



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

P&A 81 OF 2002

ELEKEO OCHIENG MBANDA ::::::::::::::::::::::::::::::: APPLICANT

AND

ANDEREA MBANDA WANJERO ::::::::::::::::::::::::::::::: DECEASED

RULING

By an application by way of Chamber Summons dated 27th April, 2006, pursuant to the provisions of section 71 (2) (b) of the Law of Succession Act [Cap 160 Laws of Kenya] the applicant seeks orders:

- a) ***That Elekeo Ochieng Mbanda do substitute Abednego Wanjero Mbanda who has since died and confirmed grant of letters of Administration issued on 2nd December 2002 to Abednego Wanjero Mbanda be issued in the names of Elekeo Ochieng Mbanda.***
- b) ***That costs be in the cause.***

The application is based on the grounds:

- a) ***That letters of administration were issued to Abednego Wanjero Mbanda on 2nd December, 2002.***
- b) ***That the said Abednego Wanjero Mbanda died on 29th November 2005 while the grant was pending for confirmation.***
- c) ***That the applicant herein is the brother of Abednego Wanjero Mbanda and a beneficiary to the estate herein.***

The application is predicated upon the annexed affidavit of Elekeo O. Ochieng Mbanda sworn on the 26th day of April, 2006.

For the applicant, it was argued that he is one of the beneficiaries of the estate of Andres Mbanda Wanjero by reason of being his son.

That the succession case herein was commenced by Abednego Wanjero Mbanda who died on 29th November 2005.

That the said Abednego Wanjero Mbanda was survived by the following children:

- a) **ABEDENEGO WANJERO MBANDA**
- b) **JACOB OBADHA MBANDA**
- c) **SOSPETER ODHIAMBO MBANDA**
- d) **NOAH MBANDA**
- e) **JOSEPH NYANGAU MARANYA**
- f) **KENNEDY ODHAIMBO MBANDA**
- g) **MORRIS MBANDA**

That by reason of the demise of Abedenego Wanjero Mbanda the court be pleased to substitute him [Elekeo Ochieng Mbanda] in place of the deceased.

Order XXIII of the Civil Procedure Provides:

“ 1. That the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. That where there are more plaintiffs, or defendants than one, and any one of them dies and where the cause of action survives or continues to the surviving plaintiff or

plaintiff alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant/s.

3. (i) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

ii) Where within one year, no application is made under sub rule (i) the rule shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

4. (i) where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone or a sole defendant or surviving defendant 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.

ii) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

iii) Where within one year no application is made under sub-rule (i), the suit shall abate as against the deceased defendant.”

I am alive to the law that the said Order XXIII is ousted by Rule 63(1) of the Probate and Administration Rules, which provides:

“Save as is in the Act or in these rules otherwise provided and subject to any order of the court or a

registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these rules.”

Accordingly, in my view; an application for substitution under Probate and Administration Rules may be brought any time by any competent person under Succession Act [Cap 160 Laws of Kenya].

That being my view of the matter, in exercise of my inherent jurisdiction under the Succession Rules (see rule 73 P&A Rules). I accordingly grant the application in terms of prayer (a) and (b) of the application.

DATED and DELIVERED at Busia this 29th day of November, 2006.

N.R.O. OMBIJA

JUDGE

Mr Otanga for the applicant.