



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

Succession Cause 134 of 1993

In the Matter of the Estate of Wachira Githinji (Deceased)

NELSON MUCHANGI WACHIRAAPPLICANT

And

DADSON GITHINJI WACHIRA}

NGUBIA CHARLES JOHNSON }.....CO-ADMINISTRATORS

RULING

In this Summons General dated 28th March, 2006 the Applicant is praying for orders:

“1. That NELSON MUCHANGI WACHIRA be substituted in the place of NGUBIA CHARLES JOHNSON the 2nd Administrator, the said Administrator being unable to conduct his business.

2. That the cost of this application be in the cause.”

I have heard the summons and from what has been brought to my attention, the Applicant Nelson Muchangi Wachira is a son of the deceased owner of the estate in this succession cause just as the two co-administrators and Samwel Migwi are. They have two sisters.

The two Co-Administrators were the Petitioners for a Grant of Letters of Administration Intestate and subsequently obtained the grant dated 16th March, 1994. That was long ago bearing in mind that to-day is the middle of the year 2006. With keen co-administrators, the administration of the estate of the Deceased herein would have been finalised many years back and the beneficiaries would not be running into the problem the Applicant says they have run into to-day.

From the year 1994 the Co-Administrators only came back to this court in this succession cause last year when they filed their summons dated 21st January, 2005, for confirmation of their grant. To-date more than a year after filing, that summons for confirmation of grant is still pending. That application was filed by an advocate Mr. H. K. Ndirangu who seems to be representing both Co-Administrators or

representing only one of them or representing the Applicant Nelson Muchangi Wachira or representing everybody including every beneficiary in this cause. His exact position in relation to clients in this succession cause is not clear as in the papers he has filed like summons for confirmation of grant he has signed as the advocate for the Applicant without clarifying the Applicant concerned where there are two administrators.

In that situation therefore the learned counsel has not remembered to let the court know whether the administrator to be replaced by substitution cannot swear an affidavit to support the application for substitution. The Court has been told Ngubia Charles Johnson cannot come to court but has not been told he cannot swear an affidavit.

Not only that. The Court is being told nothing about the re-action of the other Co-administrator Dadson Githinji Wachira. Was it not necessary to get an affidavit from him indicating whether he supports the application for substitution? How about the views of other beneficiaries. It is not enough for the Applicant Nelson Muchangi Wachira to depone in his affidavit that other beneficiaries have consented. It is important for each beneficiary to confirm that position through his affidavit. The Applicant may have consented to replace the administrator in question but that is not enough. This is a special situation in specialised proceedings where the relevant provision of the law say nothing about substitution of a party especially an administrator already appointed through the specialised procedure which involves publication in the Kenya Gazette inviting objections. Now the Applicant seeks to become an administrator without passing through the normal process; and indeed Mr. Ndirangu could not find a relevant provision of the law to rely on. Rule 49 of the Probate Administration Rules he mentioned only provides that an application which is not specifically provided for be made by way of summons and that is all.

In my view an administrator who became such an administrator following his publication in the Kenya Gazette ought not be substituted by anyone else. Moreover where substitution is done, it cannot be said that the existing grant is being rectified. That is something bigger than rectification-which is a mere correction of an error or mistake. In this situation there was no error or mistake. If an administrator is substituted, it means the existing grant has been cancelled so that it is replaced by a different grant. That amounts to revocation yet the applicant for substitution has not applied for revocation of grant. He has not invoked section 76 of the Law of Succession Act which provides for revocation. A revocation of a grant done outside section 76 will not be a revocation in accordance with the law if that grant was issued under provision of the Law of Succession Act. But that is what the Applicant in the Summons before me dated 28th March, 2006 is asking me to do. I decline to give such an order.

Accordingly, the Summons general dated 28th March, 2006 be and is hereby dismissed.

Dated this 29th day of May, 2006.

J. M. KHAMONI

JUDGE