



**In re Estate of the Late Francis Kimitei Samoei alias Kimitei Samoei (Deceased)
(Succession Cause 117 of 2022) [2023] KEHC 23181 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23181 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 117 OF 2022**

JRA WANANDA, J

OCTOBER 6, 2023

**IN THE MATTER OF THE ESTATE OF THE LATE FRANCIS
KIMITEI SAMOEI ALIAS KIMITEI SAMOEI (DECEASED)**

BETWEEN

LILIAN CHEPKOECH LELEI 1ST PETITIONER

JONAH KIMUTAI KORIR 2ND PETITIONER

AND

JOSEPHAT KIPKOSGEI KIMETEI 1ST OBJECTOR

BRIAN KIPKEMEI KIMITEI 2ND OBJECTOR

RULING

1. The deceased herein is stated to have died on 19/10/2022 aged 83 years as a polygamous man with 3 wives. On 15/12/2022, the two Petitioners, through Messrs Kenei & Associates Advocates, filed the Petition dated 13/12/2022 seeking Probate of the Written Will of the deceased, dated 30/08/2018. It was stated that the executors named in the Will are the 1st Objector and the two Petitioners and that the 1st Objector has declined to execute the Petition hence leaving the two Petitioners, as executors, to commence the process.
2. On 5/05/2023, the Objectors, through Messrs Kutto & Kaira Nabasenge Advocates filed a Cross-Petition and also a Notice of Preliminary Objection of the same date. The objection was on the ground that the Petition is fatally defective and sought that the same be struck out. Even further, on 10/05/2023, the Objectors filed the Summons dated 8/05/2023 seeking the striking out of the Petition. The grounds raised are basically the same as those raised in the Notice of Preliminary Objection.



3. It was subsequently directed that the said notice of preliminary objection and the summons, be heard together and in priority to other pending applications in the matter.
4. In the Notice of Preliminary Objection, the express grounds raised are as follows:
 - i. The instant Petition offends the provisions of sections 9 and 10 of the *Law of Succession Act* as read together with rule 13 of the *Probate and Administration Rules, 1980*.
 - ii. The instant petition has been presented to the honourable court to enforce an oral will by dint of Form P & A under the aforesaid rule 13(1) and yet the Petitioners have annexed allegedly, written Will.
 - iii. That as much as the Petitioners purport to present to this Honourable Court the alleged written Will, the same has been presented to the Honourable Court pursuant to Form P&A 78 under rule 7 and 13(1) of the aforesaid *Probate and Administration Rules* which Form is for oral will as opposed to the written Will that is filed pursuant to Form P&A 79 in accordance with rule 7 of the aforesaid *Probate and Administration Rules*.
 - iv. That Form P&A 5 filed herein by the Petitioners pursuant to rule 7 of the *Probate and Administration Rules* for guarantee by personal surety is in respect of affidavit in support of Petition for Letters of Administration intestate and yet they purport to have filed the instant Petition on the basis of the deceased having died testate.
 - v. That the Petitioners have failed to comply with *Probate and Administration Rules* in general and in particular rule 29(5) that provides for Form P&A 57 which Form must be filled by guarantors.
 - vi. The Petitioners therefore are not certain as to whether they are representing to this Honourable Court an oral Will or written Will or as to whether the deceased died intestate.
 - vii. That in the premises the Petitioners' Petition as presented to this honourable court is fatally defective and should be struck out with costs to the Objectors.
5. Regarding the Summons, the same is premised on the grounds stated on the face thereon and is supported by the Affidavit sworn jointly by the Objectors on 8/5/2023. They depone that the Petitioners filed the Petition herein and presented to this Court a written Will, that the Petition is entitled "Petition for Probate of Will", the Petition is presented pursuant to Form P&A 78 by dint of rule 7 of the *Probate and Administration Rules* whereby the said Form is in respect of oral Will and not a written Will as purported by the Petitioners, a Petition for Letters of Administration with written Will annexed ought to be presented to the Court pursuant to Form P&A 79 by dint of the provisions of rule 7 of the *Probate and Administration Rules*, the Petitioners further have presented to this Court Form P&A 5 which Form relates to guarantee by personal surety in respect of intestate estate and not testate as the Petitioners purport, the Petitioners in filing the instant Petition failed to comply with rule 29(5) of the *Probate and Administration Rules* and as such, omitted Form P &A 57 that must be presented by guarantors, the Petitioners have presented Form P&A 5 which is an Affidavit in support of Petition for Letters of Administration intestate, in view of the said anomalies, the Petition is contradictory and as such, fatally defective, the Petition as presented lacks clarity and precision as to whether the deceased died intestate or testate with oral or written Will, the Petitioners failed to follow the procedure in filing the Petition which they purport to present to this Court with a Written Will, it is trite law that parties are bound by their pleadings and thus the Petition is fatally defective and untenable and that the only recourse in that regard is to strike it out.



6. Finally, they deponed that the Will presented to the Court by the Petitioners is a forgery and that this is the reason why the Petitioners are not precise in their pleadings on whether the deceased died orally testate or intestate. They further deponed that they are aware that the deceased left behind only one valid Will which is dated 14/3/2020.

Petitioner's Response

7. The Petitioners opposed both the Notice of Preliminary Objection and the Summons vide the Replying Affidavit sworn by the 1st Petitioner and filed on 14/7/2023. She deponed that she is a bona fide widow of the deceased having gotten married to him under the Kalenjin customary law in the year 2003, the Petition does not offend the provisions of section 9 and 10 of the Law of Succession Act and rule 13 of the Probate and Administration Rules as the sections cited are not applicable herein by virtue of the fact that the deceased left a written Will and not an oral Will, they indeed lodged a "Petition for Probate of Written Will", the Forms used to lodge this Petition are correct, P&A Form 78 is used where the deceased died having written a Will and named an executor/executrix and where the deceased died leaving an oral Will, on the hand, P&A Form 79 is used where the deceased died leaving a written Will but has not named an executor/executrix. She deponed further that this means that by dint of the fact that the Will that the Petitioners annexed in their Petition appointed them as the executors, the correct Form is P&A Form 78 and not P&A 79 as alleged by the Objectors.
8. The 1st Objector further contended that there is no anomaly as rule 29(5) and 29(6) should be read wholly, rule 29(6) provides that the Rule shall not apply where the administrator is a Public Trustee or widow of the deceased, P&A Form 57 is in respect to intestate succession and not testate succession, rule 29(1) and (2) provide that where the Court may require to be satisfied as to the solvency of the administrators where there is a Will or no Will, the applicable Form is P&A Form 12 which is what they attached to the Petition.
9. She added that the Petition is precise and clear that the deceased died testate leaving a valid Will which appointed her (1st Petitioner) and his then Advocate, the 2nd Petitioner herein, as the executors of the Will, the Cross-Petitioners (Objectors) are misleading the Court by alleging that the Petitioners failed to attach a Written Will to the Petition and that the Summons and the Notice of Preliminary Objection are only calculated to frustrate the 1st Petitioner.

Hearing of the Application

10. It was then directed that the Preliminary Objection and the Summons be canvassed together and by way of written Submissions. Pursuant thereto, the Petitioners filed their Submissions on 7/8/2023 while the Objectors (Applicants) filed theirs on 22/8/2023. Despite not filing any Response, Messrs Katwa & Kemboi Advocates filed Submissions on 24/08/2023 in support of the Preliminary Objection and the Summons, on behalf of one Mary Kimitei, who had been named as the 5th respondent in some Applications herein.

Objectors' Submissions

11. Counsel for the Objectors reiterated that that the Petition has been filed on the basis that the deceased died testate and left behind the annexed Will dated 30/8/2018. He further reiterated that the Petitioner filed Form P&A 78 by dint of the provisions of rule 7 of the Probate and Administration Rules which Form is in respect of oral written Will as opposed to the express written Will as purported by the Petitioners. According to Counsel, a written Will ought to be presented pursuant to Form P&A 79 by dint of the provisions of rule 7 of the Probate and Administration Rules.



12. He further argued that the Petitioners failed to comply with rule 29(5) of the *Probate and Administration Rules* and as such omitted Form P&A 57 that must be presented by guaranties. He added that in view thereof, the Petitioners have presented Form P&A 5 which is an Affidavit in support of the Petition for Letters of Administration intestate.
13. Counsel further submitted that the Petition lacks precision and clarity on whether the Petitioners intend to proceed with the Petition as testate or intestate, due to lack of clarity, certainty and precision on the part of the documents filed by the Petitioners, it is not tenable for the Court to proceed with the Petition and, it must be made clear as to whether the Petitioners filed the Petition on the basis of a written Will, oral Will, intestate or testate, the documents filed are contradictory and as such render the Petitioner fatally defective.
14. In conclusion, Counsel submitted that it is trite law that each party must be bound by its pleadings. He cited the case of *In re Estate of Kamau Mbau Kamau (Deceased)* [2020] eKLR, H.C. Nyahururu. Succession Cause No. 61 of 2017.

5th Respondent's Submissions

15. Counsel for the 5th Respondent submitted that the Petition is fatally defective, the matter in issue is prescribed by law and thus a matter of substantive law, not procedure, departure from the same renders the Petition wholly void, the Gazette Notice generated from the defective filing is void and/or irregular, the Petitioners filed the Petition herein on the premises that the estate was testate with a Will dated 30/08/2028, most of the Forms and format used by the Petitioners belong to an intestate estate, namely, Form P&A being "Affidavit of Justification of Proposed Administrator", Form P&A 5 being "Guarantee by Personal Sureties" but wrongly indicated as "Affidavit in Support of Petition for Letters of Administration" in relation to Intestate Succession and Form P&A 11 being "Affidavit of Proposed Sureties" and that the Petition purporting to be testate contains that which is not required in a testate petition.
16. Counsel added that the Petition has been filed under Form P&A 78 by operation of Rule 7 of the Probate & Administration Rules, that Form only ought to be accompanied by P&A Form 3 being "Affidavit in Support of Petition for Probate", by mixing Forms related to testate Succession and those relating to intestate Succession, the Petitioners filed the Petition in dissonance with the provisions of the Probate and Administration Rules and that Courts have held that such lapses on the format are fatal. He cited the case of *Re Estate of Kamau Mbau Kamau (Deceased)* [2022] eKLR, H.C at Nyahururu, Succession Cause No. 61 of 2017 and stated that a party cannot seek one thing in his/her pleadings and pray the Court to award something different from what has been pleaded, the Petitioners want the Court to entertain, determine and admit to probate a written "Will" but their pleadings are a cocktail of an oral Will Petition, intestate estate and a written Will estate, it is impossible on its face to know exactly what the Petition relates to, a wrong format on a Succession Cause is similar to a wrong procedure on a cause of action, it is tantamount to attempting to urge a constitutional Petition using a Complaint. He also cited the case of *In re Estate of Johnstone Ochwang'I Moronge (Deceased)* [2022] eKLR and *INK v GJK & another* [2016] eKLR and added that Article 159 of the *Constitution* cannot be a blanket provision that can be invoked haphazardly in extending an invitation to Court to do justice in total and blatant disregard to established procedures, no conceivable reason exists as to why the Petitioner would not file proper Forms in proper Format. He further cited the cases of *Re estate of Ngetich* [2003] KLR 84, *Catherine Mwendu v Peter Bundi M'Itwamwari* [2006] eKLR, *Talewa Road Contractors Limited v Kenya National Highways Authority* [2014] eKLR and *Wilson Evans Otieno versus the Law Society of Kenya & 2 others* [2011] eKLR.



Petitioners' Submissions

17. Counsel for the Petitioner begins by observing that, according to him, the 5th Respondent has broken ranks with the other Respondents by filing Submissions agreeing with the Petitioners that the Petition and the Affidavit in support are properly before the Court. Counsel observes that however the 5th Respondent takes a different tangent and chooses to challenge the “Affidavit on Justification of Executors”, “Guarantee by Personal Sureties” and the “Affidavit of Justification of Sureties”. Counsel adds that it is improper for the 5th Respondent to seek to latch on the existing Preliminary Objection to introduce new grounds of objection and that the 5th Respondent ought to have filed her own instrument to challenge the Forms not specifically challenged by the other Objectors.
18. Counsel adds that the gist of the Preliminary Objection and the Summons is that the Petition lacks clarity to the effect that one cannot tell whether it is founded on written Will or Oral Will. He then invites the Court to look at the Petition and the Supporting Affidavit and assess whether one cannot be certain on the nature of the proceedings commenced.
19. Counsel argued that a Preliminary Objection is an objection based on a pure point of law and cited the case of *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors Ltd* (1969) EA 696. He then submits that he does not contest the position that the Objectors are challenging the Petition on the basis that it offends some provisions of the Law of Succession and the Probate & Administration Rules which would constitute a matter of law, however the grounds forming the basis for tabling the elements of the provisions cited should equally be based on a pure point of law.
20. Counsel then observes that the Objectors have raised the ground that the Petition offends section 9 and 10 of the *Law of Succession Act* as read together with rule 13 of the *Probate and Administration Rules*. He submitted that the cited Sections do not apply in the instant case since the deceased died leaving a written Will and not an oral Will.
21. According to Counsel, the facts of this Cause are under contest by the parties and this is evident from Ground 6 of the Preliminary Objection where the Objectors have indicated that it is not certain as to whether the Petitioners were presenting an oral Will or a written Will or whether the deceased died intestate, the Petitioners on the other hand are certain that the deceased died leaving behind a valid written Will, it is in dispute whether the Will annexed to the Petition is valid or not as can be gleaned from the fact that there is a second Will purportedly sought to be propounded by the Objectors and that a Preliminary Objection cannot stand where parties do not agree on the facts of the case.
22. Counsel further argued that the grounds of objection raised are not self-proof, they require other material facts for proof, the tone and structure of the Preliminary Objection is in the nature of an Affidavit pointing to a disguised deposition on matters of fact, the Preliminary Objection falls short of the required threshold and should be dismissed or struck. He cited the cases of Nairobi High Court Civil Case No. 102 of 2012; *Cheraik Management Limited v National Social Security Services Fund Board of Trustees & another* (as cited in *Pius Wanjala v Cleopa Mailu & 4 others* [2016] eKLR and *Oraro v Mbaja* [2005] 1 KLR 141 and submitted that the Court will have to comb through evidence to determine existence of the grounds for the Objection.
23. In respect to whether the Petition dated 13/12/2022 is fatally defective, Counsel submitted that the Forms used to lodge the Petition are correct, the 5th Respondent takes a contrary opinion from the other Respondents and agrees that the Petition was filed using the correct Form, namely, P&A 78 and accompanied with P&A Form 3, however the 5th Respondent introduces new issues that were not pleaded in the Summons and the Preliminary Objection including that the Petitioner used P&A Form 12 and 11 which according to her ought to have been used only where the deceased died intestate.



24. Counsel further submitted that under rule 29(1) and 29(2) of the *Probate and Administration Rules*, the Court has the discretion to satisfy itself as to the financial solvency of the administrators/executors of the estate of a deceased, this means that P&A Form 12 can also be used where the deceased died testate, thus there is no anomaly in attaching the Form to help the Court satisfy itself as to the solvency of the executors.
25. Counsel further argued that by virtue of rule 29(3) there is no harm in attaching Form P& A 11 and Form P&A 5 and that the use of the same does not render a Petition fatal or defective, it in fact helps the Court satisfy itself, the sureties will make good any loss which any person interested in the estate may suffer in consequence of breach by the administrator/executors of their duties, the abovementioned provisions of the law expressly points out that sureties are not limited to intestate succession and that the Court has discretion to order for the same even where the deceased died leaving behind a written Will.
26. Counsel reiterated that the correct Form to use when lodging a Petition for Grant of Probate is P&A Form 78 and not Form 79 as suggested by the Objectors, in fact, the Objectors are themselves guilty of using erroneous Forms while filing their Cross-Petition. He cited Lady Justice M. Angawa in her book *Procedure in Law of Succession Kenya*. He discredited the Objectors' claim that the correct instrument in the instant proceedings is P&A Form 79 and submitted that the Objectors have tried to mislead the Court that the Petitioners omitted Form 57 for Guarantors yet the said Form is only used in intestate proceedings, that the crucial instruments in Succession proceedings is the Petition and the Affidavit supporting it, if these two documents are properly before the Court, then the Succession proceedings would have been commenced as envisaged under the law.
27. Counsel submitted further that the power to strike out pleadings must be sparingly exercised and it can only be exercised in the clearest cases, if a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial, a litigant should not be deprived of his/her constitutional right to be heard, for a pleading to be struck out it ought to be so badly drawn that no amendment can cure it. He cited the case of *D.T Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* KLR and added that this Cause raises a reasonable cause of action, if the Court finds the additional Forms being P&A Form 11, 12 and 5 are not necessary then the same can be expunged without affecting the legality and probity of the proceedings, in fact, the Petition does not need an amendment if the said Forms were to be expunged.
28. Counsel further submitted that the Objectors have not demonstrated any provision of the law that the Petition offends and that the grounds for striking out a pleading have been provided for under order 2 rule 15 of the *Civil Procedure Rules, 2010*. He cited the case of *Peter Ngugi Kabiri v Esther Wangari Gitinji and another* [2013] and added that these proceedings belong to the parties, the Petitioners instructed a Counsel to represent them, it is then the duty of the Counsel to ensure that proper Forms are used, if for any reason any Form was used mistakenly/inadvertently the said error can only be attributed to the drafter of the pleadings, the Advocate, a mistake or error on the part of Counsel should not be visited upon a litigant, He cited the case of *Belinda Murai & others v Amos Wainaina* [1978] eKLR quoted in *Gold Lida Limited v NIC Bank Limited & 2 others* [2018] eKLR and also cited *Baki & others v Macharia & another* (2005) 2 EA 206.
29. Counsel also submitted that the irregularities in Petition can be cured by Article 159(d) of the *Constitution* which provides that justice should be done without undue regard to procedural technicalities, the Objectors have not led evidence to show that the Petition cannot survive expunging of any unnecessary Forms neither have they led evidence to demonstrate that the Petition cannot be cured by way of amendment.



30. In conclusion, Counsel submitted that the case law cited by the 5th Objector were decided before the year 2010 under the old constitutional dispensation and before article 159 of the current Constitution came into being to cure the injustice under the previous dispensation, Judges sitting before promulgation of the current Constitution came into being had no option but to decide cases on the basis of the then existing law, post 2010 Judges have a new lens with which they look at procedural technicalities. Counsel therefore invited the Court to distinguish the cases cited by the 5th Objector.

Analysis and Determination

31. Upon considering the Record, including the Affidavits and Submissions presented, I find that the issue that arises for determination to be the following:

“Whether in filing the Petition herein, the Petitioners used wrong Forms or procedure and therefore, whether the Petition is fatally defective and ought to be struck out”

32. Before I delve into the merits of the objections raised, I will first address the Notice of Preliminary Objection. The law as to Preliminary Objections is well settled. In the celebrated Court of Appeal case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696, it was held as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raised a pure point of law which is argued 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.”

.....

“..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.”

33. In light of the foregoing, it is debatable whether the grounds set out in the Preliminary Objection filed on 5/05/2023 disclose specific pure points of law. As correctly argued by the Petitioner, some of the matters raised may indeed require calling in of evidence and thus may not therefore be said to be pure points of law. Therefore, perhaps, it is because of this realization that the Objector’s Counsel quickly followed up by filing the substantive Summons on 10/5/2022, barely 5 days later, raising the same objections but now supported by an Affidavit. By acting as such, Counsel to a great extent cured and/or salvaged the Notice of Preliminary Objection.

34. I may also mention that although in the Notice of Preliminary Objection, the Objectors alleged that the Petition offends the provisions of sections 9 and 10 of the Law of Succession Act as read together with rule 13 of the Probate and Administration Rules, 1980, no mention of this ground was made or repeated in the Objectors’ Submissions. I therefore presume that this ground has been abandoned.

35. Regarding the issues at hand, section 51(1) of the Law of Succession Act provides as follows:

“Every application for a grant of representation shall be made in such form as may be prescribed, signed by the applicant and witnessed in the prescribed manner”.



36. Rule 7(1) of the *Probate and Administration Rules* then provides that:
- “Subject to the provisions of sub rule (9), where an applicant seeks a grant of representation to the estate of a deceased person to whose estate no grant ... has been made, the application shall be by petition in the appropriate Form supported by an affidavit-
37. It is not in dispute that the Petitioners have framed the Petition as being in respect to “Probate of written Will”. It is also not in dispute that in commencing this Cause, the format of the Petition used by the Petitioners is the one prescribed under Form P&A 78.
38. In the first limb of their objection, the Objectors contend that the Petitioners wrongly used the said Form P&A 78 and that the one they ought to have used was Form P&A 79. The Objectors contend that Form 78 applies only in respect of an Oral Will and not a Written Will.
39. It is however not in dispute that Form 78 is titled ‘Petition for Probate of Written Will or for Proof of Oral Will. From this heading alone, it is clear that the Objector’s Counsel cannot be right. My understanding, upon comparing the two Forms, is that Form P&A 79 is to be used in circumstances where the deceased died leaving behind a Will but where any of the following scenarios exist:
- i. Where the deceased had not appointed an executor or executors; or
 - ii. Where the appointed executor(s) is or are dead; or
 - iii. Where the executor(s) has or have consented or renounced the executorship; or
 - iv. Where the executor(s) has or have been issued with a citation(s) to renounce the executorship; or
 - v. Where the executor(s) has or have been issued with a citation(s) to apply for a grant of probate and has or have not done so.
40. It has not been alleged that any of the above scenarios is in existence in this case. Since, as framed, the Petition is to the effect that the deceased did appoint 3 executors, the Objectors’ contention that the Petition ought to have used Form P&A 79, rather than Form P&A 78, cannot be a serious one. In the circumstances, I find that the Petitioner properly used Form P&A 78. Accordingly, I reject the objection raised under this ground.
41. The second limb of objection is that the Petitioners improperly adopted Form P&A 5 which relates to guarantees by personal sureties in respect to intestate estates and not to testate estates. The Objectors argue that the Petitioners failed to comply with Rule 29(5) of the Probate and Administration Rules in that they omitted Form P&A 57 which is the Form that ought to be presented by the guarantors in respect to testate estates. The Objectors contend that due to this anomaly, the Petition is contradictory and as such, fatally defective.
42. It is true that Form P&A 5 is titled “Affidavit in Support of Petition for Letters of Administration Intestate”, and cites rule 7 of the *Probate & Administration Rules*. Clearly therefore, insofar as it relates to intestate estates, the Objectors are right that Form P&A 5 is not applicable to the circumstances of this case.
43. On the other hand, Form P&A 57 is titled “Guarantee by Personal Sureties” and cites Rule 29(5) of the Rules. The said rule 29(5) provides as follows:

“Every guarantee shall be in Form 56, 57 or 58, as the case may be,”



44. Since clearly Forms 56 and 58 do not apply to the circumstances of this matter, evidently therefore, the Form that the Petitioner ought to have used in this Cause was P&A 57. To this extent, the objection taken is merited. The only question to be answered is whether this error is, by itself, sufficient to warrant the striking out of the entire Petition.
45. In answering the said question, I observe that although the Form adopted by the Petitioners is titled “Form 5”, a cursory look at the body and contents thereof easily reveals that it is in fact “Form 57”. This fact was also noticed by the 5th Respondent who, even though she supported the objections, her Counsel, in his Submissions, correctly observed that the Petitioner wrongly indicated the filed “Guarantee by Personal Sureties” as “Affidavit in Support of Petition for Letters of Administration”. To me therefore, the title used can only be termed a typographical error and nothing more. The Form filed by the Petitioners and titled “Form 5”, is in fact “Form 57”.
46. In the circumstances, it is my view, and indeed I find, that the said error cannot, per se, invalidate these entire proceedings. The said error is so minimal, does not affect the substance and is only procedural in nature, it cannot warrant striking out of the Petition.
47. I am further guided by the provisions of article 159(2)(d) of the Constitution which stipulates that in exercising judicial authority, among the principles that “shall” guide Courts is that “justice shall be administered without undue regard to procedural technicalities”. While I agree that article 159(2)(d) was never meant to oust the obligation of litigants to comply with procedural imperatives, still Courts must be guided by it.
48. Further, in reiterating the principle that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham, the Court of Appeal in the case of Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu [2009] eKLR pronounced itself as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd v Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung v Ranjuer & Keeler Ltd others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”



49. The Objectors have placed much reliance on the case of *In re Estate of Kamau Mbau Kamau (Deceased)* [2020] eKLR in which Wendoh J remarked that the Petitioners therein did not follow the procedure provided in the Rules on filing of a Petition in respect of an oral Will. Having read the said authority, it is clear to my mind that considering the circumstances of the instant case, that authority is easily distinguishable and also, Counsel quoted it out of context. First, unlike herein, the issue before that Court was neither a preliminary objection nor was it about striking out of the Petition, the same was being determined after full viva voce hearing of the Cause. Secondly, the Judge correctly observed that the Petitioner had all along prosecuted the Petition therein as an intestate Cause and that the allegations of existence of a Will were raised by the Petitioner too late in the day, after the viva voce hearing had already considerably advanced. The circumstances in that case are therefore distinguishable from the scenario in this case.
50. Regarding the 5th Respondent, I agree with the Petitioner’s Counsel that the matters raised in her Submissions have been raised in a vacuum. This is because the 5th Respondent never filed her own independent Preliminary Objection nor did she file her own separate Application challenging the competency of the Petition. All the 5th Respondent could therefore do was to merely support the Objectors’ Preliminary Objection or Summons. However, it is clear that, contrary to this understanding, the 5th Respondent, in her Submissions, exceeded this boundary by introducing her own fresh points of law not raised in the Objectors’ Preliminary Objection or Summons. This can only be termed as an ambush against the Petitioners and is against the principles of practice and procedure.
51. Nevertheless, since points of law can be raised and determined even suo motu by the Court even if not raised by any party, there is no bar in this Court interrogating the points raised. I will therefore proceed to analyze and determine the same.
52. In answering the matters raised by the 5th Respondent, I note that, unlike the Objectors, the 5th Respondent’s did not seem to have a major problem with the Petitioners’ framing of the Petition as Form P&A 78. The 5th Respondent’s contention was instead, that the Petitioners went beyond what was expected and unnecessarily added further Forms which were not required and which were only necessary in respect of intestate estates. Counsel mentioned such additional Forms unnecessarily added as Form P&A 12 being “Affidavit of Justification of Proposed Administrator”, Form P&A 5 being “Guarantee by Personal Sureties” and Form P&A 11 being “Affidavit of Proposed Sureties”. According to Counsel, by mixing Forms relating to testate Succession and those relating to intestate Succession, the Petition lacks clarity and precision.
53. However, nowhere has the 5th Respondent demonstrated, or even alleged, that the mere adding of the additional Forms misled or prejudiced her in any way. Further, as conceded by the 5th Respondent and as already found above, the body and contents of the filed Form wrongly titled as “Form P&A 5” and also wrongly described as “Affidavit in Support of Petition for Letters of Administration” reveals that the same is in fact “Form P&A 57”, “Guarantee by Personal Sureties” the one correctly required in respect to testate estates. The compliant raised in regard hereto is therefore rejected.
54. Regarding Form P&A 11 being “Affidavit of Proposed Sureties” under Rule 29(8) of the Probate & Administration Rules, and Form P&A 12 being “Affidavit of Justification of Proposed Administrator” under rule 29(2), I quote the said Rules as follows:

“ 29. Court may require to be satisfied as to solvency of administrator

“(1) In the exercise of its discretion as to the person to be appointed an administrator (with or without the will annexed) the court shall endeavor to satisfy itself as to the financial solvency of such person and, having regard to



the nature and extent of the estate of the deceased likely to come to his hands, as to the probability of his being able properly to complete the administration of the estate.

(2) For the purpose of subrule (1) the court may require the proposed administrator to furnish an affidavit in Form 12 as to his means.

.....

(8) Unless the court otherwise directs –

.....

(e) every surety, other than a corporation, shall justify in Form 11.

55. Being documents that the Court “may” additionally require, at its discretion, and being guarantee or surety documents, I do not see how the mere filing of Forms P&A 11 and 12 prejudice the 5th Respondents. I would even expect the 5th Respondent, as a beneficiary, to embrace the additional Forms since by their filing, the estate is secured even further. They may, yes, be documents unnecessarily filed, but to allege that their mere filing, however unnecessary, renders the Petition fatally defective or incompetent is an incredible stretch of imagination.

Final orders

56. The upshot of my findings above is that, no basis has been demonstrated to support the prayer for striking out of the Petition dated 13/12/2022. Accordingly, I make the following orders:

- i. The notice of preliminary objection dated 5/5/2023 and the Summons dated 8/5/2023, both filed by the Objectors fail and are hereby dismissed.
- ii. Since it is the petitioners’ error, albeit a slight one, that gave rise to the filing of the notice of preliminary objection and the summons, I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF OCTOBER 2023

.....

WANANDA J. R. ANURO

JUDGE

