



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Case 328 of 1991

KINYUA MAGAMBO
PLAINTIFF/APPLICANT

VERSUS

DANIEL BAARU 1ST DEFENDANT

STEPHEN KANUGU MARETE 2ND DEFENDANT

KARAMBU M'MUGAMBI 3RD DEFENDANT

ANNA KATHANGA BAARIU 4TH DEFENDANT

RULING

Judgment was entered in the sum of Kshs. 305,840/= jointly and severally against the defendants on 16th June 1997 by this court (Etyang, J). It is clear from the pleadings that before execution the 1st defendant died on 12th August 1997. The plaintiff (applicant) made an application dated 9th July 1998 in which he sought leave of the court to appoint the widows of the 1st defendant, Anna Kathang'a and Sarah Karambu Mugambi as legal representatives of the estate of the 1st defendant.

On 15th July 1998, Juma, J. allowed the application. However by an application dated 13th January 2000 one of the widows, Sarah Karambu M'Mugambi moved the court to stay execution of the decree and the setting aside of the orders appointing her and her co-widow legal representatives of the 1st defendant.

In his ruling delivered on 25th February 2000 the Hon. Commissioner of Assize Omwitsa allowed the application thereby staying execution and setting aside the order appointing the widows of the 1st defendant legal representatives of his estate. The plaintiff/applicant has brought the very application against the two widows for orders that they be appointed joint legal and personal representative of the estate of the 1st defendant. It also seeks execution by way of warrants of arrest against the respondents.

The application is premised on the ground that the 1st defendant left a huge estate comprising land and cash in the bank. That the widows (the respondents) have refused to petition for a grant so as to frustrate execution of the decree in this matter. That the respondents have nonetheless continued to manage and appropriate the estate even without the grant of representation. They have unlawfully transferred motor vehicles and land belonging to the 1st defendant.

The application was served by registered post to the firms of Kirimi Mbogo & Co. Advocates and Mithega & Arithi Advocates, both counsel for the respondents. Neither the advocates nor the respondents attended court for the hearing of this application. The same was, therefore, argued *ex parte*.

It is the duty of a party to prove his case on a balance of probabilities even where it is not opposed. The first observation I wish to make is that the present application seeks the same orders as those which were set aside. The court (Omwitsa – C.A.) did not state why the orders in question were set aside.

I reiterate that the first prayer upon which the second prayer is dependant seeks that the respondents be appointed legal and personal representatives. Section 2 of the Civil Procedure Act defines legal representative to mean:-

“.....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.”

Section 3 of the Law of Succession Act on the other side defines a personal representative to mean:-

“.....the executor or administrator of a deceased person.”

The two definitions confirm that a legal or personal representative is a person authorized by law to act on behalf of the deceased person. How is that person authorized by law? The answer to that question was provided by the Court of Appeal in the case of **Trouistik Union International & Another V. Mrs. Jane Mbeyu & Another** Civil Appeal No. 145 of 1990, where the law was stated as follows:-

“The (Succession) Act came into force on 1st July 1981. The person whose death and succession gave rise to this suit, namely John Kathembe, died on the 10th of April, 1984. to determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act. That section confers that power on personal representation and on them alone. As to who are personal representative within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says ‘representative means executor or administrator of a deceased person.’

It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says ‘administrator means a person to whom a grant of letters of administration has been made under this Act.....’ (emphasis supplied).

It follows that before one can be appointed a legal or personal representative for the estate of a deceased person evidence must be tendered that that person has obtained letters of administration in respect of the estate of the deceased person he proposes to represent.

The Law of Succession Act, particularly the Fifth Schedule – paragraph 14 and Part VI – Rule 22(3) (c) of the Probate and Administration Rules provides an elaborate procedure of compelling a person entitled to apply for letters of administration but who is reluctant to do so or, who is meddling with the estate, to take out letters of administration.

The applicant ought to have proceeded this way first. It is only after the respondents are taken through this route and a grant of representation issued to them that an application for their being substituted in place of the defendants in this case can be brought.

The application, for these reasons must fail and is dismissed.

I make no orders as to costs.

Dated and delivered at Meru this 10th day of June 2009.

W. OUKO

JUDGE