



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**SUCCESSION CAUSE NO.137 OF 2012**

**IN THE MATTER OF THE ESTATE OF FRANCIS NDERITU KIMWATU A.K.A FRANCIS  
NDARITU KIMWATU**

**NATHANIEL WANJOHI NDERITU..... APPLICANT**

**VERSUS**

**JAMES MWANGI NDERITU .....1<sup>ST</sup> RESPONDENT**

**VERONIKAH GAKENIA MURIITHI..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. There are two applications for determination. One is dated the 16<sup>th</sup> October, 2014 and is premised under the provisions of Section 82(a) the Law of Succession Act and Section 49 of the Probate & Administration Rules.
2. The Applicant in the aforementioned application seeks the following orders;
  - i. **THAT this Honourable Court grants leave to LAWRENCE MURIITHI WANJOHI to substitute NATHANIEL WANJOHI NDERITU (deceased) as the personal representative of the Estate of Nathaniel Wanjohi Nderitu (deceased) in the suit.**
  - ii. **THAT costs of this application be bourne by the Respondent and/or the estate herein.**
3. This application is supported by the affidavit made by Lawrence Muriithi Wanjohi and is made on the 16<sup>th</sup> day of October, 2014 in which he deposes to the fact that there is a pending application for Revocation of Grant which had been instituted by his father Nathaniel Wanjohi Nderitu who passed away on the 23<sup>rd</sup> July, 2013 before the matter had been determined.
4. The applicant as the son of the deceased obtained Letters of Administration *ad litem* for the purposes of prosecuting the application for Revocation of Grant.
5. The second application for hearing and determination was filed by the Respondent/Petitioners under a Certificate of Urgency dated the 5<sup>th</sup> March, 2015 and is brought under the provisions of Rule 49 and 73 of the Probate and Administration Rules and the applicants herein seek the following orders;
  - i. **Spent;**
  - ii. **THAT the orders given on 30/07/2013 and consequently issued on 27/08/2013 be vacated.**

- iii. **THAT summons for Revocation of Grant filed on 1/07/2013 by Nathaniel Wanjohi Nderitu (now deceased) be declared as having abated.**
  - iv. **THAT the costs be awarded to the Petitioner/Applicants.**
6. This application is supported by the affidavit made by James Mwangi Nderitu and is made on the 5<sup>th</sup> March, 2015. The applicant deposes that on the 30<sup>th</sup> July, 2013 the court ordered that the deceased applicant in the summons for revocation be substituted. That thereafter the party went to sleep and did not substitute anyone until the current application for abatement was filed.
  7. That the Revocation application abated due to lack of substitution of the deceased applicant for a period of over one (1) year. They also pointed out that the current counsel was not properly on record and had backdated the Notice of Change of Advocates.
  8. Their prayer was for their application dated 5<sup>th</sup> March, 2015 be allowed and the first application dated 16<sup>th</sup> October, 2014 be dismissed and the costs be awarded in favour of the Petitioners.

### **ISSUES FOR DETERMINATION**

9. After hearing the submissions of both parties the issues the court framed are as set out hereunder;
  - i. Whether the suit has abated;
  - ii. Whether to allow the application for substitution;
  - iii. Whether the applicant's Counsel is properly on record;
  - iv. Costs.

### **ANALYSIS**

10. I shall start with the issue as to whether the firm of advocates that filed the Notice of Change of Advocates are properly on record as acting for the applicant in the application dated the 16<sup>th</sup> October, 2014.
11. The applicant deposed to the fact that Nathaniel died on the 23<sup>rd</sup> July, 2013 and a copy of the Death Certificate is annexed to the application and is marked as 'LMN-1'.
12. The applicant then obtained Limited Letters of Administration on the 16<sup>th</sup> June, 2014 and a copy of the same is annexed and marked as 'LMN-2'
13. The Notice of Change of Advocate is dated the 16<sup>th</sup> October, 2014 and states that and I quote;

**'.....that the Applicant herein NATHANIEL WANJOHI NDERITU has appointed the firm of Sichangi Partners Advocates, .....to act for him in place of Gakuhi Chege & Co. Advocates.....who previously acted for him.'**

14. This document I reiterate is dated the 16<sup>th</sup> October, 2015 which apparently was after the death of the person named therein. I concur with the submissions of counsel for the Petitioners, that the firm of Sichangi Partners are not properly on record as the instructing client was long deceased and find that the instructions are not tenable.
15. Ordinarily the correct position that this court should adopt is have the Notice of Change of Advocate struck out together with the application for substitution as it was drawn by the same firm of advocates.
16. Nevertheless I shall exercise my discretion and shall overlook this issue as it may have been a typographical error attributable to Counsel and it is the duty of this court to act judiciously so as to ensure that the litigant does not suffer injustice or hardship as a result of an excusable error visited upon the litigant by his advocates. Counsel is hereby directed to rectify the said Notice of Change of Advocate.
17. The next issue relates to abatement. The Law of Succession has no specific provision catering for this issue where the law is not exhaustive or exclusive or clear a party seeking such an order may seek leave of the court and the court may exercise its inherent powers to make orders that are in the interest of justice. Indeed In this instant case the Petitioner/applicants have sought such orders under the provisions of Rules 49 and 73 of the Probate and Administration Rules.

18. When exercising its discretion the court must look at and weigh the surrounding circumstances of the case and the material placed before it and then determine whether it would be in the best interests of justice to allow the application for abatement.
19. The circumstances that can be discerned by this court are that Nathaniel filed the application for Revocation of Grant and unfortunately passed on before the suit was determined. The son deponed that he is interested in pursuing the case to its logical conclusion and presumably on merits.
20. The Applicants want this court to find that the Respondent had been indolent as the orders for substitution had been granted on the 30/07/2013 and the Applicants state that thereafter the Respondent went to sleep. The period of indolence translates to a period of over two (2) years. The Respondent had also obtained injunctive orders on the same date which the Applicants contend are prejudicial to them, which the Respondent continues to enjoy to their detriment.
21. Having perused the court record I have noted that the Respondent though duly served with the application for abatement did not file any response but instead filed the application for substitution which then means this second application is unchallenged and uncontroverted.
22. The above notwithstanding this court notes that the Applicants did not provide the court with details as to when the Respondent came to know of the existence of the suit filed against them by his deceased father.
23. Again I shall give the Respondent herein the benefit of doubt as this period he is alleged to have slept on his rights could have been attributable to the fact that the particulars of the case may not have been within his knowledge and could have only come to his knowledge after the application for abatement was filed and served. I reiterate the onus of shedding light on the issue of knowledge of the suit was upon the Applicants.
24. In the light of the forgoing this court is unable to exercise its discretion in favour of the Petitioner/applicants as it finds that this is not the opportune time to grant the prayer for abatement.
25. On the last issue of substitution, here the court is also required to exercise its discretion.
26. The suit relates to the revocation of succession rights granted to the Petitioners and touch on the rights to access and control of the subject matter which is land. Issues touching on land and inheritance are known to be emotive.
27. It is this courts' considered view that by obtaining the Limited Letters of Administration and by also filing the application for substitution the Respondent has shown that he is interested in having the matter adjudicated and determined.
28. I am also guided by the principles set down in the Court of Appeal in the case of which held;

**'The administration of justice should normally require that the substance of all disputes should be investigated and decided on merits.....'**

29. In the light of the above circumstances this court is satisfied that the applicant in the application for substitution has demonstrated sufficient reasons to enable this court to exercise its discretion.
30. This court finds that this is a suitable case in which it can exercise its discretion in favour of the applicant in the application for substitution so as to enable him to ventilate the case to its logical conclusion.

### **DETERMINATION**

31. The application for substitution dated the 16<sup>th</sup> October, 2014 is hereby allowed. The applicant is hereby allowed to substitute the name of **Nathaniel Wanjohi Nderitu (deceased)** with that of **Lawrence Muriithi Wanjohi** in the Succession Cause, herein.
32. The Applicant is directed to have the application for the Revocation of Grant listed for hearing within thirty (30) days from the date hereof.
33. In default the suit shall stand abated and the Preservatory Orders granted therein on the 30/07/2013 shall be discharged, forthwith. The Petitioners shall be entitled to costs of the suit.
34. The Petitioners shall have the costs of both applications.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 30th day of November 2015.**

**A. MSHILA**

**JUDGE**