



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

FAMILY DIVISION

MISC CASE NO. 3 OF 2017

IN THE MATTR OF THE ESTATE OF TRUFENA MWAVAGA DECEASED

AND

IN THER MATTER OF HAMISI SRM SUCC. CAUSE NO. 66 OF 2016

AND

IN THE MATTER OF REVOCATION/ANNULMENT OF THE GRANT

BETWEEN

DAVID KHASIEVERA ANUSU.....1ST APPLICANT

MARY AMUGOTSO KHASIEVERA.....2ND APPLICANT

DORIS JESANG.....3RD APPLICANT

VERSUS

EVANS KHASIEVERA ANUSU.....RESPONDENT

R U L I N G

1. By the summons dated 02.03.2017 the applicants seek to revoke and/or annual the grant of Letters of Administration intestate issued to Evans Khasievera on 17.02.2017 by the Senior Resident Magistrate's court at Hamisi on grounds that the proceedings to obtain the grant were defective in substance; that the grant was obtained by means of fraud; that the grant was obtained by means of untrue allegations of some fact essential in point of law to justify the grant and further that the registration of the respondent as administrator of the deceased's property, if allowed to stand, shall amount to intermeddling. There is also an affidavit sworn by the applicant, David Khasievera Anusu in support of the summons.

The Objection

2. When the summons came up for interparties hearing on 23.05.2017, Mr. Musiega, counsel for the applicant raised a preliminary objection on the ground that this honourable court has no jurisdiction to hear and determine the summons by dint of the provisions of the Magistrate's court Act No. 26 of 2015 and in particular the provisions of Sections 23 and 24 thereof which repealed Sections 48(1) and 49

respectively of the Law of Succession Act, Cap 160 Laws of Kenya. Counsel fortified his argument by stating that since the applicant has not shown by evidence that the value of the deceased's estate is greater than the pecuniary jurisdiction of the Magistrate's court at Hamisi, then he has no business filing the summons before this Honourable Court. Counsel urged court to uphold the Preliminary objection and dismiss the summons.

Response to the Preliminary Objection

3. The applicants filed written submissions and urged this court to find that the alleged Preliminary Objection by the respondent does not meet the threshold of a Preliminary Objection as set out by the Court of Appeal for Eastern Africa in the case of **Mukisa Biscuit Manufacturing CO. Ltd. – vs – West End Distributors Ltd [1969] EA 696 at page 700**. The applicants arguments are premised on the ground that the sections of the Magistrate's courts Act cited by the Respondent do not make the amendments alluded to by the respondent and in particular that the said sections are silent as to whether the Magistrate's Court shall entertain an application under Section 76 of the Law of Succession Act. Section 48 of the Magistrate's Court's Act reads;-

“Notwithstanding any other written law which limits jurisdiction but subject to the provisions of Section 49, a resident Magistrate shall have jurisdiction to entertain any application other than an application under Section 76 and to determine any dispute under this Act andHigh Court.”

4. Counsel also cited rule 44(1) of the Probate and Administration Rules which provides that applications for revocation of grants shall be made to the High Court, unless the court otherwise directs. Even where the grant was issued by a resident Magistrate where there is no High Court, such applications shall be made through the High Court registry situated nearest to that Resident Magistrate's registry.

Analysis and Determination

5. After a careful analysis of the law and the submissions, I am of the considered view that the respondents Preliminary Objection has no merit for two reasons. The first reason is that provisions of the law set out above clearly show that the High Court still has exclusive jurisdiction to entertain an application under Section 76 of the Law of Succession Act. In any event, the Preliminary Objection also fails on the ground that it seeks a discretionary order from the court. A Preliminary Objection must only be on a point of law and not otherwise.

Conclusion

6. For the reasons stated above, the respondents Preliminary Objection to the summons for revocation is accordingly dismissed with costs to the applicants

It is so ordered.

Ruling delivered, dated and signed in open court at Kakamega this 13th day of July, 2017

RUTH N. SITATI

JUDGE

In the presence of;-

.....Mr. Matete for Musiega(present).....For Respondent/Objector

.....Mr. Nandwa (absent).....for Applicants/Respondent

.....Erick.....Court Assistant.