



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Prob & Admin 226 of 2002

IN THE MATTER OF THE ESTATE OF GREGORY KYENGO MALUILA

AND

DOMITILA NDUNGE MUTISO APPLICANT

RULING

The petitioner/Respondent moved this court seeking to be allowed to administer the estate of the deceased Gregory Kyengo Maluila. On 17.12.2002 the court issued grant of letters of administration to Domitila Ndunge Mutiso and Boniface Makau Mutiso.

On 28.2.2003 Ruth Mwithi Maluila the mother of the deceased filed an application seeking revocation of the grant of probate to the two petitioners and a prayer that an injunction do issue restraining the petitioners from disposing of, selling or interfering with the Estate of the deceased until the matter is determined.

Directions were taken on 23.5.2003 that the said objection would proceed by way of viva voce evidence.

Counsel for the petitioner/Respondents asked that the matter be heard urgently because the minor children of the respondents could not go to school for lack of school fees. This is after the matter had come up severally for hearing. The court fixed the hearing for 7.5.2004. On that day counsel for objector was absent. Matter was adjourned to 11.6.2004. On 11.6.2004 Mrs. Kivuva did not show up. Later at 11.30 a.m. Mr. Kitheka held brief for Mrs. Kivuva for the objector and sought an adjournment of the objection proceedings which adjournment was vehemently resisted by the respondent's counsel. Counsel for applicant was said to be unwell whereas objector was absent. The court dismissed the objection proceedings for want of prosecution. It is this dismissal order that the objector/applicant seeks to be set aside and the applicant/objectors application of 17.12.2003 be reinstated. The application is dated 20.9.2004 and supported by the affidavit of the objector/applicant Ruth Mwithi.

The gist of the applicants case is that the applicants application was dismissed when the objector had stepped out of court to call her advocate who was not present. Her contention is that the mistakes of her advocate should not be visited on her. It is also alleged by applicant that grant was obtained fraudulently as the assets are not indicated in form P&A 5 and assets entered therein as liabilities. The applicant denies that the respondent was the wife of the deceased nor are the respondents children the deceased's children; that the second administrator is unknown to the applicant and lastly that the respondent has settled on land that belongs to the applicant and that is why she prays that the application be heard on merit.

In opposing the application the respondents counsel filed grounds of opposition which are that the application is misconceived and without merits, bad in law and incurably defective, is brought in bad faith, misleading and based on misrepresentations that there has been inordinate delay in bringing the application; that the application was lawfully and regularly dismissed as the objector was nowhere in court.

The order dismissing the applicants application was made on 11.6.2004. Mr. Kisongoa came on record on 26.8.2004. It is not until 20.9.2004 that this application was filed, over 3 months since the dismissal. Since the applicant claims to have been in court, it means that she was aware of the court's order on 11.6.2004. The delay of 3 months in bringing such an application is inordinate and the applicant has not offered any explanation as to why the delay.

It is the contention of the respondent that the application by applicant dated 20.9.2004 is defective because it offends provisions of order 50 Civil Procedure Rules in that grounds are not stated within the body of the application and that they are mandatory.

It is also argued that the application offends Order 50 Rule 15 (2) which provides in mandatory terms that the application should have a footage that if the respondent does not appear the application shall proceed. Mr. Kisongoa in response argued that provisions of Order 50 are not applicable as the application was brought under Probate and Administration Rules. Rule 63 of the Probate and administration rules provides as follows.

“Save as in the Act or in these rules otherwise provided and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules namely Orders V, X, X1, XVIII, XV, XLIV and XLIV, together with the High court (practice and procedure) Rules shall apply so far as relevant to proceedings under these Rules.”

The above provision clearly ousts the application of Order 50 Civil Procedure Rules to application made under Probate and Administration Rules as indeed the application was brought pursuant to Section 47 Law of Succession Act and Rule 59 Probate and Administration Rules. The Probate and Administration Rules were meant to simplify procedure before court and such technicalities as found in the Civil Procedure Rules have been avoided.

The respondent's counsel urged the court to strike out the affidavit in support of the application as it offends provisions of Section 35 of Advocates Act in that the advocate who drew the affidavit did not endorse his name and address or name address of the firm. Section 35 makes it an offence for an advocate who does not comply with the provisions of Section 35 Advocates Act. Mrs. Mwangangi argued that this is not an irregularity or want of form that can be cured by Order 18 Rule 7 Civil Procedure Rules. Mr. Kisongoa in reply purported to ask for amendment of the affidavit but that would have been irregular at that stage and further the law is that an affidavits cannot be amended as they are evidence. In support of her contention the applicant relied on the case of **JOVENA EAST AFRICA LTD. HCC 1086/02** where Justice Nyamu held that failure to comply with Section 35 (1) of Advocates Act is not an irregularity in form that is capable of being regularised by Order 18 Rule 7 as it is substantive and goes beyond provisions of Order 18 Rule 7. Order 18 Civil Procedure Rules is one of those provisions in Civil Procedure Rules applicable to Probate and Administration matters. I fully agree with the Learned Judge that failure to comply with Section 35 (1) of Advocates Act renders the affidavit defective and the same has to be struck out.

The applicant has deponed that she was in court on the day the application was dismissed. As per the court record when the application was first called out Mrs. Kivuva for objector was absent. Mrs. Mwangangi for respondent was present and ready to proceed. The court put aside the file for hearing later. At 11.30 a.m. Mr. Kitheka held brief for Mrs. Kivuva who was said to be indisposed. He indicated that the person who had come with instructions came late and was not able to address the court. Mr. Kitheka on hearing Mrs. Mwangangi's objection to an

adjournment told the court that he had enquired from the court clerk to find out if the objector was in court but she was not. The court went ahead to rule on the application for adjournment and dismissed the objection.

The court will normally call out the parties' names and at no time did the objector respond. She was not in court otherwise the court would have noted it. What she has deponed to in her affidavit is untruth and he who comes to equity must come with clean hands which the applicant has not done.

Most of the issues argued go to the merit of the application which do not need to be canvassed at this stage in light of the finding that the affidavit in support of the application is defective and it offends Section 35 (1) of Advocates Act. It is hereby struck out. The application cannot stand alone without an affidavit and it too must be struck out. Costs of the application to the respondents.

Dated at Machakos this 10th day of November 2004

Read and delivered in the presence of

R. V. WENDOH

JUDGE