



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 54 OF 2010

FREDRICK MUROKO GITUKU.....PLAINTIFF

VERSUS

JOSEPHINE W KIRIKA & 4 OTHERS.....DEFENDANTS

RULING.

The Plaintiff applicant herein **Frerick Muroko Gituku** has brought this application dated 25th March, 2013 under **Order 24 Rule 4 and 5 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act Cap 21** and all the enabling provisions of the law, for Orders that leave be granted to join **Mugo Kirika** in his capacity and Legal Representative of the Estate of the late **Josephine Wamaitha Kirika** to be joined as 1st Defendant in this matter in the place of the late 1st Defendant herein and for costs of the application to be in the cause.

The application is supported by the grounds on the face of the application and on the affidavit of **Fredrick Muroko Gituku**. These grounds are that:-

- i. The Plaintiff in the matter was the joint owner of Parcel of Land described as **LR No. 13330/582** together with the now deceased 1st Defendant in this matter.
- ii. That the cause of action survives the demise of the 1st Defendant.
- iii. That 1st Defendant passed away on 16th April, 2012.
- iv. That it is necessary for the determination of this suit to have the Legal Representative or Administrator of the Estate of the 1st Defendant, the late **Josephine Wamaitha Kirika** who died on 16th April, 2012 to be determined and enjoined in this suit.
- v. That, it will be in the interest of justice to allow for the enjoining of the said legal representative.
- vi. That no prejudice will be suffered by the legal representative by the intended enjoinder to the suit.

The application was opposed by the said intended legal representative who alleged that he is not the legal representative of the estate of the late **Josephine Wamaitha Kirika** and that the cause of action herein does not survive the demise of the 1st Defendant.

He filed his Replying Affidavit and averred that the purported fraud cannot be transferred from the late **Josephine Kirika** to him.

The 4th Defendant also filed his grounds of opposition and alleged that no evidence has been tendered to

show **Mugo Kirika** is the legal representative of the Estate of the 1st Defendant and without such evidence, the said application is unsustainable and must fail. That no purported Amended Plaintiff has been attached.

The parties herein canvassed the application orally in Court. The Court has now considered the oral submissions, the pleadings generally and the Law and I make the following findings.

Order 24 Rule 4 of the Civil Procedure Rules provides that:-

“where one of two or more Defendants 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”.

The Law is therefore very clear that it is the legal representative of the estate of the Deceased who is to be made a Defendant.

The Succession Act cap 160 describes who the legal representative is. A Legal Representative is one who has taken out letters of administration or a Personal Representative see section 3

Applicant herein has not attached any letters of administration to confirm that **Mugo Kirika** is the Legal Representative of the estate of the late **Wamaitha Kirika**. The fact that **Mugo Kirika** was a husband to the late **Josephine Wamaitha Kirika** does not automatically mean that he is indeed the legal Representative. **Mugo Kirika** has denied that he is such a Legal Representative. If the Court would grant the Applicant the present application then, the Court will be involved in fishing expedition. The Court has considered **Order 24 Rule 5** which provides that;-

“Where a question arises as to whether any person is or is not the Legal Representative of the deceased, such question shall be determined by the Court”.

Mugo Kirika has denied that he is not the Legal Representative of the Estate of the late **Josephine Wamaitha Kirika**. There is no document brought to confirm that **Mugo Kirika** has been declared such legal Representative. The Court shall therefore, determine herein that without evidence of such Legal Representation, the Court will find it very difficult to hold that indeed **Mugo Kirika** is the Legal Representative of the estate of late **Josephine Wamaitha Kirika** and that he should be joined as the 1st Defendant herein.

I have also considered the claim by the Plaintiff herein against the late **Josephine Wamaitha Kirika**. The claim is emanating from fraud. That kind of fraud was personal to **Josephine Wamaitha Kirika** and it is not the kind of action that survives the demise of the late **Josephine Wamaitha Kirika**.

In a nutshell, the Court finds that the cause of action herein does not survive the demise of the 1st Defendant as the said fraud was personal to her. Also there is no evidence that one **Mugo Kirika** is the Legal Representative of the Estate of late **Josephine Wamaitha Kirika**. It is trite law that properties of deceased are administered by the Legal Representative or administrator of the Estate of the deceased. Section 3 of the interpretation Section of Cap 160 provides that :-

“Administrate means a person to whom grant of letters of Administration has been made under this Act”.

It was held in the case of **Troustik Union International and another Vs Alice Mbeyu and another Civil Appeal No.145 of 1990 that:-**

“Personal Representatives are people who have obtained grant and not blood relation”.

Though it is not denied that **Mugo Kirika** was the husband of the late **Josephine Wamaitha Kirika**, it is in doubt whether he is the Legal Representative of her Estate.

Consequently, the Court dismisses the Plaintiff/Applicant's Notice of Motion dated 25/3/2013.

Costs in the cause.

It is so ordered.

Dated, Signed and delivered this 26TH day of July, 2013.

L N GACHERU

JUDGE

In the Presence of:-

.....for the Applicant

.....for the Defendants

Anne Court Clerk

L .N. GACHERU

JUDGE