



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC APPL NO 32 OF 2019

IN THE MATTER OF THE ESTATE OF RARU PATEL – DECEASED

RARU PATELDECEASED

MARTIN MURITHIAPPLICANT

VERSUS

VINOD LALJIRESPONDENT

RULING

1. These Proceedings were commenced by way of a chamber summons expressed to be brought under Order XXXVI Rule 1 of the Civil Procedure Rules and any enabling provision of law. I doubt whether a chamber summons could originate substantive proceedings. Nonetheless, I will consider the merits of the application.

2. The applicant seeks for a declaration that, by being left out of the estate of RARU PATEL, his constitutional rights have been violated. He alleges that a succession cause was filed secretly leaving him out of the estate of the deceased, yet, he is a biological son of the deceased albeit born out of wedlock.

3. The applicant through Wamache & Co. Advocates submitted that Order 24 rule 4 of the Civil Procedure Rules is the basis of his client’s clamour for joinder of legal representative in these proceedings. He also cited section 2 of the Civil Procedure Act to establish who a legal representative is in law. He therefore came to the conclusion that the citing of the Respondent in these proceedings is proper. He relied on the case of **KINGORI vs. CHEGE & 3 OTHERS** on the test for joinder of necessary party, that is:

- a. He is a necessary party*
- b. In case of defendant, they must be relief flowing from the defendant to the plaintiff*
- c. Order or decree cannot be enforced without his presence*
- d. His presence is necessary to enable the court effectively and completely adjudicate the issue in controversy.*

4. According to him, the Respondent is a necessary party, and therefore properly enjoined in these proceedings. He prays for his application to be allowed.

Respondent: I am a stranger

5. The Respondent stated that he neither knows the deceased nor aware of any succession cause in respect of the purported deceased person. He says he is a stranger to all matters stated in these proceedings. In his submissions, he objected to this court’s jurisdiction to adjudicate questions on legality of alleged succession cause. On jurisdiction, they cited the case of **S. K. MACHARIA VS. KCB (2012) eKLR**. According to them a court cannot assume jurisdiction in a “succession cause” that has not been disclosed. They wondered how such application could be made when there is nothing to show that the alleged deceased person had died. At least he could have annexed a certificate of death. It is puzzling what kind of orders could be sought or granted in such circumstances.

ANALYSIS AND DETERMINATION

6. I have expressed my doubt on the manner these proceedings were initiated. That notwithstanding, I do note that the applicant seeks this court to make declarations and orders in respect of some “succession cause” and “estate” that have not been disclosed or identified,

respectively. I do note also that there is nothing to show the person about whose estate the purported proceedings relate has died. I expected some evidence of death or succession case number or something of the sort to be produced in court. Even assuming these proceedings are appropriate, absence of properly identified estate, deceased person and the succession cause, this court has no basis on which to act or exercise jurisdiction. Worse, still, none of the matters in the application have been verified or are verifiable on the information provided. The court is simply being asked to grope in the dark. A court of law does not act on nothing or vacuum. A court of law does not act on perceived or hypothetical causes of action. A court of law acts on real disputes based on causes of action recognized in law. There is no identifiable cause of action disclosed or real issue in controversy for which the court may assume jurisdiction. The application before me is a perfect hypothetical formulation for purposes of teaching or instructing law students.

7. Further; the complaints I have heard relate to succession of purported deceased person. Such complaints, if true, should be litigated in the succession proceedings relating to the deceased. He should apply in the succession proceedings and prove that he a dependant of the deceased, and make whatever claim the law of succession provides for his circumstances. On that front again, these proceedings are incompetent.

8. I do note further that the Respondent claims he neither knows the applicant nor the deceased. He has also stated that he has never been appointed by any court as a personal representative of the purported deceased person herein. Here, I must remind that only personal representatives of the deceased should sue or be sued on behalf of the estate of the deceased. See the case of **MAKOKHA MUKENYA VS. ROSELYNE MAYAKU SHIUNDU [2018] eKLR**, where the court pronounced itself as follows;

“The defendant thus has no capacity to be sued on behalf of the estate of the late Matayo Shiundu Mukenya.....The defendant thus lacks locus standi to be sued and this suit against her must fail. As was held in the case of Otieno vs Ougo 1986 – 1989 E. A. L. R 486:

“...an administrator is not entitled to bring any, action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.”

9. Nothing shows that the respondent is the personal representative of the purported deceased person or a holder of grant of representation in respect of the estate of the purported deceased person. He cannot therefore be sued on behalf of the estate of the purported deceased person. For the sake of jurisprudence, the law permits filing of citations against persons with priority or in equality to apply for grant of representation in respect of a deceased person but who have refused to take out the grant. These proceedings are not citation; they have been hopelessly disguised as constitutional petition. Ultimately, the only fair assessment is that this application has no foot on which to stand. It has no evidence to support any of the allegations made. It collapses out of its emptiness. Accordingly, I dismiss the application with costs to the respondent. It is so ordered.

Dated and signed at Narok this 14th day of December, 2020

F. GIKONYO

JUDGE

Dated, signed and delivered at Meru this 16th day of December 2020

T. W. CHERERE

JUDGE