



REPUBLIC OF KENYA



**KENYA LAW**  
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**In re Estate of Cosmas Gatherer Mungai (Deceased) (Succession Cause  
13 of 2016) [2022] KEHC 10868 (KLR) (23 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10868 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
SUCCESSION CAUSE 13 OF 2016**

**RB NGETICH, J**

**JUNE 23, 2022**

**IN THE MATER OF THE ESTATE OF COSMAS GATHERER MUNGAI (DECEASED)**

**BETWEEN**

**LUCY WANJIKU MUNGAI ..... APPLICANT**

**AND**

**GRACE WANGARI KAMAU ..... RESPONDENT**

**RULING**

1. The applicant has filed the current application dated 1<sup>st</sup> July 2021 seeking to substitute one of the administrators Philip Mungai Gatherer who is now deceased with Lucy Wanjiku Mungai.
2. The application is supported by the affidavit sworn by Lucy Wanjiku Mungai. She averred that she is the wife of the deceased administrator who died on 31<sup>st</sup> March, 2021 before he could complete the transmission and the estate belongs to her late son.
3. Grace Wangari Kamau filed a replying affidavit sworn on 23<sup>rd</sup> September, 2021 to oppose the application. She averred that her co-administrator died before the transmission of the estate and the application is fatally defective and ought to be dismissed; that the applicant is not a party to the suit and thus has no audience before the court.
4. Further, she avers Section 81 of the Law of Succession vests the powers and duties of the personal representative in the surviving administrator in case of demise of one administrator thus she should take full responsibility for administering the estate. She contends the application is malicious and a waste of judicial time.
5. Directions were taken on 21<sup>st</sup> February, 2022 that the application be canvassed by way of written submissions. Parties complied by filing written submissions.



## **Applicant's Submissions**

6. Counsel for the applicant filed written submissions dated 28<sup>th</sup> February, 2022. She submitted that there is a need to substitute the administrator as most beneficiaries to the estate are minors and there is a continuing trust of the estate of the deceased. She submitted that the Respondent is untruthful and thus the need to have a co-administrator to help in the administration of the estate.
7. She urged this court to allow the application as the substitution is based on the best interest of the minors.

## **Respondent's Submissions**

8. Counsel for the Respondent filed submissions dated 28<sup>th</sup> April 2022, and submitted that the application as brought under Rules 43 of the Probate and Administration Rules and Section 74 of the Succession Act is defective as the estate has already been distributed by this honourable court and the Respondent is willing to transmit the property as per the court orders.
9. According to counsel, the Applicant has not obtained the relevant grant to warrant her appointment as a co-administrator and urged this court to dismiss the application.

## **Analysis and Determination**

10. The issue before the court for determination is whether Philip Mungai Gatheru should be substituted as an administrator.
11. A grant of representation is specific and made to a certain person, the same is therefore not transferable. Any person seeking to be appointed as an administrator must apply to the court for such orders.
12. Section 81 of the *Law of Succession Act* provides as follows:-

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him”.

13. In deciding the issue of substitution this court is guided by the decision of the court of Appeal in *John Karumwa Maina Vs Susan Wanjiru Mwangi* [2015] eKLR where the court stated as follows:-

“In the case of *Florence Okutu Nandwa and Another Vs John Atembakojwa, 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 judge stated as follows:-

“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 a 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.”

14. Further in Julia Mutune M'mborok Vs John Mugambi M'mboroki & 3 others {2016}KLR the court held as follows:-
  - a. 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
  - b. 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.
15. This court is bound by the Court of Appeal decision as set out above. A deceased administrator cannot be replaced by substitution. A person wanting to be added as an administrator in place of a deceased administrator has to seek administration as per the provision of Succession Act.
16. There is a surviving administrator who is left behind to administer the estate of the deceased.
17. The application for substitution lacks merit and the same is dismissed.
18. Final Orders
  1. Application dated 1<sup>st</sup> July, 2021 is hereby dismissed.
  2. No orders as to costs.

**RULING DELIVERED, DATED AND SIGNED VIRTUALLY AT KIAMBU THIS 23<sup>RD</sup> DAY OF JUNE, 2022**

.....

**RACHEL NGETICH**

**JUDGE**

In the Presence of:

Kinyua – Court Assistant

Mrs. Kerio for Applicant

Mr. Muchiri for Respondent

