rule provides that only orders V, X, XI, XV, XVIII, XXV, XLIV and XLV together with High Court Practice Rules will apply to proceedings under Succession Act. Order 39 is not one of the Orders applicable. The court has no jurisdiction to grant orders of injunction under 39 in matters relating to succession and without the jurisdiction, the court cannot invoke Section 72 of Interpretation and General Provisions Act to cure the form when the court has no jurisdiction in the first place.

Counsel as much as conceded to the fact that Form 107 was not conformed with and therefore Section 44 of Probate and Administration Rules was contravened. It is apparent that the applicant combined the prayer for revocation with that of injunction in the same application but that is improper because the application for revocation should have been made at the registry and has to be issued by the Deputy Registrar and the Deputy Registrar had to give directions on whom the application was to be served. It is my view that failure to conform with the form does prejudice the parties who were to be

served with notice of objection and were not so served as provided by Rule 44. Again I do find that Section 72 of Interpretation and General Provisions Act cannot cure the said defect as there is no mere deviation from the form but a total ignorance of the whole of Rule 44 Probate and Administration Rules. It does not matter that the applicant came under certificate of urgency. That rule had to be complied with to avoid injustice being suffered by those affected.

In sum I do find that the preliminary objection raised does have substance. The court has no jurisdiction to grant an order of injunction under Order 39 Civil Procedure Rules since this matter is commenced under Succession Act (P&A Rules) and it is therefore incompetent and the court has no option but strike the whole application out. Similarly failure to comply with Rule 44 Probate and Administration Rules renders the application incompetent.

The preliminary objection is upheld and application dated 12.7.2002 is hereby struck out with costs.

Dated at Machakos this 24th day of November 2004

R. V. WENDOH

JUDGE