



REPUBLIC OF KENYA



In re Estate of Peter Ouma Onyango (Deceased) (Succession Cause E1198 of 2022) [2023] KEHC 18679 (KLR) (Family) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 18679 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE E1198 OF 2022

PM NYAUNDI, J

MAY 12, 2023

BETWEEN

LUCY WANJIRU KAMAU OBJECTOR

AND

ROSE NYALWENGE WERE OUMA 1ST PETITIONER

PAUL AAPOLLU OUMA 2ND PETITIONER

THOMAS WERE OUMA 3RD PETITIONER

RULING

1. Before the court is the preliminary objection dated February 10, 2023 seeking to strike out the Application dated December 16, 2022 on the ground that:
 1. The objection to the Application for grant of probate of written will of the above deceased was not lodged in the prescribed form within the period specified in the notice of the said application that was published in the Kenya Gazette Special Issue Vol. CXXIV-No. 277, Nairobi, December 16, 2022 at page 9161.
 2. The parties agreed to canvas the application by oral arguments and the Court heard them on 6th April 2023.

Background

3. The deceased is the husband of the 1st petitioner. the 2nd, 3rd and 4th petitioners are the children of the 1st Petitioner with the deceased. The Deceased died at the Aga Khan Hospital on October 24, 2021. Following his death, the Petitioners, petitioned for probate of written will of the deceased vide



application dated October 6, 2022. Notice of this Petition was duly published in the Kenya Gazette vide Gazette Notice No. 15572 of December 16, 2022.

4. The Applicant as mother and next friend of Jeremy Baraka Ouma, Monica Nduta Ouma & David Wamalwa Oumapresented summons dated December 16, 2022under certificate of urgency seeking to safeguard the interests of the minors who were not provided for under the will. She contends that she is the 2nd wife of the deceased and the minors are the children of the deceased.
5. The Application is presented underarticle 159 of the Constitution of Kenya, sections 67,76,26,27,28,47 Law of Succession Act, chapter 160 Laws of Kenya and Rules 40 and 73 of the Probate and Administration Rules and seeks the following orders.
 1. Spent
 2. That leave be granted of this Honourable Court to institute the current proceedings as the objector
 3. That pending the hearing and determination of this application, an order so issue granting the dependents/ beneficiaries of the Deceased being Jeremy Baraka Ouma, Monica Nduta Ouma & David Wamalwa Oumaprovision for urgent school fees and school related expenses from the estate of the deceased.
 4. That pending the hearing and determination of this application an order do issue making monthly maintenance provision in the sum of Kshs 150,000/- to the dependants Jeremy Baraka Ouma, Monica Nduta Ouma & David Wamalwa Ouma.
 5. That pending the hearing and determination of this application, all the monthly rental income from the properties of the deceased known as the house in Runda on L.R. No. 7785/1419 and an apartment in Lavington Royal Castle L.R. No. 330/471 Apartment B3 be deposited in the joint escrow accounts of the Advocates on record.
 6. That pending the hearing and determination of this Application, the Respondents whether by themselves, their servants and /or agents be restrained forthwith from subdividing, transferring, selling the properties of the Estate known as house in Runda on L.R.No. 7785/1419, Residential home in Buyuku Village Muluwa, Bunyala on Plot No. 73, Plot in Buyuku Village Muluwa Plot No. 817 & Half(1/2) portion of the plot in South C on LR No. 209/10482/21 & an apartment on Lavington Royal Castle LR No. 330/471 Apartment B3
 7. That an order do issue to the Respondents to account fully forthwith for all the rents collected from the properties of the Estate known as house in Runda on L.R.No. 7785/1419, Residential home in Buyuku Village Muluwa, Bunyala on Plot No. 73, Plot in Buyuku Village Muluwa Plot No. 817 & Half(1/2) portion of the plot in South C on LR No. 209/10482/21 & an apartment on Lavington Royal Castle LR No. 330/471 Apartment B3 from 24th October 2021 when the late Peter Ouma Onyango died.
 8. That the will purportedly executed by the deceased dated September 18, 2020 is not genuine and valid and that the deceased died intestate
 9. That the signatures appearing on the purported will dated September 18, 2020 be subjected to forensic document examiner and a report be submitted to Court. The witnesses thereto Angelina Nanwali Gonzo and Cecilia Angel Were be cross examined.



10. That an order do issue allowing the children of the deceased Jeremy Baraka Ouma, Monica Nduta Ouma & David Wamalwa Oumato view the gravesite of their father the late Peter Ouma Onyango
11. That this honourable Court do adopt the DNA Results from the government chemist dated December 2, 2021 to confirm that the deceased was the biological father of the children Jeremy Baraka Ouma, Monica Nduta Ouma & David Wamalwa Ouma
12. That Lucy Wanjiru Kamaube appointed as the administrator of the Estate of the deceased herein and issue grant the letters of administration intestate accordingly.
13. That the costs of this application be provided in the cause.

Petitioner's/ Respondent's Submissions

6. The basis of the Preliminary objection is that in essence the Application is an Objection which is not presented in the proper format as dictated by section 68 of the *Law of Succession Act*.
7. Further it is submitted that Rule 17 of the Probate and Administration rules. It is submitted that this failure to comply is fatal and that therefore the Summons should be struck out. The summons being defective the reference to the Court by the Deputy Registrar was erroneous as the Petitioners had not been served with the required notices neither has the Applicant filed answer to Petition and cross application as required by law.
8. It is further submitted that the minors will not be prejudiced if the summons is struck out as they can still present a claim as dependants under section 26 of the *Law of Succession Act*.

Applicant's Submissions

9. The applicant contends that the Preliminary objection does not meet the test in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 .
10. It is argued that this is an omnibus application that seeks other prayers in addition to the objection. In any event, it is argued, the preliminary objection is raised on a technical and not substantial issue.
11. The applicant seeks to shelter under article 159 which underscores the need for courts to pursue substantial justice, arguing that it is not fatal to proceed by way of summons.
12. Further it is submitted that the preliminary objection must fail as it is inviting the court to look at evidence and therefore fails the test in the Mukisa case.
13. The applicant submits that the matter touches on the interests of minors and that and the objector who is a second wife. The applicant is categorical that the minors should not be subjected to a second DNA test.

Analysis and Determination

14. Having considered the pleadings filed herein alongside the submissions of the parties, I discern the following as the issues for determination.
 - 1) Whether the Preliminary Objection as presented meets the criteria set out in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696
 - 2) Whether the summons dated December 16, 2022 is in effect an Objection?



- 3) Whether the Summons dated December 16, 2022 should be struck out for failing to comply with the provisions of section 68 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules.
- 4) Who should pay the costs?
15. Does the Preliminary objection as presented meet the criteria set out in the Mukisa case?
16. In the *Mukisa case* at page 700 paragraphs D-F Law JA (as he then was) had this to say:
 ...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
17. And at page 701 paragraph B-C Sir Charles Newbold, P. added the following:
 A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....
18. The petitioners aver that the applicants herein filed an objection to the application for grant of a probate of written will that was not in the prescribed form and within the period specified. I find that the Preliminary objection as framed meets the criteria laid out in judicial precedent. The court is invited to examine whether or not the summons as presented fails to comply with the laid-out provisions of the law and whether this is fatal and results in the striking out of the summons. The preliminary objection is on a pure point of law.
19. The second issue is Whether the summons dated December 16, 2022 is in effect an Objection?
 There is a swift and rapid answer to this question. Prayer 2 of the Summons is
 2. That leave be granted of this Honourable Court to institute the current proceedings as the objector.
20. This read alongside prayers 8,9,11 and 12 are a clear articulation of the reliefs the Applicant seeks. It is evident that the Applicant is opposed to the grant of probate to the Petitioners, contests the will and is cross petitioning for grant of letters of administration intestate.
21. If it looks like a duck, swims like a duck and quacks like a duck, then it probably is a duck. On the second issue I find that the summons as presented is intended to be an objection to the Petition lodged by the Petitioners.
22. The 3rd Issue for determination is Whether the Summons dated December 16, 2022 should be struck out for failing to comply with the provisions of section 68 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules?
23. It is not disputed that the laid down procedure for presenting an objection is set out in section 68 and 69 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules.
24. The Petitioner submits that failure to comply is fatal and the summons should be struck out. The applicant on the other hand contends that this is a technical and not substantive issue and therefore not fatal. The applicant submits further that article 159 of the Constitution of Kenya calls on courts to administer substantive justice.



25. *In re Estate of Johnstone Ochwang'i Moronge (Deceased)* [2022] eKLR, the court underscored the mandatory nature of the provisions of section 68, 69 of the *Law of Succession Act* and Rule 17 of the *Probate and Administration Rules*. The court observing that the objector failed to comply with the provisions proceeded to strike out the objection.
26. It has been submitted the provisions of article 159 (2) (d) should override this 'technical' omission on the part of the applicants. In *Wanja & another v Roothaert* (Miscellaneous Application E193 of 2021) [2022] KEHC 10255 (KLR) the court was faced with almost similar facts where a party had initiated a claim by Notice of Motion and not plaint as stipulated under the *Civil Procedure Act*. In response to the contention that section 159 of the *Constitution* of Kenya would act as a shield Justice Maureen Odero held
- “ [18]Not every procedural blunder can be excused as a ‘mere technicality’. The filing of a suit is a mandatory statutory provision which the court cannot simply wish away. In the case of *Dishon Ochieng v Sda Church* [2012] eKLR the court held that an application must be anchored in a plaint and that failure to comply renders the said application fatally defective.
- [19] The failure/omission of the applicant to file substantive suit cannot be overlooked as a “mere technicality.”
- [20]. Article 159(d) cannot be used to excuse glaring omissions in adhering to statutory provisions. In *Scope Telmatics International Sales Limited v Stoic Company & another* [2017] eKLR, it was held that -“Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure”
27. In *Africa Inland Church Kenya Registered Trustees v Julius Mwanza & 2 others* [2021] eKLR, Justice Dulu had this to say on the application of article 159(2)(d):-
- [8]... The courts are thus enjoined by the *Constitution* to administer substantive justice in all cases except where the identified technical fault goes to the root of the whole cause and thus the suit cannot be saved, before striking out a case or an application on the basis of a technical error.
28. In the instant case the failure by the applicant to present a proper application under section 68 meant the laid down process under the law could not and is unlikely to be set in motion. This will place the Petitioners at a disadvantage.
29. For the reasons above, I find that the preliminary objection is merited and uphold it and strike out the Application dated December 16, 2022.
30. The Court was invited to grant the Petition by the Petitioners I decline to do so and instead under section 68 of the *Law of Succession Act* extend time to the applicants herein to file an objection in the proper format within Fourteen Days from the date of this ruling.
31. The applicants urged the court to issue the interim orders arguing that this would be in the best interests of the minor, having struck out the Application the said prayers have no feet on which to stand.
32. On costs, having regard to the nature of the dispute each party will bear their own costs.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF MAY, 2023.

P M NYAUNDI



JUDGE

In the presence of:

.....Advocates for the Applicant

.....Advocates for the Respondent

Karani Court Assistant

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