



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

P&A ADLITEM. NO. 61 OF 2015

IN THE MATTER OF THE ESTATE OF MUSA KIPCHOLIO CHEPSOM

ELKANA KIBINGOR.....APPLICANT

VERSUS

KIPKOGEI CHEPSOM.....1ST RESPONDENT

JENIFFER CHEPSOM.....2ND RESPONDENT

RULING

1. *Elkana Kibingor*, the petitioner herein moved this court through a petition for letters of administration ad litem dated 28th April, 2015 seeking that *Kipkogei Chepsom* and *Jeniffer Chepsom* be jointly nominated as legal representatives of the Estate of the late *Kipcholio chepsom* for the purpose of substitution of the deceased as a defendant in a civil suit filed at the Environment and Land court at Eldoret being suit No. 459 of 2013. The summons was filed under *Rule 14* of the fifth schedule of the *Probate and Administration Rules*.

2. The petitioner has made a similar application in P & A Ad Litem No. 60 of 2015 in which he seeks to have *John Kipchumba Tallam* and *Amos Tallam* nominated as the personal representatives of the Estate of the late *Kiprono Samoei Tallam* for purposes of substitution as parties in the same suit, that is, E&L 459 of 2013 in which the deceased's Estate is sued as the 3rd defendant.

3. Following a consent reached by the parties, the court on 16th January, 2017 ordered that the ruling in Ad litem cause No. 61 of 2015 shall apply to ad litem cause No. 60 of 2015 since both petitions seek similar orders save for the petitions being in respect of different Estates and having different nominees.

4. In his supporting affidavit in Petition No. 61 of 2015, the applicant swore that the deceased died on 10th September, 1991 and since then, none of his survivors has taken out a grant of representation to his Estate; that this has compelled him to nominate two of his aforesaid dependants so that they can be substituted as defendants in Case No. 459 of 2013 in place of the deceased.

5. In answer to the petition, learned counsel *Mr. Kipnyekwei* who represented the nominees in both petitions filed grounds of opposition dated 31st October, 2016. The points taken in the grounds of opposition are as follows:-

(i) That the suit herein E&L Case No. 459 of 2013 was filed against *Musa Kipcholio Chepsom* long after he had died.

(ii) That there was therefore no suit against the estate of the deceased herein.

(iii) That the suit if any has abated since the Applicant did not seek to substitute the deceased within the statutory period.

(iv) That the Applicant is attempting to validate a suit that is non-existent.

6. On 16th January 2017, learned counsel for the Applicant *Mr. Odhiambo* and *Mr. Kipnyekwei* for the nominees made brief oral submissions in support of their respective positions.

Mr. Odhiambo submitted that the nominees were children of the deceased person; that they had been duly served to enter appearance in the aforesaid pending suit and they had refused to do so; that their nomination by the court is necessary for a just determination of the pending suit; that the depositions in the supporting affidavit should be deemed to be admitted since the nominees have not filed a replying affidavit denying any of the averments therein. He urged the court to allow the petitions. In support of his submissions, he relied on the persuasive authority of ***In Re Estate of Paul Kamau Job Wanderi (Deceased) [2015] eKLR*** where *Hon. Hatari Waweru J* allowed a similar petition.

7. In his opposition to the petition, learned counsel *Mr. Kipnyekwei* argued that a prayer for substitution of parties should not be granted automatically; that a party seeking substitution must advance sufficient grounds to support such an application. He further contended that if the prayers sought were granted, they will not serve any useful purpose. This is because in his view, E&L case No. 459 of 2013 is not a valid suit having been instituted about ten (10) years after the demise of *Musa Kipcholio Chepsom*; that there is no suit in which the respondents can be validly substituted. He further asserted that the authority cited by the Petitioner is inapplicable in this case given that in the authority, the substitution was sought when the deceased was alive and not after his demise like in the present case. He urged the court to dismiss the petition.

8. I have considered the petition; the affidavit sworn in its support and the submissions made by counsel on record. I take the following view of the matter: The petition is premised on *Rule 14* of the fifth schedule of the *Probate and Administration Rules*. This Rule is in the following terms;

“ When it is necessary that the representative of a deceased person be made to a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause of suit, and until a final decree shall be made therein, and carried into complete execution”.

9. It has not been disputed by the nominees that they are infact a son and daughter respectively of the deceased person and that since his death slightly over twenty five (25) years ago, neither them nor any of his dependants has taken out letters of administration to his Estate. They have not filed a replying affidavit in answer to the petition and consequently, their failure to take out a grant of representation to the deceased’s Estate has gone unexplained. Such a prolonged and inordinate delay can only be understood to mean that the deceased’s dependants including the nominees have for their own undisclosed reasons refused or are unwilling to take out letters of administration to the Estate.

10. *Rule 14* of the fifth schedule reproduced earlier in this ruling is meant to offer redress to parties to suits who find themselves in the kind of predicament the applicant in this case finds himself in.

It provides that where it is necessary that the representative of a deceased person be made a party to a pending suit and the person entitled to apply for letters of administration is unable or is unwilling to act, the court may grant letters of administration to a person named as nominee of the deceased by a party in such a suit but limited for purposes of representing the deceased in the suit until the suit is concluded.

11. With due respect, I do not find any merit in the submissions made by learned counsel *Mr. Kipnyekwei* in his opposition to the petition. He did not deny that the applicant had filed a suit against the deceased in the Environment and Land court at Eldoret. He only sought to challenge its legal competence or validity on grounds that it was filed after the deceased's death. I agree with learned counsel *Mr. Odhiambo* that this court sitting as a succession court cannot purport to question the validity of a suit filed in the E&L Court for the simple reason that it lacks jurisdiction to do so. This is an issue which can only be canvassed and determined in the suit itself in the appropriate forum. But such a determination cannot be made where some of the parties to the suit are dead and they have not been substituted by their personal representatives.

12. Besides, Rule 14 aforementioned does not require the court to enquire into the validity of a suit before nominating a representative of the deceased's Estate. It only requires the court to satisfy itself that there is a pending suit to which the deceased was a party and that the person entitled to take out letters of administration to his Estate is either reluctant or unwilling to do so.

13. In this case, as stated earlier, it has not been disputed that the respondents are biological son and daughter of the deceased respectively. They are therefore in the category of persons who are entitled to apply for a grant of representation to the deceased's Estate but they have refused to do so for over 25 years. I have called for and perused the court file in E&L NO. 459 of 2013. My perusal reveals that the suit is still pending hearing.

14. In view of the foregoing, I have come to the conclusion that this petition is merited. However, I do not see why two people should be nominated to be substituted in place of one deceased person. One nominee in my view should suffice. I consequently allow the petition and grant letters of administration Ad litem in respect of the Estate of *Musa Kipcholio Chepsom* to *Kipkemoi Marinoi* limited for purposes of substitution of the deceased in E&L case No. 459 of 2013.

15. As agreed by the parties, this ruling shall apply to Ad Litem Cause No. 60 of 2015 save that the grant of letters of administration ad litem shall be issued to *John Kipchumba Tallam* limited for purposes of substitution in place of the 5th defendant in the aforesaid suit.

16. Costs of the petitions shall be costs in the cause.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 31st day of January 2017.

In the presence of:-

Mr. Siboe for the petitioners

Ms Matoke Holding brief for Mr. Kipnyekwei for the Respondents.

Mr. Lobolia Court Clerk