



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

FAMILY DIVISION

SUCCESSION CAUSE NO 35 of 2019

IN THE MATTER OF THE ESTATE OF STEPHEN TARAIYA KAPANDE (DECEASED)

RULING

Summons

There is pending before this court Summons for Confirmation of Grant dated 29th June 2020. Before that Summons was heard and determined, Mary Nyambura brought her own pleadings in respect of this Estate. She filed Summons under Section 26 of the Law of Succession Act dated 25th January 2021; Affidavit of Protest against confirmation dated 25th January 2021 and Objection to Making of Grant also dated 25th January 2021. Central to her pleadings is the claim that the deceased left 10 survivors from three (3) households. She names herself as one of the widows from the second household and her two children Andrew Kariuki and Victoria Muthoni Taraiya as dependants and beneficiaries and claims that she and her children have been left out of the estate of the deceased.

The Objection to the making of grant attracted a Notice of Preliminary Objection (P.O) by the Administratrixes dated 24th June 2021. The reason for the P.O is that the Objection to making of grant offends Section 68 of the Law of Succession Act and Rule 17 (1) of the Probate and Administration Rules hence this court lacks jurisdiction to entertain it. Secondly, the Objection to making grant is misconceived, bad in law and incompetent, the same having been taken drawn and filed without leave of the court long after the Grant of Letters of Administration had been made to the Petitioners. Thirdly, the Objection is frivolous, vexatious or is otherwise an abuse of the process of the court. It is sought that the Objection be struck out with costs.

The Objection also attracted Grounds of Opposition by the Administratrixes date 24th June 2021. The Grounds of Opposition are similar to the grounds found in the Preliminary Objection.

On 6th October 2021, I gave directions that the Summons for Confirmation of the Grant should await the outcome of the Summons dated 25th January 2021 and the Objection to making the grant. I further directed that the P.O and the Grounds of Opposition be argued first.

Submissions

Parties submitted orally. Mr. Wanyingi for the Administratrixes argued that the objection to making the grant is required to be filed within the time limit as indicated on the Notice in the Kenya Gazette. He further argued that the petition was published on 16th August, 2019 and that there is indication that the court will issue a grant within 30 days if there is no objection filed. He argued that the said grant was issued on 28th October, 2019; that Section 68 of the Act requires anyone who wished to file objection outside required time to seek leave of court; that this was not done, making the Objection not only unprocedural but also against the law; that under Rule 17(1) of the Probate and Administration Rules the Objection cannot continue to be on record and should be dismissed.

Mary Nyambura argued that the Grant had been issued within the same year and that there was no deadline. She argued that she was not out of time in filing the Objection and that she is not protesting the Grant but the confirmation of the same. She further stated that she is pursuing upkeep and contesting the confirmation of grant and not its issuance. She argued that the reason she is asking for provision is that she had orders from the Children Court in respect of the children and that she presented all the facts of what had transpired after the deceased died. She stated that the school fees were being paid by the deceased and that the same stopped when the deceased was in India for treatment. In addition, she argued that they are beneficiaries to the deceased estate. She stated that she also wanted food and housing. That she had access to her matrimonial home in Kiserian but was evicted by police after one of the beneficiaries called them. She further stated that they are being accommodated by well-wishers.

In response, Mr. Wanyingi argued that the Objector was arguing a different matter from the application dated 25th January, 2021. He argued that the Summons dated 25th January, 2021 were not supported by an Affidavit. He stated that if facts were not pleaded then he could not respond to the issues. He further argued that the Objector relies on Section 26 of the Law of Succession Act yet she has not proved that she is a dependent and has just raised matters without evidence. He stated that they do not recognize her as a beneficiary and that her application

must be supported by evidence. In addition he stated that the order being sought is not correct as the grant has not been confirmed and that the application ought to be dismissed.

Analysis and Determination

Mary Nyambura relied on Section 26 of the Law of Succession Act and Rule 45(1) of the Probate and Administration Rules. I have gone through the Application, the Affidavits, the Preliminary Objection as well as the Grounds of Opposition. I have also considered the arguments made by both parties.

The circumstances under which a Preliminary Objection can be raised were set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696*, where it was held that:

“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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

Does the Preliminary Objection in this matter raise a point of law which if argued as a preliminary point may dispose of the suit? To answer that question I need to look at the provisions relating to the petitioning of the grant and making objections to the issuance of that grant. The procedure is provided under Sections 67 to 69 of the Law of Succession Act. Section 67 of the Act provides for publication of the notice of the application for a grant before the grant is issued. The Notice gives time within which any party with an objection to the issuance of the grant to the applicant is done.

Section 68 provides for the procedure to lodge an objection by anyone opposed to the application for issuance of a grant. This objection must be done within the period specified in the Notice. After the objection has been lodged, the court issues a notice to the objector to file an answer to the application and a cross application within a specified period after which the court proceeds to determine the matter. Where there is no objection lodged the court proceeds to issue the grant.

To the same effect, Rule 17(1) of the Probate and Administration Rules also provides as follows in this regard:

“Any person who has not applied for a grant to the estate of a deceased and wishes to object to the making of a grant which has been already applied for by another person may do so by lodging within the period specified in the notice of the application published under rule 7(4), or such longer period as the court may allow, either in the registry in which the pending application has been made or in the principal registry, an objection in Form 76 or 77 in triplicate stating his full name and address for service, his relationship (if any) to the deceased and the grounds of his objection”.

In addition, Rule 17 sub rules 11 provides that so long as an objection which has been lodged has not been withdrawn, no grant shall be made by any registry to the estate of the deceased, prior to the expiration of the period for the filing by the objector of an answer and cross-application specified by the court under section 68 of the Act. Further, that no registrar shall make a grant if he has knowledge of the existence of an effective objection lodged in any registry in respect of the estate of the deceased.

It is evident from the above provisions that an objection can only be competently made before the issue of a grant and within the time limits set out in the published notice of an application.

As argued by Mr. Wanyingi, the petition in this matter was published on 16th August, 2019 and the grant was issued on 28th October, 2019. There is no indication of an objection to the making of the grant and that is the reason the court issued the same. The Objectors herein filed her Objection on 25th January, 2021, almost two years after the grant had been issued to the Administratrixes. It is obvious to me that these are two years too late for the Objector. She has filed wrong proceedings.

It is also clear that she did not file a Supporting Affidavit to the Objection, instead she filed Affidavit of Protest. Both the Objection and the Affidavit of Protest are based under Section 26 of the Act and Rule 45 (1) of the Probate and Administration Rules. Section 26 relates to the provisions of dependants who have not been adequately provided for in the will or in intestacy. Rule 45 (1) provides the procedure for such applications.

It is clear to me that the P.O raised in this matter raises a point of law that does not require any arguments to establish. It is a point of law which has the effect of settling this matter. There is nothing to object to. The grant has already been issued and the Objector has no case in making any Objection. What she needs is a different type of pleading and given the section of the law she has based her Objection, her submissions in court and her Affidavit of Protest, it is clear to me that she is seeking to be recognized as a widow of the deceased and her children as the children of the deceased and that they are entitled to a share of the estate.

I need not spend more time on this matter. It is clear that the Objection raised by Mary is not meritorious. It is wrongly before the court and as stated by the Administratrixes, it is misconceived, bad in law, incompetent, vexatious and an abuse of this court's process. The same cannot be allowed.

The P.O and the Grounds of Opposition are hereby allowed with the effect that the Objection and the Summons both dated 25th January 2021 are hereby dismissed. Let each party bear own costs.

Having said that, I wish to state that this is a court of law and a custodian of justice. It is not the intention of this court to close any party to a suit before they are fully heard. I note that there is an Affidavit of Protest although wrongly filed as Supporting Affidavit to the Objection. The Objector may have a case. I will allow her to argue her Protest at the time of hearing the Summons for Confirmation of Grant. I will not lay emphasis to the procedural technicalities but will allow her to proof her case as a widow and her children as dependants of the estate of the deceased. This is a matter that could easily go to court-annexed mediation but I want to hear parties on that issue.

Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 2ND NOVEMBER 2021.

S. N. MUTUKU

JUDGE