



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

SUCCESSION CAUSE NO. 453 OF 2017

IN THE MATTER OF THE ESTATE OF KIMINA KALII (DECEASED)

JAMESON WAMBUA KIMINA.....APPLICANT/OBJECTOR

-VERSUS-

JACKSON MUTUNGI KIMINA

SAMMY MWONGELA KIMINA.....RESPONDENTS

RULING

1. The application for determination is the one dated 28/03/2017. It is brought under section 73 of the Probate and Administration rules and seeks the substitution of one NZIOKA KIMINA with the applicant.
2. It is stated that Nzioka Kimina had applied for the revocation of the grant issued and confirmed in this cause but he died on 31/10/2016 before the hearing and determination of that application. The applicant avers that Nzioka's family refused to give him the death certificate and has therefore attached a letter from the chief as proof of death.
3. The application is opposed through a replying affidavit dated 14/08/2017 sworn by Jackson Mutungi Kimina. He avers the applicant is not the administrator of the estate of the late KIMINA KALII and thus has no standing to bring the application. Further, he contends that without letters of administration, the applicant cannot purport to represent KIMINA KALII.
4. Directions were taken on 02/11/2017 that the application be canvassed by way of written submissions. Both sides complied with the directions and filed their respective submissions.
5. I have looked at the application, the replying affidavit, the rival submissions as well as the authorities cited therein. I have also perused the entire record.
6. The issue that I need to look into is how to bring on board a party to continue with the prosecution of an application for revocation of grant where the original applicant is deceased.
7. It is clear that the applicant wants to step into the shoes of the late NZIOKA KIMINA and prosecute the summons for revocation of grant to its logical conclusion. However, the applicant has not demonstrated that he is the duly appointed personal representative of NZIOKA KIMINA's estate.
8. **Section 82 (a) of the Law of Succession Act**, Chapter 60 Laws of Kenya provides that a personal representative shall subject to any limitation imposed by their grant, have the power to enforce by suit or otherwise, all causes of action, which by virtue of any law, survive the deceased or arise out of his death.
9. Our Courts have churned out numerous authorities in affirmation of this well settled principle. It is therefore trite that anyone seeking to do anything on behalf of a deceased person must first obtain the relevant authorization. In my mind, the appropriate grant for the applicant would be a *grant ad litem* for the special purpose of litigating the pending issues.
10. The respondent relies on **Machakos High Court Succession Cause No. 80 of 2011; Alexander Mutunga Wathome –vs- Peter Lavu Tumbo & Anor (20150 eKLR** which I find relevant in the current case. The Court stated as follows;

“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 protestor’s estate and cannot therefore be substituted in the place of the 2nd protestor” (emphasis added).

11. The issue of whether there was fraud in obtaining the grant will be canvassed at the appropriate time. The relevant application is already before Court.

CONCLUSION

12. The application is incompetent and thus struck out with liberty to the applicant to file a proper one.

SIGNED, DATED AND DELIVERED THIS 17TH DAY OF MAY 2018 IN OPEN COURT.

C. KARIUKI

JUDGE

.....