



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**SUCCESSION CAUSE 345 OF 2007**

**IN THE MATTER OF THE ESTATE OF ELIUD KARANJA WAWERU (DECEASED)**

**PAULINE WAIRIMU GATHIRU.....APPLICANT**

**VERSUS**

**ROSEMARY NJERI KARANJA.....1<sup>ST</sup> RESPONDENT**

**WILSON MUIRURI KARANJA.....2<sup>ND</sup> RESPONDENT**

**SIMON MWANGI KARANJA.....3<sup>RD</sup> RESPONDENT**

**RULING**

A Preliminary Objection has been raised in respect of the applicant's application dated 19<sup>th</sup> May, 2009 for revocation of the grant and an order directed at the petitioner/respondent to vacate a house at Gecha Farm in Gilgil.

The Notice of Preliminary Objection raises two points, namely; that the application does not comply with the mandatory requirements of the Law of Succession Act and that the applicant has no *locus standi* to bring it. Submitting on these grounds, counsel for the petitioner/respondent argued that the application contravenes Rule 59 (1)(5) of the Probate and Administration Rules. That under Rule 44(1) of the Probate and Administration Rules, the application must be by Summons in form 107. That it is not signed by the Registrar as required; that a prayer for an order

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to the petitioner/respondent to vacate the property at Gilgil cannot be brought under Form 107; that the affidavit in support of the application is not in Form 14 as required. In support of the above, counsel cited **In the Matter of the Estate of Mwangi Nganga – (Deceased) – John Mwangi Nganga & Another V. Samwel K. Mwangi & Another**, H.C.Succ.Cause (Eld.) No.89/03.

The second objection is that the applicant lacks legal capacity to bring the application as no letters of administration in respect of the estate of the deceased has been issued to her. In support of the above,

counsel relied on the decision of **Otieno V. Ougo & Another** (1987) KLR 407.

The Preliminary Objection was opposed on the grounds that defect of form cannot be used to defeat the application. That the court has inherent powers under Rule 73 of the Probate and Administration Rules to grant orders to meet the ends of justice. That the requirements under Form 107 have been met in the application. On *locus standi* of the applicant, counsel submitted that that is a matter of evidence and cannot be raised in a Preliminary Objection. I have considered the arguments.

A Preliminary Objection must consist of a point of law which is capable of disposing of matter before the court. A Preliminary Objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See **Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd.** (1969) EA 696. The first point

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raised relates to the form of the application. First, Rule 59 which provides that every application to the court shall be brought in the form of a Petition, Caveat or Summons, as may be appropriate. If it is by summons, it must be in one of the forms contained in the First Schedule to the Probate and Administration Rules. The forms in question are Forms 104 to 110.

The substantive provision under Section 76 of the Law of Succession Act simply provides that a grant may be revoked or annulled if the court decides on application by any interested party without specifying the form of application. Rule 44 of the Probate and Administration Rules, however, specifies that the application shall not only be by Summons but also in Form 107. Rule 44(2) aforesaid makes further provision that the Summons shall be filed with an affidavit of the applicant in Form 14. The preamble to the Law of Succession Act provides as follows:

***“An Act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto.”***

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The Act was a special legislation which was intended to, among other objectives, consolidate the law on succession. It is in its present form a self-regulating legislation with substantive and comprehensive rules. It prescribes forms to be used in moving the court. Yet often counsel or unrepresented litigants prefer to bring applications as if proceeding under the Civil Procedure Rules. The instant application is a perfect example. All the applicant needed to do is to copy the contents of Form 107 if the same was not available in the registry.

Rules of procedures have critical role in the administration of justice and adherence is a must. I emphasize that the application ought to have been brought in the manner prescribed in Form 107. In a similar manner as the Civil Procedure Act under Sections 3, 3A and 63(e) retain inherent jurisdiction of the court in matters under that Act, Section 47 of the Law of Succession Act and Rule 73 of the Probate and Administration Rules donate unlimited inherent power to a probate court to make such orders as may be necessary for the ends of justice or to prevent abuse of its process. I must set out the provisions of Section 47 aforesaid. It states:

***“The High court shall have jurisdiction to entertain any application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”*** (emphasis supplied).

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So that, although the rules are the vehicles of delivering substantive justice, the court must look at any prejudice or injustice that may have been occasioned by failure to adhere to the rules. The application

being challenged here is headed SUMMONS FOR REVOCATION OF GRANT while Form 107 is styled SUMMONS FOR REVOCATION OR ANNULMENT OF GRANT.

The heading adopted in the application conforms with that in Form 1, namely, IN THE HIGH COURT OF KENYA AT NAKURU

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The information that must be contained in the application for revocation as provided in Form 107 are, in the case of an intestate application, the name of the administrator, the date of the deceased person's death, the date the grant was made to the administrator and the grounds for seeking revocation. The application to be supported by grounds contained in the accompanying affidavit. From the totality of the applicant's averments and from the record herein, there cannot be any doubt that the grant was issued to Rosemary Njeri Karanja, Wilson Muiruri Karanja and Simon Mwangi Karanja, the respondents. Again the date of death of the deceased, the date of the grant and the grounds for seeking revocation are readily discernible. To that extent the mischief of Form 107 is satisfied hence no injustice or prejudice has been caused to the respondents.

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Turning to the second ground, it was argued that the question of *locus standi* is a question of evidence. With respect to those submissions,

the issue of *locus standi* as argued here is pure question of law. Although whether the applicant was married to the deceased is a matter that can only be resolved after evidence has been adduced, what is being questioned by this objection is the applicant's capacity to agitate by way of application, her interest in property registered in the name of the deceased in the absence of letters of administration. It has been decided in a long line of authorities that:

***“Personal representative shall, subject only to any limitation imposed by their grant have the following powers:-***

***(a) to enforce, by or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”***

– (see Section 82(a) of the Law of Succession Act).

In ***Otieno V. Ougo*** (Supra) it was held, *inter alia*, as follows:

***“But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does, the action is***

***incompetent at the date of its inception.”***

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As early as 1703 it has been so held in the English case of ***Wankford V. Wankford*** (1703) 1 Salk 299 where Powys, J. said:

***“but an administrator cannot act before letters of administration are granted to him.”***

The applicant seeks in paragraph (b) of the Summons that the respondents be ordered to vacate her house at Gecha Farm, Gilgil where she had been living with the deceased. Apart from the fact that the details such as L.R. number of the property in question have not been provided, there is no evidence that the

property belongs to the applicant. There are two (2) properties in Gilgil, namely, Gilgil/Karunga Block 4/92 (New Ngecha) and Gilgil/Karunga 4/300 (New Ngecha). These are, according to certificates of official search registered in the name of the deceased.

But more importantly such an application (for eviction) cannot be brought in the omnibus manner as it was brought. For the above reasons, it is observed that paragraph (b) of the summons is unattainable but that *per se* does not dispose of the application. The prayer for revocation is proper, as I have found.

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To that extent the preliminary objection fails and is overruled.

I make no orders as to costs.

DATED and DELIVERED at Nakuru this 2<sup>nd</sup> day of October, 2009.

**W. OUKO**

**JUDGE**