



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 702 OF 2019

IN THE MATTER OF THE ESTATE OF HURBAI HUSSEIN (DECEASED)

ARSHAD BEGUM SHAH (suing as the administratrix of the Estate of HURBAI

HUSSEIN (Deceased).....PETITIONER

VERSUS

NURU ABDULLA AHMED.....OBJECTOR

RULING

1. Before this Court for determination is the Notice of Preliminary Objection dated **11th June 2021** by which the **OBJECTOR NURU ABDULLA AHMED** opposes the summons for confirmation of Grant dated **2nd January 2020** on the following grounds:-

“The Petitioner’s Petition for grant of letters of administration intestate offends the mandatory provisions of section 51(a), (b),(c),(d),(e),(f) & (h), 51(3)(a) and 71(2) of the Law of Succession Act and the confirmation of grant ought to be revoked as deceased left a will for the estate in 1983.”

2. The Preliminary Objection was supported by Grounds in support thereof which grounds were dated **18th June 2021** the Further Affidavit dated **11th June 2021** and the Supplementary Affidavit dated **6th August 2021**.

3. The Administrator of the estate **ARSHAD BEGUM SHAH** filed a Replying Affidavit dated **8th July 2021** by which she opposed the Notice of Preliminary Objection. The matter was canvassed by way of written submissions. The Objector filed the written submissions dated **9th August 2021** whilst the Administrator relied upon her written submissions dated **12th October 2021**.

BACKGROUND

4. This Succession Cause relates to the estate of **HURBAI HUSSEIN** (hereinafter ‘the **Deceased**’) who died in **Nairobi** on **17th June 1985**. Following the demise of the Deceased his granddaughter-in-law **ARSHAD BEGUM SHAH** Petitioned the court for Grant of letters of Administration Intestate. In the Affidavit in support of the Petition dated **6th June 2019** it was indicated that the Deceased died Intestate and was survived by the following persons-

- (i) KHATIJA JAMAL JUMA – Granddaughter (Deceased)**
- (ii) ABDUL AZIZ LUHAR- Grandson (Deceased)**
- (iii) ARSHAD BEGUM SHAH – Granddaughter-in-law**

5. The estate of the Deceased was said to comprise of only **one** asset being Title No. **LR 36/11/347, 8th Street Eastleigh, Nairobi** valued at **Kshs 10 million** and the estate was indicated to have **NIL** liabilities.

6. Following the petition filed Grant of Letters of Administration Intestate were issued to the Administrator on **27th September 2019**. The said Grant was thereafter confirmed on **21st January 2020** with the sole asset of the estate devolving wholly to the Administrator.

7. The Objector **Nuru Abdulla Ahmed** then filed in court the summons dated **2nd July 2020** seeking revocation of the Grant issued and confirmed to the Administrator. The Objector claimed to be in occupation of the **Eastleigh** property. Before the summons for revocation Grant could be heard, the Objector also filed this Notice of Preliminary Objection.

ANALYSIS AND DETERMINATION

8. I have carefully considered this Preliminary Objection, the Affidavit in Reply as well as the written submissions filed by both parties. The gist of the preliminary Objection is that the Administratrix misled the court in her petition for Grant of letters of Administration by averring that the Deceased died Intestate. The Objector asserts that the Deceased died testate having left a written Will. A copy of the alleged will is Annexure 'NAA-1' to the Further Affidavit sworn by the Objector.

9. The Objector alleges therefore that the Grant issued to the Administratrix was obtained fraudulently and ought to be revoked.

10. The Administratrix counters that the document alleged to be a written Will fails to meet the threshold required by **section 11** of the **Law of Succession Act Cap 160 Laws of Kenya**. That all the executors and beneficiaries named in the Will have in any event passed away thus the alleged Will cannot be effected. That the Objector is an intermeddler who is merely trying to interfere with the estate of the Deceased. The Administratrix urges the court to dismiss this Preliminary Objection on its entirety.

11. To determine this issue I will refer parties to what constitutes a preliminary objection, as set out in the celebrated case of **Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Ltd [2]** where it was held:-

“...so far as I am aware 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...” (own emphases)

12. In the words of **Sir Charles New Bold, P.** at page **701, B:-**

“...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 has to be ascertained or if what is sought is the exercise of judicial discretion.” (Own emphasis)

13. Therefore a Preliminary objection may only be raised on a pure point of law which if determined would dispose the entire case. This is **not** the case here. The Preliminary Objection raised by the Objector raises the issue of the validity or otherwise of the written Will allegedly authored by the Deceased. This is not a pure point of law. This is an issue, which requires that evidence be heard to determine whether the alleged Will is valid and enforceable.

14. I note that the same Objector did file a summon for revocation of Grant dated **2nd July 2020**. **Hon Lady Justice Ali-Aroni** on **27th July 2020** directed that the said summons be canvassed orally at an interparties hearing. It baffles the court why instead of setting down the summons dated **2nd July 2020** for hearing the Objector instead filed this Preliminary Objection. Moreover, the Preliminary Objection raises identical issues to those raised in the summons for revocation of Grant. This borders on abuse of court process.

15. Finally, I find no merit in the Notice of Preliminary Objection dated **11th June 2021**. The same is dismissed in its entirety. The summons dated **2nd July 2020** to be set down for hearing. Costs to be met by the Objector.

DATED IN NAIROBI THIS 3RD DAY OF DECEMBER 2021.

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MAUREEN A. ODERO

JUDGE