



REPUBLIC OF KENYA
AT THE HIGH COURT OF KENYA

AT BUSIA

P&A CAUSE 16 OF 1999

IN THE MATTER OF THE ESTATE OF GREGORY OGUKU USHIT (DECEASED)

AND

**IN THE MATTER OF APPLICATION BY MARY AKOLYA OGURU
MALIGATA:::::::::::::APPLICANT**

AND

GREGORY OKUKU USHIT ::::::::::::::: DECEASED

RULING

By an application by way of Chamber Summons, dated 3rd November 2006 pursuant to the provisions of section 71(2) (b) of the Law of Succession Act and under Rules 49 and 73 of the Probate and Administration Rules, the applicant seeks orders:

- a) *That Mary Akolya Oguru do substitute Maligata Nasirumbi Oguru who has since died and confirmed grant of letter of administration issued herein on 4th October 1999 to Maligata Nasirumbi Oguru be issued in the names of Mary Akolya Oguru.***
- b) *That costs be in the cause.***

The application is based on the grounds:

- a) *That Letters of Administration were issued to Maligata Nasirumbi Oguru on 4th October, 1999.***
- b) *That the said Maligata NASIRUMBI Oguru died on 2nd June 2004 while the grant was pending for confirmation.***
- c) *That the applicant is the only surviving daughter of the said Maligata Nasirumbi Oguru and Gregory Oguru Ushit both deceased and a beneficiary to the estate herein.***

The application is predicated upon the annexed affidavit of Mary Akolya Oguru sworn on the 3rd day of November 2006.

For the applicant, it was argued that the Succession Cause herein was commenced by Maligata Nasirumbi Oguru and a grant of letters of administration was issued to her on 4th October, 1999.

That the only other beneficiary to the estate herein was her sister by name Regina Auma Akaroot Oguru who died on 25th December, 2004 as evidenced by a copy of death certificate marked “MA – 2”.

That the applicant is the only surviving child of Gregory Oguru Ushit and Maligata Nasirumbi Oguru both deceased. Evidence of this fact is by way of a letter of the area chief marked as exhibit “MA -3”.

That on the premises the estate consisting of L.R.NO.SOUTH TESO/ANGOROMO/2892 should be registered in the applicant’s name as the sole surviving beneficiary.

Order XXIII of the Civil Procedure Rules provides:

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

2. Where there are more plaintiffs or defendants than one, and any of them dies and where the cause of action survives or continues to the surviving plaintiff or plaintiffs 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 (1), the suit 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 or two or more defendants dies and the cause of action does not survive or continue against the surviving defendant of 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 (1), the suit shall abate as against the deceased defendant.”

It was contended, on behalf of the applicant, that Order XXIII aforesaid is ousted by Rule 63(1) of the Probate and Administration Rules. Hence the application for substitution under the Probate and Administration rules may be brought at any time by any of the beneficiaries of the estate or competent persons under the Succession Act.

Rule 63(1) of the Probate and Administration rules 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 this rules.”

In my view, the said rule oust the provision of Order XXIII of the Civil Procedure rules. In which event the court has inherent powers under rule 73 of the Probate and Administration rules to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In the exercise of my inherent jurisdiction [see Rule 73 of 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.