



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C.A NO 149 OF 2014
FORMERLY EMBU HCC NO. 51 OF 2003

MARTIN MUGO MIGWI.....PLAINTIFF

VERSUS

NJERU M'UTHI.....1st DEFENDANT

NANCY NJOKI MWANGI.....2nd DEFENDANT

CHRISTOPHER THUMI DIFATHA.....3rd DEFENDANT

RULING

INTRODUCTION

1. Martin Mugo Migwi through his counsel filed a chamber summons under Rule 21, 22 (5) (c) of the Probate and Administration Rules as read with Rule 58 of Part XI of the Litigious Proceedings and Rule 73 Part XII of the Miscellaneous Provisions seeking the following orders from this court:

1. That the Honourable court do require or order Alice Mwakera Thumi to take grant within 21 days failing which the grant will be given to applicant Martin Mugo Migwi.
2. That costs of this application be provided for.
2. The plaintiff has annexed a supporting affidavit to his application in addition to the grounds which are set out on the face of the chamber summons dated 17th April, 2012.
3. In the meantime, Alice Mwakera Thumi on behalf of the estate of the deceased (the 3rd defendant), filed a summons through her counsel for substitution citing herself as a substitute in place of her late husband (Christopher Thumi Difatha).
4. The summons for substitution also seeks an order of this court in regard to the payment of costs. Additionally, it has set out the grounds upon which it is based.

The Case for the Plaintiff:

5. In his supporting affidavit, the plaintiff has stated that he sued Christopher Thumi Difathas who was the 3rd defendant. According to him, the 3rd defendant is dead.
6. Furthermore, the wife of the deceased did not take out letters of administration in respect of the estate of the deceased. As a result, the plaintiff filed a citation in succession case in the High Court being cause number 502 of 2011 citing Alice Mwakera Thumi (wife of the deceased) and

- requested her to accept or refuse letters of administration intestate.
7. It is his further evidence that the wife of the deceased was served with the citation to accept or refuse the letters of administration. A copy of the citation signed by the Deputy Registrar of this court addressed to the wife of the deceased and supported by a verifying affidavit sworn by the plaintiff is annexed to the supporting affidavit. The citation is dated 24th November, 2011.
 8. The plaintiff has also stated that the wife of the deceased has refused to enter appearance and has not filed a reply to the citation in the succession cause. As a result, the plaintiff has sought orders of this court to make appropriate orders appointing him as the administrator of the estate of the late Christopher Thumi Difatha.
 9. The plaintiff has set out 4 grounds in support of his application. He has stated in ground 2 that the deceased died on 14th February 2011 and his wife was served with the citation dated 12th August 2011 to enter appearance.
 10. In ground 3, he has stated that the wife of the deceased failed to enter appearance within 21 days as required.
 11. In ground 4, the plaintiff has stated that the wife of the deceased was required to take the grant within 21 days of the service of the citation failing which a grant would be given to the applicant/plaintiff, who is a creditor to the estate.

The Case for the Defendant:

12. Apparently, in response to the plaintiff's application, Alice Mwakeri Thumi, on behalf of the estate of the 3rd defendant responded to the citation by filing a summons for substitution dated 15th June, 2014.
13. In that application, the wife of the deceased has applied to this court to be substituted in place of her late husband. In support of her application, she has filed an affidavit. According to her, she has now obtained limited letters of administration which she has annexed to the summons for substitution marked AMT 1.
14. In that affidavit, she has also stated that her late husband died before the case was finalized. And finally, she has requested that she be allowed to be substituted in place of her late husband.

The Applicable Law:

15. The law that applies in this application is set out in the Succession Act in particular the rules made pursuant to the Succession Act, which are set out in the chamber summons of the plaintiff dated 17th April, 2011.
16. According to her, the 3rd defendant was her husband who is already dead. She also says that her late husband was the 3rd defendant. And finally she has stated that she has now obtained letters of administration in respect of her husband's estate and that it is only fair and just that her application be allowed.

Issues for determination:

17. In the light of the affidavit evidence and the rival grounds of both parties, the following are the issues for determination:
 1. Whether or not the plaintiff should be allowed to take out letters of administration in respect of the deceased estate in terms of his citation.
 2. Whether or not the widow of the deceased should be substituted in place of her late husband for purposes of prosecuting this case and other related matters.
 3. Who should pay for the costs of this application.

Evaluation of the Facts, the Law and Findings:

18. I have considered the affidavit evidence together with the rival grounds in support of the two applications. I find that the widow of the 3rd defendant, Alice Mwakera Thumi should be substituted in place of the 3rd defendant.
19. Furthermore, I find that there has been some delay on the part of the widow of the 3rd defendant in responding to the citation which was filed and served upon her in 2011.
20. Notwithstanding, this delay it is in the interest of justice that she be allowed to prosecute this case and other connected matters to avoid further delays in the matter. The limited grant given to her was issued by the High Court in Embu of 14th May 2012.
21. It was limited for purposes of prosecuting this suit which is assigned High Court Civil cause number 51 of 2003 in the registry at Embu.
22. I have also taken notice of the preliminary objection filed by counsel for the plaintiff, in which he has stated that the application of the widow is mis-conceived, ill advised and should be struck out.
23. Having come to the conclusion that the widow is the best person placed to administer the estate of her late husband, I do not intend to consider the merits of the preliminary objection which is now overtaken by events.

Verdict and Disposal Order

24. In the light of the foregoing matters, I hereby make the following orders:

1. The application of Alice Mwakera Thumi to be substituted in place of her late husband is hereby allowed.
2. The costs of this application shall be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 24thday of**MARCH.....2015.**

In the presence of Mr Okwaro holding brief for Mr P.N. Mugo for plaintiff and in the absence of the defendants.

Court clerk Mr Muriithi

J.M. BWONWONGA

JUDGE