



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS APPLICATION CASE NO. 139 OF 2014

JOSEPH MBOGO ISHUMAEL.....APPLICANT/PLAINTIFF

VERSUS

HENRY NAMU.....RESPONDENT/DEFENDANT

RULING

INTRODUCTION

By his chamber summons dated 13th October 2014, the plaintiff/applicant has applied to this court to appoint Henry Namu as the person to represent the estate of the deceased Mugo Munyambu. In support of the chamber summons, the plaintiff has sworn an affidavit dated 4th August, 2014. He has also in support of the application set out the grounds which are clear from the chamber summons.

The proposed nominee to represent the estate of the deceased namely Henry Namu was served with today's (8th December, 2014) notice of hearing through his wife with whom they are living together. The affidavit of service was filed in this court on 4th December, 2014. Because the service had been effected upon his wife, the hearing of the application proceeded in his absence.

The Plaintiff's Factual Basis

In support of his application to nominate Henry Namu as the representative of his late father's estate, the plaintiff has sworn an affidavit in which he has stated that the deceased (Mugo Munyambu) died on 28th March, 2013. It is also his evidence that the deceased held the suit lands reference nos. Nthawa/Gitiburi/3065 and Nthawa/Gitiburi/3073 in trust in his capacity as chairman of the plaintiff's clan. According to the plaintiff, he is entitled to a share of the said suit land.

Furthermore, the plaintiff has stated that since the death of the deceased, none of the family members has gone forward to apply for letters of administration of the estate. He further says that his family will continue to suffer loss as they cannot utilize the suit parcels of land number Nthawa/Gitiburi/3065 and Nthawa/Gitiburi/3073.

The plaintiff has finally stated that his suit has high chances of success since the defendant's advocates have partially admitted part of the claim in respect of the two parcels of the suit land. He further asks this court to allow his application that Henry Namu be nominated as the legal representative of the estate of the deceased in terms of ***Schedule 5 Rule 14*** of the ***Succession Act Cap 160 Laws of Kenya***. This will enable him to prosecute the pending suit. According to him, Henry Namu is the proper nominee because

he is the eldest son of the deceased. Additionally, he says that Henry Namu was the one who was issued with a burial permit for his late father, Mugo Munyambu.

The Applicable Law:

The law that applies in this regard is set out in the *5th Schedule, Rule 14 of the Law of Succession Act Cap 160, Laws of Kenya*. The provisions of that Schedule and the Rule State as follows:

“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 the suit, limited for the purpose of representing the deceased therein, 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.”

Issues for Determination:

It is my considered view that the issues for determination in this application are as follows:

1. Whether or not the plaintiff has met the evidentiary threshold for the appointment of Henry Namu as the the nominee representative of the estate of the deceased.
2. Who should bear the costs of this application.

Evaluation of the Facts and the Law:

Before an applicant is granted an order of the court appointing a nominee to represent the estate of the deceased, the following requirements must be met:

1. It must be shown that it is necessary to appoint a representative for purposes of a pending suit.
2. It must also be shown that the executor or the person to be appointed is entitled to administer the estate but is unable or unwilling to act.
3. The grant of such order is only limited for purposes of representing the estate in the suit or any other cause between the parties.

The affidavit evidence of the plaintiff has shown that neither Henry Namu, nor any member of the family has gone forward to apply for letters of administration of the estate of the deceased Mugo Munyambu. There is credible evidence that Henry Namu is the one who was granted a burial permit to bury his late father. There is further evidence the advocates of the late Mugo Munyambu refused to accept service of this application on the grounds that their client Mugo Munyambu was late and that they have not found any substitute from the members of the deceased family. There is also evidence that the plaintiff cannot proceed with this suit in the absence of a nominee in terms of Rule 14 of the 5th Schedule of the Succession Act.

It is clear from *Order 24 Rule 4 (1), (2) (5) of the Civil Procedure Rules, 2010* that there is to be a legal representative of the deceased who is entitled to be a proper party, where the deceased has died. In this case, there is no legal representative of the deceased in terms of *section 2 of the Civil Procedure Act* because no one has taken out letters of administration of the estate of the deceased.

In the circumstances, the application of the plaintiff is granted in terms of prayer 1 of his chamber summons. It therefore follows that Henry Namu will represent the estate of the deceased in this suit until same is heard and finalized.

Verdict and Disposal Order:

In the light of what I have mentioned above, it is ordered that:

1. Henry Name is the nominee of the estate of the deceased for purposes of prosecuting this suit until same is heard and finalized.
2. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this...**8th**day of ...
December....**2014**

In the presence of

The plaintiff applicant and in the absence of the defendant/respondent

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE