

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO. 1577 OF 2006

IN THE MATTER OF THE ESTATE OF MARTIN LUTHER AWUOR (DECEASED)

RULING

1. I am called upon to determine the preliminary points of law raised in the Notice of Motion dated 9th December 2012 and filed herein on 12th November 2012.

2. The objection is raised with respect to the application dated 5th October 2012. It is stated that the application, its supporting affidavits and the annexures are incurably defective. The application is also said to be premature, an abuse of the process of court and as seeking orders that are not tenable.

3. The application dated 5th October 2012 is a summons under Sections 47 and 70 of the Law of Succession Act and rules 73 of the Probate and Administration Rules seeking that the applicant be declared a dependant of the deceased.

4. The affidavit in support of the application was sworn by the applicant before Joanita Bushara on 5th October 2012. The former affixed a stamp and seal on the document indicating that she was an advocate, notary public and commissioner for oaths. Attached to the affidavit is a certificate of birth of the applicant bearing the same stamp and seal but not marked as an exhibit. There are other documents which are marked as exhibits and bear the stamp and signature of Joanita Bushara, Commissioner for Oaths.

5. What a Preliminary Objection should entail was stated by the former Court of Appeal for East Africa in *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd (1969)EA 696*, where it was said-

“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 same. Examples are of an objection to the jurisdiction of the court on a plea of limitation or that parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ...”

6. Quite clearly, the matters raised by the objector do not fall within what was defined by the court in the authority cited above. On the whole the matters raised by Mr. Awuor can only be adjudicated upon after all the parties have been heard on the application. Whether the application is premature, or an abuse of the court process or the orders sought are untenable matters to dispose of after looking at the facts of the matter.

7. There is though the technical issue relating to the application being defective. Mr. Awuor in his submissions addresses me on the jurat and says the person who commissioned the affidavit was unqualified. There is no evidence that Joanita Bushara is not a Notary Public and therefore unqualified to commission in Uganda a document intended to be used in court proceedings in Kenya. I see nothing wrong with application and the affidavit in question. I agree though there are some annexures that are not properly on record to the extent that they were not notarized. But then that alone cannot warrant the striking out of the application.

8. It has not been properly articulated how the court lacks jurisdiction to hear and determine the application. This court has jurisdiction to handle causes filed under the Law of Succession Act. That

would include applications that are properly filed within the cause.

9. I find no merit in the Preliminary Objection dated 9th December 2012. I hereby overrule it. The application dated 5th October 2012 is properly before the court. It shall be heard and disposed of in the normal cause of business. Costs to be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 2ND DAY OF OCTOBER, 2015.

W. MUSYOKA

JUDGE