



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**HIGH COURT CIVIL CASE NO. 2127 OF 2007**

**THE REGISTERED TRUSTEES OF**

**RUIRU SPORTS CLUB**

**RONALD GRAMAME TIMMS**

**MICHAEL ALBERT ALLEN HARRIS**

**MAJOR GEN. (RTD) HEZRON AMBUNDO MURUNGA.....PLAINTIFF**

**VERSUS**

**ISAAC KARURI NYONGO.....1<sup>ST</sup> DEFENDANT**

**PETER MIRINGU KIBUI.....2<sup>ND</sup> DEFENDANT**

**SAMUEL KIMONDO THEURI.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....5<sup>TH</sup> DEFENDANT**

**JOSHUA KIMANI NJOGU.....6<sup>TH</sup> DEFENDANT**

**OAKES ENGINEERING INT. LTD.....7<sup>TH</sup> DEFENDANT**

**PETER F. WAIGANJO.....8<sup>TH</sup> DEFENDANT**

**ALFRED KIMENDERA IRUNGU.....9<sup>TH</sup> DEFENDANT**

**DANIEL KIMENDERA RUKUNGA.....10<sup>TH</sup> DEFENDANT**

**ESTHER WAKONYO MBURU.....11<sup>TH</sup> DEFENDANT**

**DANIEL KIMANI WAINAINA.....12<sup>TH</sup> DEFENDANT**

**GEORGE KIRAGU NJAU.....13<sup>TH</sup> DEFENDANT**

JAMES MBURU NJUGUNA.....14<sup>TH</sup> DEFENDANT

PETER KIUMU MUGECHI.....15<sup>TH</sup> DEFENDANT

TERESIA WANGUI KIUMU.....16<sup>TH</sup> DEFENDANT

## RULING

### The Application

The application for determination before the court is the Notice of Motion dated 17<sup>th</sup> June 2013 brought by the Plaintiff seeking orders that the time within which to join a legal representative of the 2<sup>nd</sup> Defendant in this suit be enlarged or extended for six (6) months, and that the deceased 2<sup>nd</sup> Defendant, the late Peter Miringu Kibui be substituted with a legal representative, Mary Wairumu Miringu (hereinafter “the Intended Legal Representative”) as the cause of action still subsists.

The Plaintiff states that the 2<sup>nd</sup> Defendant died on 9<sup>th</sup> June 2012, and has not been substituted with a legal representative. Further, that they were under the belief that the 2<sup>nd</sup> Defendant’s family would petition for Letters of Administration, and that the Plaintiff has now been applied for a limited grant of Letters of Administration which were granted on 22<sup>nd</sup> May 2013. These averments are supported by an affidavit sworn on 17<sup>th</sup> June 2013 by Major General (Rtd) Hezron Ambundo Murunga.

The Plaintiff’s counsel in his submissions dated 1<sup>st</sup> October 2013 raised a preliminary issue that the intended legal representative had no locus as she was not yet a party to this suit, and this court should not have granted her leave to file a replying affidavit. He relied on the decision in **Estate of Naomi Wangui Mungai alias Naomi Kaboro Mungai, Succession Cause No. 1234 of 2009** in this respect. Further, that the limited grant was lawfully granted ex parte as the family of the 2<sup>nd</sup> Defendant was unable and/or unwilling to petition for the same and relied on section 54 of the Law of Succession Act and Rule 15 of the 5<sup>th</sup> Schedule to the Act.

The Plaintiff’s counsel further submitted that from their petition for the Limited grant the purpose for issuing the said limited grant was for representing the deceased in this suit. However, that there was a typographical error on the said limited grant which ought to be rectified, and the counsel asked this court to *suo moto* rectify the said limited grant in accordance with the prayers sought in the Plaintiff’s petition.

### The Response

The Intended Legal Representative’s advocate entered appearance in a Memorandum of Appearance dated 25<sup>th</sup> July 2013, and was granted leave by this court to file a response to the Plaintiffs’ Notice of Motion. The Intended Legal Representative in a replying affidavit sworn on 29<sup>th</sup> July 2013 stated that she was not aware of any proceedings to be made legal representative of the 2<sup>nd</sup> Deceased, and only became aware upon being served with the application herein. Further, that the said limited grant is for purposes of filing suit, and she does not intend to file any suit for the estate of the deceased 2<sup>nd</sup> Defendant. It was her averment that the said grant cannot therefore be utilized in this application as it is in a general form of wording.

The Intended Legal Representative also averred that the Plaintiff’s counsel by a letter dated 6/5/2013 and received at the Probate Registry on 1/6/2013 sought for the rectification of the limited grant, and even attached a copy of the grant with the amendments they required. She attached copies of the said letter and amended grant.

The Intended Legal Representative’s counsel in submissions dated 23<sup>rd</sup> October 2013 argued that the limited grant issued by the court on 22/5/2013 was defective in substance as it is limited for purposes of

“filing suit”, and cannot be used as the basis for substituting the 2<sup>nd</sup> Defendant. Further that the Plaintiff has sought to have the grant rectified, and that the correct procedure is provided by section 74 of the Law of Succession Act and Rule 43 of the Probate and Administration Rules that requires rectification to be by way of summons.

The counsel also argued that this court has no inherent jurisdiction to rectify the grant *suo moto*, and that its powers are limited by section 13 of the Environment and Land Court Act. Further, that the powers to deal with succession and probate proceedings are reserved for the High Court under section 47 of the Law of Succession Act. Lastly, the counsel submitted that the Intended Legal Representative’s rights to be heard as provided by Article 50(1) of the Constitution were curtailed in the application made to nominate her as the legal representative of the 2<sup>nd</sup> Defendant.

### **The Determination**

I have read and carefully considered the pleadings and submissions made by the Plaintiff and Intended Legal Representative. I will first address the preliminary issue raised of the locus of the Intended Legal Representative to respond to the Plaintiff’s Notice of Motion. Order 51 of the Civil Procedure Rules that provides the procedure to be followed in applications filed in court, and rule 3 requires that every person who is affected by an application to be served with the same. Rule 14(1) of the Order further states as follows:

**“(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents**

**(a) a notice preliminary objection; and/or;**

**(b) replying affidavit; and/or**

**(c) a statement of grounds of opposition;...”**

A respondent is defined in **Black’s Law Dictionary, Ninth Edition** at page 1426 as the “the party against whom a motion or petition is filed”. The Plaintiff has filed the present Notice of Motion to join the Intended Legal Representative as a party to this suit. The said Notice of Motion is thereby directed at the Intended Legal Representative who this court finds to be the Respondent herein, and who has a right to respond to the said Notice of Motion under Order 51 Rule 14 (1) of the Civil Procedure Rules.

In addition, if the framers of Order 51 Rule 14(1) of the Civil Procedure Rules had wanted to limit opposition to applications to parties in a suit, nothing would have been easier but to state so. It is my opinion that one of the reasons the word “Respondent” is used in the said rule instead of “Party” was to enable a person affected by an application to be able to respond to it. It is also necessary to point out that this court is given the power under section 3A of the Civil Procedure Act to make such orders as are necessary in the interests of justice.

I shall now proceed to address the prayer sought for enlargement of time for substitution, and for the substitution of the 2<sup>nd</sup> Defendant with the Intended Legal Representative. Order 24, Rule 4 of the Civil Procedure Rules in this regard provides the procedure to be followed in the case of death of one of several Defendants or of the sole Defendant as follows:

**“4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”**

The issues before the court therefore are whether there the Intended Legal Representative can be substituted in place of the 2<sup>nd</sup> Defendant, and if so whether this court can enlarge the time for such substitution.

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.

The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

**“When it is necessary that the representative of a deceased person be made 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 the 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, and until a final decree shall be made therein, and carried into complete execution.”**

I have perused the limited grant that was produced in evidence by the Plaintiff as annexure “HAM-2” to their supporting affidavit, and it stated therein that the grant of letters of administration is limited only for purposes of filing suit. Paragraph 14 above however requires a limited grant to be with respect to a specific and specified suit. It is therefore the finding of this court that the Intended Legal Representative has not been given any limited grant of representation to represent the 2<sup>nd</sup> Defendant in this suit.

I have also considered the arguments made by the Plaintiff and Intended Legal Representative on the rectification of the said grant. It is my view in this regard that it is not within the purview of this court to review the procedures of the court that granted the said limited grant, or to rectify the said grant. Indeed it is provided by section 99 of the Civil Procedure Act in this regard that if one seeks to correct the clerical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, one must move the court that granted the said decree or orders, which is clearly not this court.

In addition, I agree with the Intended Legal Representative’s submissions that this Court’s jurisdiction is limited to determining disputes on the environment, and use, occupation of and title to land under Article 162(2) (b) of the Constitution, and has no jurisdiction to rectify limited grants of representation.

The Plaintiff’s Notice of Motion dated 17<sup>th</sup> June 2013 is therefore denied for the foregoing reasons. The Plaintiff is however at liberty to apply for substitution of the 2<sup>nd</sup> Defendant by a properly appointed legal representative.

The Plaintiff shall bear the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_27<sup>th</sup>\_\_\_ day of \_\_\_January\_\_\_, 2014.

**P. NYAMWEYA**

**JUDGE**