

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

IN THE MATTER OF THE ESTATE OF KAMAU GATHANGA (DECEASED)

SUCCESSION CAUSE NO. 2053 OF 2007

RULING

1. The application for determination is the Motion dated 26th October 2015. It seeks the substitution of the executor of the will of the deceased who has passed on.

2. The deceased herein had allegedly died testate, having made a will on 23rd February 2007. The said will had named one Julius Gathanga Kamau as executor thereof. When the alleged executor petitioned for representation, an objection was lodged against his appointment as personal representative of the deceased by one Paul Ndung'u Gathanga. A grant of representation is therefore yet to be made in the matter. The objection proceedings commenced on 16th July 2010. Four witnesses have so far testified for the objector.

3. The affidavit in support of the application dated 26th October 2015 is sworn by Harrison Wakinga Kamau, who seeks to be appointed as executor in the place of the now dead executor and petitioner herein, Julius Gathanga Kamau. He avers that the family wishes to have the dead executor substituted and it is in that respect that he has made the application dated 26th October 2015.

6. The application is opposed by the objector, Paul Ndung'u Gathanga. He swore an affidavit on 13th January 2016, which was filed herein on 15th January 2016. He asserts that the family had not agreed on the applicant substituting the dead executor, adding that he doubted the validity of the will the subject of the proceedings.

5. The application was argued orally on 18th May 2016. Mr. Macharia urged the case for the applicant. He appeared to argue for substitution of the dead executor not as executor but as petitioner. The objector complained that the process has not been inclusive. He stated that although the deceased had ten (10) children, only four (4) were involved in the process. He continued to contest the will and the appointment of the executor.

6. The application before court invites me to order substitution of Julius Gathanga Kamau as executor with the applicant, Harrison Wakinga Kamau. Executors of a will are appointed by the testator during his lifetime. The law on this is sections 3(1) and 6 of the Law of Succession Act, Cap 160, Laws of Kenya, which state as follows:-

'3(1) 'executor' means a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided.'

'6. A person may, by will, appoint an executor or executors.'

7. Going by these provisions, it is quite certain that executors can only be appointed by the testator during the testator's lifetime. The effect of it is that the court has no jurisdiction to appoint an executor, for that is what the applicant is asking me to do.

8. I do note, of course, that at the oral hearing of the application, the applicant's counsel was careful to

submit on substitution of Julius Gathanga Kamau as petitioner rather than as executor. Curiously, counsel did not seek to have the application amended so as to accord with the oral submissions that he was making in support of it. The said submissions and the prayers made in the application were therefore not in tune.

9. In view of what I have stated above, it is clear that the applicant ought to have applied for substitution of the dead petitioner as such, as a petitioner. I agree with the respondent. The applicant should, in seeking the substitution the subject of this paragraph, obtain and attach to his application evidence that the other family members or survivors of the deceased had consented to his being so substituted, or, at any rate, obtain citations for service on the other family members.

10. Consequently, I do hereby find that the application dated 26th October 2015 seeks orders that are not within the jurisdiction of this court to grant. The said application is therefore incompetent and I do hereby dismiss the same with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 18TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE