

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 606 of 2007 (OS)

GABRIEL MULI MUSILUPLAINTIFF

VERSUS

GEORGE MWANGIDEFENDANT

AFRICA TRADE AGENCY LIMITEDINTERESTED PARTY

RULING

The plaintiff **Gabriel Muli Musilu** has described himself as a son of **Joseph Musilu Ndolo** (deceased) and an heir to his estate. He claims that prior to his demise, the late **Joseph Musilu** was a director and shareholder of **Africa Trade Agency Limited**. He also alleges that the defendant is a representative of the estate of **Samuel Mwangi Maina** (deceased) who was a director and 2nd shareholder of Africa Trade Agency. The plaintiff's claim or cause of action against the defendant and interested party is over land parcel No.**Athi River/100426/2** and the proceeds of a sale concerning that property. The plaintiff alleges that the said parcel was sold for Kshs.32.5 million. And he seeks the distribution of the proceeds of the aforesaid sale among the directors or shareholders of the company (Africa Trade Agency Limited).

The advocate for the defendant has raised a preliminary objection in that the plaintiff has not obtained letters of administration before the commencement of this action. Consequently this suit is incompetent from the day of inception and should be struck out with costs to the defendant. The question for my determination is whether the plaintiff is entitled to maintain the present suit as presented. It has been alleged that the father to the plaintiff left a will to one **John Kimotho Ndolo** to be the executor of his estate. In Succession miscellaneous cause No.3081 of 2007 the said **John Kimotho Ndolo** applied for a grant of probate of written will of the late Joseph Musilu Ndolo who died at Nairobi hospital on 14th April, 2007.

The law is very clear that once a deceased person leaves behind a will, the only person who can validly and legally step into his shoes is the person mentioned in the will. It is therefore clear that the plaintiff is not a personal representative and he cannot agitate by suit any cause of action vested in his late father at the time of his death. In short the plaintiff cannot fall within the description of personal representative and he cannot be the administrator of the estate of the deceased. The plaintiff confirms that he has not obtained letters of administration under the Succession Act therefore he cannot invoke the aid of this court to agitate the cause of action which survived the deceased. It is clear that the plaintiff has brought the present action as a son and an heir to the estate of his late father. In my view he has no capacity, powers, authority and duty to instigate the present suit against the defendant and interested party. It is my position that what the plaintiff is trying to do is parallel and/or contrary to the will left behind by the deceased.

In short the suit is incompetent for lack of capacity and it is hereby struck out with costs to the defendant and interested party.

Dated and delivered at Nairobi this 3rd day of April, 2008.

M. A. WARSAME

JUDGE