



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A

P&A CAUSE NO. 1062 OF 2013

(IN THE MATTER OF THE ESTATE OF PAUL KAMAU JOB WANDERI (DECEASED))

RULING

The applicant, Jane Wanjiku Njoroge, lodged in court a summons in general form, seeking to have one Dominic Irungu Kamau, nominated as the legal representative of Paul Kamau Wanderi (deceased) for purposes of substitution of the deceased as a party in **Nyeri High Court Civil Appeal No. 165 of 2002**; prior to his demise the deceased was the respondent while the applicant was and still remains the appellant in this appeal. The summons was made under **Rule 14** of the **Fifth Schedule** and **Rule 73** of the **Probate and Administration Rules**.

In the affidavit sworn by the applicant in support of her summons, the applicant says that the respondent died on 2nd February, 2010 and since then none of his survivors has taken letters to administer his estate. It is for this reason that the applicant has opted to nominate the deceased's eldest son, Dominic Irungu Kamau, as the deceased's representative so that he can assume the place of the deceased in the appeal case.

In response to the summons, the proposed nominee has opposed the application. He states in his affidavit filed in response to the applicant's summons that while it is true that he is the deceased's eldest son, he has never been involved in the proceedings out of which the appeal in the High Court at Nyeri arose.

The parties' counsel opted to have the application determined by way of written submissions and to this end, they filed and exchanged their respective submissions which I have duly considered.

The applicant has invoked **rule 14** of the **Fifth Schedule** which reads:-

14. Administration limited to suit

“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 or suit, an until a final decree shall be made therein, and carried into complete execution.”

The applicant is of the view that Dominic Irungu Kamau, who is the eldest son of the deceased, is the proper person to be nominated to represent the deceased in the circumstances contemplated under the foregoing rule.

On his part Dominic Irungu Kamau has admitted that indeed he is the oldest son of the deceased but that

he has never been involved in the proceedings out of which the appeal in which he is sought to be joined arose. He says that he has been advised by his advocates which advice he verily believes to be true that the applicant's summons is an abuse of the court process because under **Order 24 rule 4 of the Civil Procedure Rules**, the appeal in issue has abated. For these reasons, Dominic Irungu Kamau has asked the court to dismiss the summons herein.

Counsel for the parties filed and exchanged written submissions on the positions they have adopted in respect of the applicant's summons; I have duly considered these submissions.

I agree with counsel for the applicant that the **Law of Succession Act, (Cap. 160)** is self-contained and reference to the **Civil Procedure Act** can only be made in limited circumstances; these circumstances are expressly stated in **Rule 63 (1)** of the **Probate and Administration Rules**. This rule provides:-

63. (1) Save as 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, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

Although some of these Rules have since been renumbered in the Civil Procedure Rules, 2010 the rule in respect of abatement of suits as provided under **Order 24 Rule 4 (3)** has never been part of those rules which may be invoked in the proceedings instituted under the Probate and Administration Rules. Since the Probate and Administration Rules expressly state specific provisions of the Civil Procedure Rules which may apply to proceedings made under those Rules, it is assumed that the rules in the Civil Procedure Rules which have not been expressly provided for do not apply. For this reason, **Order 24 Rule 4** of the **Civil Procure Rules** which Dominic Irungu Kamau has cited in opposition to the applicant's summons does not apply.

In any event, the Law of Succession Act itself provides for the circumstances under which suits or proceedings would ordinarily abate where such proceedings are covered by the Civil Procedure Rules; **Rule 14** of the **4th Schedule** to the Act, which has been quoted earlier in this ruling appears to be clear that whenever it is necessary that a representative of a deceased person should be made a party to a pending suit and such potential representative is reluctant to act and take out letters of administration in respect of the deceased's estate, he may be nominated for the purpose of representing the deceased in the pending suit; in my view the term "suit" in the context of this rule would include the appeal proceedings that are now pending in the High Court. The rule itself does not limit the representation to a suit alone, it says that representation may be extended to "*any other cause or suit which may be commenced in any other court...until the final decree shall be made therein, and carried into complete execution.*" The rule does not state when such application for nomination of a representative of the deceased may be made and thus it would appear that it may be made at any time during the pendency of the proceedings.

In the premises I am inclined to allow the applicant's summons dated 3rd October, 2013. The grant of letters of administration intestate in respect of the estate Paul Kamau Job Wanderi is hereby made to Dominic Irungu Kamau, limited for purposes of substitution in **Nyeri High Court (Probate & Administration) Appeal No. 165 of 2002**. The costs of the application shall be in the cause.

Dated and signed at Nyeri this 17th day of November 2014

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE