



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

PROBATE AND ADMINISTRATION CAUSE NO. 370 OF 2014

IN THE MATTER OF THE ESTATE OF MARY NAMUKURU WABWILE.... .DECEASED

BETWEEN

BARTHOLOMEW JUMA WAFULAPETITIONER/RESPONDENT

AND

FRANCIS WABWILE NYONGESAOBJECTOR/APPLICANT

RULING

1. Before court is an application by the Objector pursuant to Order 40 Rules 1, 3, 4 (1), III Order 51 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The said application for purposes of this ruling sought for injunctive orders against the Petitioner by himself, his agents and or servants from dealing in the estate of one Mary Namukuru Wabwile in any manner whatsoever pending hearing and determination of the suit. The application brought under certificate of urgency is dated 8th May, 2015.
2. The application is based on the grounds that, at the time of his death the deceased was not married, and lived alone; the Petitioner is not a beneficiary of the estate and he is out to deny the right beneficiaries their right of inheritance.
3. The Petitioner objected to the application through a replying affidavit He contended that the deceased was his wife and was survived by the Petitioner's children as the deceased had no children of her own; that he married the deceased in the year 2000 and paid dowry; and carried out all the customary rituals after he buried the deceased. He produced photographs depicting his life with deceased prior to her death. He further contended that in her last 4 years the deceased suffered from breast cancer, and during her illness he nursed her; that the Objector at no point visited the deceased; further the objector was present and participated in the burial that took place at the Petitioner's home.
4. At the hearing of the application Mr. Masinde cited Section 73 of the Law of Succession Act. He argued that the Petitioner did not proof marriage between him and the deceased.
5. On the other hand Mr. Sichangi for the Petitioner objected to the application arguing that the application was defective in form as the Law of Succession Act is self-reliant. He argued further that Section 66 of the Law of Succession Act gave priority to a spouse and the application therefore has no basis.
6. I have considered the application, the affidavit in reply and submissions by counsel on both sides.

The issues for consideration are:

1. Whether the application before court is defective.
2. If the answer to (1) is in the affirmative whether or not to grant the injunctive orders sought for.
7. Briefly the background of this matter is that the Petitioner filed for grant of the representation of the estate of the deceased Mary Namukuru Wabwile describing himself as the husband. He cited names of 3 sons and 2 daughters as survivors of the estate of the deceased. On the other hand the objector filed objection proceedings claiming that at the time of her death the deceased was single and had no child.
8. Rule 63 (1) of Probate and Administration Rules provide;

“Same as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registration in any particular case for reasons to be receded, the following provisions of the civil procedure rules, namely Orders V, X, XL, XV, XVIII, XXV, XLIV and XLIX, together with the High Court practice and procedure Rules, shall apply so far as relevant to proceedings under these rules”

In my considered opinion Mr. Sichangi is correct in that the Law of Succession stipulates what rules may be adopted and applied with the Civil Procedure Rules in succession proceedings. Furthermore Section 47 as read with 73 of the said Act empowers the court to entertain an application such as the one before court and therefore there was no need of bringing the current application under the provisions of either the Civil Procedure Rules or Act. In that regard, the application is incompetent.

9. Even if the court was to ignore the procedural technicality, the grounds upon which the application is grounded are subject of objection proceedings. There has been no demonstration that the petitioner was intermeddling with the estate. Whether, he was a husband or not, whether the deceased had children or not is a subject of the objection proceedings and I am therefore of the view that second limb of this application must also fail.
10. The court takes liberty however to remind the petitioner that for now he can only collect and preserve the estate pending the objection proceedings and eventually confirmation and distribution of the estate to the right beneficiaries.

Application dismissed with costs.

Dated at Bungoma this 6th day of October 2015

ALI-ARONI

JUDGE.