



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

SUCCESSION CAUSES NO. 20 OF 2003

In the matter of the Estate of MARINGA KIONDO (Deceased)

ELIZABETH WANJIRA NJERU

PERINA IRIMA MAGONDU.....PETITIONERS

V E R S U S

FLORAH WAITHERA NJERU

NDERI JOSEPH KARWERIA

AGNESNTHAMBI KARWERIA

MUNCIPAL COUNCIL OF EMBU.....RESPONDENTS

R U L I N G

1. The application dated 07/03/2018 seeks for two prayers: -

i. That Albert Njue Njeru the legal representative ad litem of the estate of Flora Waithera Njeru deceased be made a party in this cause in place of the deceased and proceed in this suit for the benefit of the estate of Flora Waithera Njeru.

ii. That the application for substitution of the applicant be deemed to have been filed within time.

2. The affidavit of the applicant Albert Njue Njeru Njue contains the ground supporting the application.

3. It is deposed that the delay in filing the application was caused by lack of the necessary legal advice by the applicant's former advocate.

4. The applicant obtained the limited grant on 18/12/2017.

5. The applicant further states that he is the son of Flora Waithera Njeru who passed-on on 02/05/2013 and that he wishes to claim the entitlement of his deceased mother who was a beneficiary of the late Maringa Kiondo the deceased in this cause.

6. The respondents /petitioners opposed the application by way of filing a preliminary objection dated 16/07/2018.

7. The grounds raised in the objection are that the suit is not properly before the court and that this application offends Order 24 of the Civil Procedure Rules. It is further contended that this application ought to have been brought after seeking leave to file it out of time was granted.

8. The respondents submitted in their submissions filed on 16/07/2018 that Order 24 Rules 3 and 4 provide that an application substitution shall be made within one (1) year from the time of death of the person to be substituted. The application has been brought four and a half years after the death of Flora Waithera Njeru. It was argued that the prayer in the application does not amount to a prayer for extension of time.

9. It was further argued that no reason for delay have been advanced by the applicant. Further that the death certificate was issued one month after the death of Flora Waithera and the applicant should have brought his application within time.

10. The applicant urged the court to disregard Order 24 of the Civil Procedure Rules because it is not applicable in succession causes in

pursuance with the provisions of Rule 63 of the Probate and Administration Rules. It is further submitted that this being a succession cause the applicant should not be locked out of the cause because such a move is likely to disinherit some of the beneficiaries in the estate of the deceased.

11. On the issue of procedures of filing an application for extension of time before that of substitution, the applicant called upon the court to disregard procedural technicalities and allow the applicants application.

12. The issue for determination arising from this application is as follows: -

a) *Whether this application is competent.*

b) *If it is found to be competent, whether the applicant deserves the orders sought.*

c) *Who will pay the costs of this application.*

13. The objection is based on the provisions of Order 24 of The Civil Procedure Rules which provide: -

3. (1) *Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.*

(2) *Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:*

Provided the court may, for good reason on application, extend the time.

4. (1) *Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*

(2) *Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

(3) *Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant. The question that arises here is whether order 24 is applicable to succession causes the probate and Administration Rules are designed as the procedural guide in succession cases. The civil procedure Rules are applicable to civil cases and only a few of the rules are applicable in succession causes by virtue of Rule 63 of the probate and Administration Rules.*

14. The question that arises here is where Order 24 is applicable to succession causes. The Probate and Administration Rules are designed as the procedural guide in succession cases. The Civil Procedure Rules are applicable to civil cases and only a few of the rules are applicable in succession causes by virtue of Rule 63 of the Probate and Administration Rules.

15. Rule 63 of the Probate and Administration Rules provide:

Application of Civil Procedure Rules and High Court (Practice and Procedure) Rules

(1) *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.*

(2) *Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.*

16. The Rules imported from the Civil Procedures Rules are orders dealing with service of summons, interrogation, discoveries, inspection, consolidation of suit, summon and attendance of witnesses, affidavits, review and computation of time.

17. Order 24 of the Civil Procedure Rules is not among the imported orders and is therefore not applicable.

18. In succession causes, there has been several pronouncements by the high court in this regard.

19. In the matter of the estate of **JOSEPH MWINGA MWAGANA** deceased, the court in an application brought under Order XLI Rule 4 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules held that only Rules allowed by Rule 63 of the Probate and

Administration Rules are applicable in succession causes.

20. It is my considered view that this ground in the preliminary objection has no legal basis in view of the provisions of Rule 63.

21. The applicant also challenged the form of the application in that it has combined the two prayers arguing that, that of substitution ought to have been brought first.

22. In this regard the applicant relied on Article 159(2)(d) of the Constitution which provides: -

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(d) justice shall be administered without undue regard to procedural technicalities;

23. The enactment of this article has developed jurisprudence in this country. Article 159(2)(d) of the Constitution enjoins the court to “administer justice without due regard to procedural technicalities”. It is my considered view that the court should not shut the doors of justice to the applicant just because he has included the prayer of extension of time in this application for substitution.

24. Rule 73 of the probate and administration rules empowers this court in its inherent powers to make orders necessary in meeting the ends of justice.

25. In view of the provisions of Article 159(2)(d) and Rule 73 it would be against the spirit of the constitution and contrary to the interests of justice to strike out this application due to procedural technicalities.

26. I find this application competent and that is properly before the court.

27. Enlargement of time in succession matters is governed by Rule 67 of the Probate and Administration Rules which provides;

“Where any period is fixed or granted by this rules or by an order of the court for doing any act or thing the court upon requests or on its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”

28. The rule does not give any conditions or limitation of time for any application filed under the said rule. By providing that a court may enlarge time on its motion demonstrates the ease in procedures in succession causes as opposed to civil procedure which has more stringent procedural provisions.

29. I come to the conclusion that there is no limit of time for filing an application for substitution under the rules. It is the court to decide on the merit of application after taking all the relevant factors into consideration.

30. The respondent took issues with the reasons given for delay arguing that the same were not sufficient. The applicant explains the delay of bringing this application in that his former advocate did not advise him on the way forward.

31. This means that after the death of his mother, the applicant did not know the process of stepping into his mother’s shoes. He may not have been aware that he was required to obtain a limited grant *ad litem* as a vehicle to pursue his late mother’s interests in this case.

32. It is not in dispute that the death certificate was obtained one year after the death. But did the applicant know the next step to be taken. The reason given by the applicant that he is the son of the late Flora is not in dispute and it is sufficient to allow substitution.

33. The late Flora had registered her interest in this case as a widow of one Patrick Anderson Njeru Maringa deceased who has beneficial interest in the estate in respect of plot No.1112/719 part of the deceased estate herein Embu Municipality. The matter had not been determined when she passed on. It is in the interests of justice that her heirs follow this cause to conclusion.

34. It is my finding that the application is merited and hereby allows it as prayed. Each party to meet its own costs of this application

35. The preliminary objection lacks merit and is hereby dismissed.

36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF OCTOBER, 2018.

F. MUCHEMI

J U D G E

In the presence of: -

Mr. Mugo Kamau for Petitioners

