

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

SUCCESSION CAUSE NO. 15 OF 1957

IN THE MATTER OF

THE ESTATE OF MATHURADAS JAMNADAS PANCHMATIA (DECEASED)

AND

IN THE MATTER OF HER MAJESTY'S SUPREME COURT AT KISUMU

PROBATE AND ADMINISTRATION CAUSE NO. 15 OF 1957

AND

IN THE MATTER OF AN APPLICATION BY

MANSUKHLAL MATHURADAS PANCHMATIA

RULING

The deceased herein left a will in which he appointed his wife Premkunvarbai Mathuradas, his son Mansukhalal Mathuradas and his brother in-law Manilal Lalji Thakeras as trustees and executors of his will and property.

By the Chamber Summons dated 22nd October 2015 Mansukhalal Mathuradas has petitioned this Court, firstly to appoint himself, Mr. Anantkumar Bhangwanji Panchmatia, and Mrs Jayshree Chandrakant Mathuradas Panchmatia so as to substitute his mother Premkubarbai Mathuradas and the deceased's brother in-law Manilal Lalji Thakeras who have both since died. Secondly he urges this Court to have the names of the executors who are deceased cancelled from the register of land Parcel Number **LR Kisumu Municipality Block 7/106** and replaced by his own name and those of Anantkumar Bhangwanji Panchmatia and Jayshree Chandrakant Mathuradas Panchmatia to hold as the personal representatives of the deceased.

In his supporting affidavit he deposes that the other properties of the deceased were disposed by his mother before her death and that **Block 7/106** was registered in the names of the executors in their capacity as trustees and personal representatives of the deceased; that Manilal Lalji Thakeras died on 21st April 1990 and Premkunvarbai Mathuradas Panchmatia on 20th December 2011 as is evidenced by their death certificates; that consequently he is the sole surviving administrator and as there exists a continuing trust there is need to substitute the deceased executors. Further that as the property **Kisumu Municipality Block 7/106** was on 10th October 1998 registered in the names of the deceased executors there is need to remove their names from the register so that it can be registered in the names of the executors/trustees that shall be named. He has annexed letters of no objection from the persons he proposes to be named as the executors/trustees.

There is no dispute that two of the persons appointed as the personal representatives of the deceased are now deceased. Their certificates of death have been exhibited. The issue for determination is whether it is necessary to appoint other executors in their place. Section 81 of the Law of Succession Act upon which the application is premised states:-

“Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall

become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of the trust until the court has made a further grant to one or more persons jointly with him”.

It is clear from the above provision that substitution of deceased executors or administrators to whom a grant of representation has been made, as in the instant case, is necessary only if the grant involves a continuing trust. The issue for determination in this case, therefore, is whether the grant of probate herein involves a continuing trust.

The Grant of Probate herein is exhibited as annexure “MND-2” to the supporting affidavit and in my view the same does not involve a continuing trust. The deceased according to Clause 4 of his will intended that upon the death of his wife to whom he had bequeathed the income of all his assets for her absolute use, an event that has since occurred, the property was to devolve to his four sons or their nominees as tenants in common in equal shares. It is generally accepted that a continuing trust would occur where it is expressly provided in the will or where there are minor children. That is not the case here. Accordingly I see no need to make an order for appointment of two other administrators the powers and duties of the deceased executors having become vested in the Administrator/Applicant by virtue of the law. I would only now urge him to move with speed to have the grant confirmed so as to fulfil the wishes of his late father. There shall be no order for costs.

Signed, dated and marked as delivered at Kisumu this 22nd day of September 2016

E. N. MAINA

JUDGE