



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**SUCCESSION CAUSE NO. 80 OF 2011**  
**IN THE MATTER OF THE ESTATE OF TUMBO LAVI (DECEASED)**  
**ALEXANDER MUTUNGA WATHOME.....APPLICANT**  
**VERSUS**  
**1. PETER LAVU TUMBO**  
**2. DAVID TUMBO LAVI.....PETITIONERS**

**RULING**

**The Application**

The Applicant herein filed an application by way of a Notice of Motion dated 19<sup>th</sup> November 2014, seeking orders that the 2<sup>nd</sup> Protester herein James Kathome Tumbo, now deceased, be substituted by the Applicant in his capacity as the trustee of the deceased's estate.

The Applicant in his supporting affidavit sworn on 19<sup>th</sup> November 2011 attached a copy of the death certificate of the 2<sup>nd</sup> Protester, and stated that he was the son of the deceased, and that the said 2<sup>nd</sup> Protestor was protesting the Confirmation of Grant of Letters of Administration in Succession Cause No. 80 of 2011 of the estate of Tumbo Lavu.

Further, that the Applicant was appointed trustee of the estate of the 2<sup>nd</sup> Protestor by all the beneficiaries of the said estate, and he attached a copy of a letter dated 13<sup>th</sup> April 2014 by the said beneficiaries to this effect, which was addressed to the chief of Mitaboni Location and.

**The Response**

The 1<sup>st</sup> Petitioner thereupon filed a replying affidavit sworn on 11<sup>th</sup> May 2015 on behalf of the Petitioners herein, in opposition to the Applicant's application. The Petitioners aver that the Applicant is not the administrator of the estate of the late James Kathome Tumbo and thus has no standing to bring the application. Further, that a chief has no power to appoint a trustee of the estate of a deceased person, thus the purported trusteeship does not arise.

**The Submissions**

The parties were directed by the Court to canvass the Applicant's application by way of written submissions. The submissions by the Applicant's counsel Anne M. Kiusya & Company Advocates are dated 8<sup>th</sup> October 2015, and were filed on the same date. The Applicant submitted that he has brought the application herein for substitution on the grounds that he is a beneficiary of both the deceased Tumbo Lavu and the 2<sup>nd</sup> Protestor herein, and secondly that he has been appointed to watch out for the interests of one of the houses that the deceased Tumbo Lavu had. Further, that the Applicant is not seeking to administer the estate of Tumbo Lavu, but is interested in standing in for his father as an objector to the confirmation of the instant suit.

The Applicant relied on section 66 of the Law of Succession Act that lays down a hierarchy of persons eligible to be appointed the administrators of the estate of the deceased, and the decision in **Re Estate of John Musambayi Katumanga (Deceased) [2014] eKLR** that where one of the dependants of a deceased person is dead, the dependants of the deceased dependant replace him under Section 38 of the Law of Succession Act. It was his submission that the Petitioners have no standing to object to this application, since they do not have any interests in the deceased 2<sup>nd</sup> Protestor's estate.

The Applicant explained that the deceased Tumbo Lavu had three wives and that two of his wives, Mathembo Tumbo and Nduku Tumbo are deceased. Further, and that the Petitioners are representatives of the house of Mathembo Tumbo. However, that the houses of the two other wives of the deceased Tumbo Lavu have not been represented and great injustice will be occasioned if the deceased 2<sup>nd</sup> Protestor is not substituted with the Applicant.

The Applicant relied on section 84 of the Law of Succession Act and the decisions in **Mary Wanjiru Njenga & 4 Others vs Elizabeth Wairimu Njenga & 2 Others, [2015] eKLR** and **Antony KaruKenya Njeru vs Thomas M. Njeru, [2014] eKLR** on the mode of choosing administrators of a deceased's estate where the deceased was polygamous. It was his position in this regard that to ensure that the estate is administered honestly, all houses that the deceased Tumbo Lavu had must be represented.

The Petitioners' counsel, B.M Munga'ta & Company Advocates, filed submissions dated 24<sup>th</sup> July 2015, wherein he argued that Order 24 Rule 3 of the Civil Procedure Rules is clear that upon death of the plaintiff and the cause of action survives, the court on application made in that behalf shall cause the legal representative of the deceased plaintiff to be made party and proceed with the suit. Further, that the same applies in case of death of the defendant under Rule 4 (1).

It was the Petitioners contention that it is the legal representative who is vested with the authority to proceed and prosecute a suit surviving the deceased, and that under Section 54 of the Law of Succession Act, the court may limited any grant of representation which it has jurisdiction to make in any forms described in the 5<sup>th</sup> Schedule to the Act, including limiting it to representing a deceased person in a suit under paragraph 14 of the said Schedule.

In addition, that section 82 (a) Law of Succession Act provides that a personal representative shall subject to any limitation imposed by their grant, have the power to enforce by court or otherwise all causes of action which by virtue of any law survive the deceased or arise out of his death for his estate. It was the Petitioners submission that the rightful person to substitute the deceased 2<sup>nd</sup> Protestor is his personal representative.

Reliance was also placed on section 2 of the Civil Procedure Act which defines legal representative as a person who in law represents the estate of a deceased person, and in the decision in **Mary Nanjala Muhalya –VS- Ambrose Kipruto [2014] eKLR** where the court was of the opinion that the definition of legal representative is equivalent to that of personal representative as defined under the Law of Succession Act. The Petitioners also cited section 3 of the Law of Succession Act that defines a personal representative as the executor or administrator of a deceased person.

On the Applicant's claim that he is trustee of the 2<sup>nd</sup> Protestor's estate, the Petitioners submitted that a chief lacks power to appoint a trustee, and as such the purported trusteeship does arise. Reliance was

placed on section 7 of the Public Trustees Act for the position that it is the court that has the mandate to appoint a trustee, and the chief has no power whatsoever to appoint a trustee or even give any authority to defend any suit against the deceased.

The Petitioners claimed that the Applicant's application seeks to waste courts time as the applicant herein is not the administrator of the deceased's estate, and therefore lacks *locus standi* to represent and defend the deceased in the matter before this court. Further, that his nomination as a trustee does not vest in him any authority to substitute and subsequently defend any suit in the deceased's stead.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions made by the parties herein. The issue to be decided is whether the 2<sup>nd</sup> Protestor can be substituted by the Applicant. The sections of the law relied on by the Applicant in his Notice of Motion in this regard are Order 51 Rule 1 and Order 24 Rules 3, 4, and 7 of the Civil Procedure Rules. Order 24, Rules 3 and 4 of the Civil Procedure Rules provides the procedure to be followed in the substitution of a deceased Plaintiff or Defendant, and provide that the court can upon application cause a legal representative of the deceased Plaintiff or Defendant to be made a party to a suit, and that party shall proceed with the suit.

It is in dispute in the present application whether the Applicant is a legal representative of the 2<sup>nd</sup> Protestor for purposes of Order 24 Rules 3 and 4 of the Civil Procedure Rules. Under section 2 of the Civil Procedure Act a "legal representative" is defined as "a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued".

In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. In addition section 82 of the Law of Succession Act provides that it is the personal representative who has the powers) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person. The Applicant has in this respect not produced evidence to show that he has been given such a grant of representation with respect to the 2<sup>nd</sup> Protestor's estate, and cannot therefore be substituted in place of the 2<sup>nd</sup> Protestor.

These findings notwithstanding, this Court notes that Rule 40(6) of the Probate and Administration Rules allows any person wishing to object to the proposed confirmation of a grant to file an affidavit of protest against such confirmation stating the grounds of his objection. The Applicant can therefore in his own right and on behalf of other beneficiaries file an affidavit of protest without necessarily substituting the deceased 2<sup>nd</sup> Protestor. However, he is also at liberty to apply for a grant of representation with respect to the estate of the 2<sup>nd</sup> Protestor, and once successful he can renew his application for substitution.

I accordingly dismiss the Applicant's Notice of Motion dated 19<sup>th</sup> November 2014 for the foregoing reasons, and the Applicant shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 26<sup>th</sup> day of October 2015.

**P. NYAMWEYA**

**JUDGE**