



**In re Estate of Stephen Mbau Giticha (Deceased) (Succession Cause
83 of 2006) [2022] KEHC 3144 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3144 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 83 OF 2006
TM MATHEKA, J
APRIL 21, 2022
IN THE MATTER OF THE ESTATE OF STEPHEN MBAU
GITICHA (DECEASED)**

BETWEEN

SUSAN NDURUKI MBAU ADMINISTRATRIX

AND

JONATHAN GITICHA MBAU PROTESTOR

AND

ROSE WAIRIMU MBAU BENEFICIARY

AND

LAWRENCE WACHIRA MBAU ADMINISTRATOR

AND

LAWRENCE GAKUNA MBAU APPLICANT

SAMMY MBUA GITICE APPLICANT

RULING

1. Stephen Mbau Githicha died on 22nd March 1986.
2. According to the Chief's letter of Chinga Location dated 4th July, 2005, he was survived by 2 widows: - Susan Nduruki Mbau and Muthoni Mbau. (It turns out the person described as Muthoni Mbau is the same as Rose Wairimu Mbau) The three had ten (10) children seven of whom appear to have survived him, and three to have predeceased or to have died before the cause was filled. That information is not available on the record.



3. A Grant of Letters of Administration Intestate was made to Susan Nduruki Mbau on 9th August, 2006 and she filed Summons for Confirmation of Grant dated 2nd April, 2007. She proposed that the entire estate of the deceased be shared equally between her and Muthoni Mbau. It composed of plots No.11, 20, 21 Subukia, Plot No.6 Commercial Mumui, Subukia/Subukia Block 9/4 and 8, Kieseges/Nyamamithi Kieseges No.217, 218, 219 and 220.
4. An affidavit of Protest was filed by Jonathan Giticha Mbau on 19th July, 2007 to the effect that his mother, one Mary Rose Waweru Mbau was the 1st wife of the deceased. He disputed the date of death as indicated in the Petition, and the list of properties set out at form P & A 5. He contended that his father had more properties than those listed and had distributed his properties in his life time between his mother and Susan Nduruki.
5. On 23rd February, 2009 a Certificate of Confirmation of Grant was issued by Koome J (as she then was) where the estate was distributed between Susan Nduruki Mbau and Wairimu Mbau in equal shares to hold in trust for themselves and for their children: -According to the grant these were the assets that were distributed. Subukia Centre Plot Nos.20 and 21 Plot No.11 Residential at Subukia Plot No.6 Commercial Mumui Subukia/Subukia Block 9/4 & 8 (Chinga) Subukia/Subukia Block 9/8 (Chinga) Kieseges/Nyamamithi/Kieseges No. 217, 218, 219 and 220
6. On 29th June, 2009 Rose Wairimu Mbau filed Summons for Revocation/Annulment of Grant on the ground that three (3) of the properties listed for sharing by Susan Nduruki were registered in her names, that is Subukia/Subukia/9/4 and 8 (Chinga), and were thereafter listed as part and parcel of the estate.
7. She also listed additional properties, and sought the court order that they be included as assets of the deceased. Her registration was revoked by the Ruling of Maraga J (as he then was) on 2nd July 2010.
8. John Giticha Mbau died on 28th May, 2015.
9. Susan Nduruki Mbau died on 4th May, 2018.
10. Rose Wairimu Mbau died on 13th July, 2018.
11. The meaning of that is that the estate of Stephen Mbau Giticha (deceased) has no administrator as Susan Nduruki Mbau was the sole administrator.
12. To deal with that lacuna two applications were filed: -
 - i. Notice of Motion dated 15th October, 2019 brought under Order 24 Rules 1 and 2 of the [Civil Procedure Rules](#), 2010 and Sections 1A, 1B of the [Civil Procedure Act](#) Cap 21 Laws of Kenya.
This is brought by Lawrence Gakuna Mbau son of Rose Wairimu Mbau (deceased) and Sammy Mbau Gitice son of Jonathan Giticha Mbau (deceased).
These two (2) seek to be substituted to replace their deceased parents as beneficiary and protestor respectively. They support their Notice of Motion with an affidavit and annexures being the certificates of death of their respective parents.
 - ii. Summons dated 1st February, 2021 by Lawrence Wachira Mbau son of Susan Nduruki Mbau brought under Section 47 of the Laws of Kenya [Cap 160](#) and Rules 43 (1) and 49 of the [Probate and Administration Rules](#).
The applicant seeks that the grant of letters and certificate of confirmation of grant given on 23rd February, 2009 be amended by substituting the name of the administrator with that of the applicant. The summons is supported by an affidavit with annexures, the Certificate of



Confirmation of grant, a letter from the Chief, Chinga North West Location dated 6th May, 2019 showing the survivors of Susan and certificate of death.

13. I have carefully considered the record, the applications, supporting affidavits and three issues arise for determination.

ISSUE FOR DETERMINATION

Whether the deceased Administrator Susan Nduruki Mbau the deceased Protestor Jonathan Giticha Mbau, the deceased beneficiary Rose Wairimu Mbau can be substituted in the manner sought by the applicants;

Analysis & Determination

14. To deal with that issue some questions need to be answered. Is substitution provided for in the [Law of Succession Act](#) Cap 160? Khamoni J in [Re Estate of Mwangi Mugwe alias Elieza Ngware \(deceased\)](#) [2003] eKLR, had this to say:

“...the operative word is “substitution”. The [Law of Succession Act](#) has no provisions talking about substitution of a deceased single administrator...In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the [Law of Succession Act](#) and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the grant has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”

15. What comes out here is the process that a person seeking to replace a deceased sole administrator ought to follow. Seek the revocation of the now useless grant, apply for his appointment with the supporting documents from the other beneficiaries.

16. Musyoka J on his part in [Re Estate of George Ragui Karanja \(Deceased\)](#) [2016] eKLR held:

“The [Law of Succession Act](#) does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the [Law of Succession Act](#), to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

17. Clearly from the foregoing it is evident that upon the demise of the administrator any other person seeking to be an administrator has to put in their application as provided for at Section 51 to 66 of the [Law of Succession Act](#).

18. In drawing my conclusions, I find guidance in the oft cited Court of Appeal case of *Florence Okutu Nandwa & Another v John Atemba Kojwa*, Court of Appeal Civil Appeal in Civil Appeal No. 306 of



1998 at Kisumu where it was held that a court should not issue a grant to a person who has not sought for it. The court stated: -

“A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another.

The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules). I agree with the respondent that there cannot be a substitution of the dead administrator by his wife in the manner proposed by the applicant.”

19. The court is categorical. There can be no substitution of the deceased administrator by his son.
20. In view of the above authority am in agreement with Gikonyo J in Julia Mutune M'mboroki v John Mugambi M'mboroki & 3 others [2016] eKLR that upon the demise of a sole administrator, it is a mistake to apply to substitute the administrator as the same is not envisaged by the Law of Succession Act Cap 160. He states:

“There is absolutely no room of substitution of the deceased administrator under the Law of Succession Act. In my view, therefore, where the sole administrator is a natural person, and he or she dies, the grant becomes useless or inoperative by reason of subsequent event of his demise....

Accordingly, in such case, the proper procedure is to apply for revocation of grant of letters of administration under section 76(e) of the Law of Succession Act on the reason that the grant has become useless and inoperative through subsequent circumstances and a grant to be made to another person named in the application.”

21. Clearly therefore there is no room for the substitution of a deceased administrator by her son. The way out is for the grant to be revoked as being inoperative and useless. The Applicant therefore ought to have filed an application seeking revocation of the said grant and an application for the Grant Letters of Administration Intestate. Such Application is not before court.
22. With respect to the Protester and the Beneficiary, the application is brought under Order 24 Rules 1 & 2 of the Civil Procedure Rules 2010 and Section 1A & 1 B of the Civil Procedure Act Cap 21 Laws of Kenya .Order 24, Rules 3 and 4 of the Civil Procedure Rules provides the procedure to be followed in the substitution of a deceased Plaintiff or Defendant, and provide that the court can upon application cause a legal representative of the deceased Plaintiff or Defendant to be made a party to a suit, and that party shall proceed with the suit.
23. However, it is important to point out that not every provision of the Civil Procedure Code and Civil Procedure Act applies to the Law of Succession Act Cap 160. Rule 63 of the Probate and Administration Rules provides for the provisions that are applicable:

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX



(Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”

24. In the case of *Re Estate of Omar Abdalla Taib*[2017] eKLR the court observed that that Order 24 is not one of the provisions of the *Civil Procedure Rules* imported into the *Law of Succession Act* by virtue of the above provision and that the *Law of Succession Act* is self-sufficient as it has its very own provisions for substitution of a deceased party.
25. In view of the above provision, an applicant with a limited grant of representation for the estate of the deceased testator may represent the deceased in the suit herein. In addition, Rule 40(6) of the *Probate and Administration Rules* allows any person wishing to object to the proposed confirmation of a grant to file an affidavit of protest against such confirmation stating the grounds of his objection. The Applicant can also in his own right file an affidavit of protest without necessarily substituting the deceased Testator.
26. For guidance I turn to the case of *Alexander Mutunga Wathome v Peter Lavu Tumbo & Anor* [2015] eKLR, Machakos High Court Succession Cause No. 80 of 2011 where the court stated;

“In law, one can only represent the estate of the deceased person when a grant of representation has been made in respect of the estate of such deceased person under the *Law of Succession Act*. In addition, Section 82 of the *Law of Succession Act* provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which by virtue of any law survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person. The applicant has in this respect not produced evidence to show that he has been given such a grant of representation with respect to the 2nd testator’s estate and cannot therefore be substituted in the place of the 2nd testator”.
27. I am of the view that this applies similarly to the deceased Rose Wairimu Mbau as the claim for her share would now be made on behalf of her estate.
28. The two applicants have the option of obtaining limited grants to enable them represent the respective estate of their deceased parent in this cause. Section 54 of the *Law Of Succession Act* Cap 160 provides for limited grants and their situation finds expression at Paragraph 14 of the Fifth Schedule as follows:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”
29. That settles their issues.
30. Having found that the administrator cannot be substituted in the manner sought by the applicant, what should happen to the estate?
31. Firstly Section 76 of the *Law Of Succession Act* Cap 160 empowers the court to revoke the grant on its own motion A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion—



where the parameters set out therein are met. In this case the grant is useless and inoperative as the person to whom it was issued is deceased.

32. To that end therefore the grant made to Susan Nduruki Mbau and confirmed on the 29th February 2009 be and is hereby revoked.
33. That leaves the beneficiaries of the Estate of Stephen Mbau Giticha with the opportunity to apply for a fresh grant as provided for under Section 51 to 66 of the *Law of Succession Act*.
34. Taking into consideration the age of the matter it is only proper that they do so within 45 days hereof in default of which the matter will be referred to the Public Trustee.
35. The order therefore is that the three applications fail.
36. The grant made to Susan Nduruki be and is hereby revoked.
37. The Beneficiaries of the estate of the deceased have 45 days hereof to file and serve the requisite application failure to which the court will appoint the Public Trustee to administer the estate.
38. This being a family matter there are no orders to costs.
39. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL, 2022

MUMBUA T MATHEKA

JUDGE

In the presence of;

CA Edna

Lawrence Wachira Mbau

Ms. Cheronno for Lawrence Gakuna Mbau

Gakuhi Chege Advocates for the intended Administrator

Ndeda & Associates Advocates for intended Protester & Beneficiary

