



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**MISC. APPLICATION 254 OF 2013**

**JACKLINE APONDI MIDEGA.....APPLICANT**

**VERSUS**

**MARGRET AUMA ODHIAMBO**

**& STEPHEN MBOYA MIDEGA.....RESPONDENT**

**AND**

**NATIONAL SOCIAL SECURITY**

**FUND BOARD OF TRUSTEES.....INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the application dated 27<sup>th</sup> January 2016 in which the applicant seeks, *inter alia*, an order that Esther Akumu Adao (now deceased), who was the applicant in the matter, be substituted with Jackline Apondi Midega.
2. The application is supported by the applicant's affidavit wherein she avers that she is the first born child of the late Pamela Eve Midega *aka* Pamela Adhiambo De Jesus (also deceased) and the grand-daughter of Esther Akumu Adao who died on 14<sup>th</sup> October 2015 as shown in the copy of death certificate marked "MI". She further avers that she wishes to be enjoined in the suit in place of her grandmother, Esther Akumu Adao, who is now deceased.
3. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the application through their grounds of opposition dated 29<sup>th</sup> September 2017 wherein they accuse the applicant for failing to disclose that she has 4 other siblings who rank in equal priority with her and whose consent she did not seek and obtain before making the instant application.
4. They further state that the applicant cannot seek to be substituted in place of the deceased because she is not the legal representative of the Estate of Esther Akumu Adao.
5. The respondents further state that there is a pending ruling in respect to the applicant's application dated 12<sup>th</sup> January 2016 in which parties have already filed written submissions and which application ought to be decided first as it preceded the instant application.
6. The parties then opted to canvass the application by way of written submissions.

**Applicant's submissions**

7. Through her advocates M/s O.M. Otieno & Co. Advocates, the applicant submitted that her application was merited as she was seeking to substitute the applicant/objector in respect to the summons for revocation and annulment of grant dated 16<sup>th</sup> October 2013. The applicant maintained that she qualified to be substituted as an objector in the succession cause as it was not in dispute that she is a beneficiary of the estate of the deceased who is also opposed to the proceedings leading to the issuance of the grant of letters of administration to one Margaret Auma Odhiambo and still wishes to have them revoked and/or annulled.
8. The applicant further argued that **Rule 73 of the Probate and Administration Rules, Article 159 2 (b) (d) and (e) of the Constitution and Order 10 Rule 10 of the Civil Procedure Rules** grants the court the discretion and the powers to grant the orders sought in order to dispense expeditious and substantive justice to the parties to the suit.

9. It is the applicant's case that she does not need to be the legal representative of the estate of the late Esther Akumu Adao or to seek the consent of her siblings before making the application for substitution. She also argued that the pendency of another application does not bar her from obtaining the orders sought in the instant application.

### **Respondent's submissions**

10. Through M/s Ocharo and Co. Advocates, the respondents argued that the Law of Succession Act does not make any provisions for the substitution of a deceased single administrator.

11. The respondents cited the case of **Re Estate of Keziah Wanjiru Chege (deceased) [2014] eKLR** and the matter of the **Estate of Mwangi Mugwe Alias Elieza Ngware (deceased) [2003] eKLR** wherein it was held that the Law of Succession has no provisions on substitution of a deceased single administrator and that the proper procedure was to invoke the provisions of **Section 76 (e) of the Law of Succession Act** and **Rule 44 of the Probate and Administration Rules** whereby the applicant may apply for revocation or annulment of a grant on the ground that it had become useless and inoperative through subsequent circumstances.

12. The respondents also faulted the applicant for failing to obtain the consent of her siblings before filing the instant application.

13. The Respondent further argued that this matter should be transferred to the Family Division of the High Court at Nairobi where the suit property is situated and further, that the court should first determine an earlier application dated 12<sup>th</sup> January 2016.

### **Analysis and determination**

14. I have considered the application together with the parties' written submission. The main issue for determination is whether the applicant can be substituted as the objector in place of her grandmother Esther Akumu Adao (deceased).

15. The other issues arising are:

**a) Whether the applicant should have obtained the consent other siblings before filing the application.**

**b) Whether the case should be transferred to Nairobi High Court.**

16. On the first issue of the substitution of the deceased objector, I note that the applicant's case was that the initial objector, Esther Adao is deceased. She produced the death certificate that was annexed to the affidavit in support of the application. The said deceased objector was not an administrator of the estate of the deceased whose estate is the subject of these proceedings and I therefore find that the respondents' argument that the applicant seeks to substitute a deceased sole administrator is erroneous and not present the true picture.

17. Secondly, the respondents' argument that the applicant needed to have obtained the consent of her siblings before filing the application is also misconceived because the consent of other adult beneficiaries as specified in Form 38 would only be applicable only in instances where a person is applying to be issued with a grant of letters of administration.

18. In the instant case, the applicant has not applied for grant but has instead applied to be substituted as an objector in place of a deceased objector.

19. Turning to the issue of whether this court should have determined an earlier application filed on 12<sup>th</sup> January 2017 before dealing with this application on which was filed later on 27<sup>th</sup> January 2016, I note that both the two applications were filed by the applicant and it is not upon this court to decide, for the applicant, which application to proceed with first.

20. I am of opinion that there is no mandatory legal requirement that the earlier application be heard and determined before the later one even though it would have been desirable that cases and applications be heard in a more systematic manner. My take is that the court cannot decide for the parties which matters they should proceed with as the court will only determine cases or applications that have been placed before it for that purpose.

21. Lastly, on the issue of whether or not this case should be transferred to Nairobi High Court Family Division, once again, I am of the view that the respondents voluntarily chose to file the instant succession cause before this court with the full knowledge that the subject matter of the case, to wit, the suit property was situate in Nairobi. Be that as it may, I find the issue of transfer of the case to another jurisdiction is one that can be done by consent of the parties or in the absence of a consent, by the filing of a formal application setting out the grounds for seeking the said transfer. At the moment, no such application or consent has been filed before this court so as to warrant the transfer of the case to Nairobi.

22. The upshot of my ruling is that I find that the application for substitution of the deceased objector with the applicant is merited. I further find that there is no law barring a beneficiary or a party having an interest in the estate of the deceased from filing an objection to the issuance of grant and in this case, the applicant has demonstrated her interest in the estate of the deceased in her capacity as the daughter of the deceased. Whether or not her objection to the issuance of the grant of letters of administration to the respondents will be successful is a matter that can only be determined after the hearing of the full objection proceedings.

23. Consequently, I allow the application dated 27<sup>th</sup> January 2017 with further orders that each party shall bear their own costs.

**Dated, signed and delivered in open court this 28<sup>th</sup> day of February, 2018**

**HON. W. A OKWANY**

**JUDGE**

**In the presence of:**

N/A for the Petitioner

N/A for the Objector

Omwoyo:

Court

Clerk