



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**SUCCESSION CAUSE NO. 1317 OF 1991**

**IN THE MATTER OF THE ESTATE OF JOHN KAMAU alias**

**JOHN KAMAU MIRIANO**

**(DECEASED)**

**ROSE WANJIKU KURIA ..... APPLICANT**

**VERSUS**

**NGANGA MUGWE ..... RESPONDENT**

**Issue:**

**Whether the court can lawfully authorize the Registrar of the High Court or his Deputy to sign land transfer and related Documents on behalf of a personal Representative of a deceased person Under the Law of succession Act.**

**R U L I N G**

In the summons dated 8th April 2002 stated brought under Rules 49 and 73 of the Probate and Administration Rules, the Applicant is asking the court for an Order:

“That the Deputy Registrar of this court be authorized to sign transfer forms L.R. 7 application to be registered as proprietor by transmission L.R. 19 partition forms, Land Control Board forms and any other document necessary to enable the applicant to be registered as owner of her portion namely LOC.6/Muthithi/1489 – 0.36 Hectares”.

The Applicant and the Respondent are co-Administrators of the estate of John Kamau alias John Kamau Miriano and had their grant of letters of administration confirmed on 4th February 2002. The schedule in the certificate of confirmation says that the only asset to be distributed in the estate being land parcel L.R. LOC. 6/Muthithi/1489 measuring 0.36 hectare was to belong to Rose Wanjiku Kuria as heir.

I have not been shown evidence to prove that the said parcel of land is now registered, as it should be following confirmation of grant, in the names of both administrators. However, to finalize the administration, it is necessary that both administrators sign the forms mentioned in the prayer quoted above for that parcel of land to be registered in the name of Rose Wanjiku Kuria alone as heir.

I should add that the grant of letters of administration in this matter was confirmed following a dispute between the two administrators as to who, among them, should be registered as heir or owner of that parcel of land. That dispute was heard and resolved in favour of Rose Wanjiku Kuria by Lady Justice

Aluoch on 4th February 2002 before she proceeded to confirm the grant of letters of administration.

I was, therefore, told that the Respondent was not appearing in this matter to oppose this summons because he had moved, after confirmation of grant, to the Land Disputes Tribunal where he obtained the Tribunal's ruling in his favour in May 2002 and went to rest waiting until the hearing of this summons today when the Respondent's advocate came to court to apply for adjournment to file a replying affidavit. Service of the summons upon the Respondent had been effected in November 2002. When I refused to grant the application for adjournment, the Respondent's advocate, Mr. Muraguri, disappeared and left Mr. Kinuthia, the Applicant's advocate, to prosecute the summons undefended.

Mr. Muraguri had told the court, during his application for adjournment, that the Tribunal had given his client 0.4 acre and Rose Wanjiku Kuria 0.5 acre pointing out that the whole land measured 0.9 acre which is approximately 0.36 hectare. But since that was subsequent to this court's judgment dated 4th February 2002 which gave the whole of 0.36 hectare to Rose Wanjiku Kuria, Mr. Muraguri felt rather embarrassed to say the legal effect of the Tribunal's decision bearing in mind that the judgment of this court still exists unchallenged and that these are succession proceedings under the Law of Succession Act which has no provisions for Land Disputes Tribunals.

To go back to the summons before me, it was filed because Nganga Mugwe has refused to co-operate with his co- Administrator rose Wanjiku Kuria to sign the forms mentioned in the prayer aforesaid. The legal position is that although the Respondent has refused to sign those forms, he still remains a co-administrator together with the Applicant. The two are still personal representatives of the deceased.

It is better to realize that the Law of succession act forms a specialized area in the law of this country. As such, it has ousted provisions of the Civil Procedure Act and Rules so that only specifically permitted provisions under rules 41 and 63 of the Probate and Administration Rules are allowed to apply in proceedings under the Law of succession Act.

Having, therefore, carefully considered what has been brought to my attention during the hearing of the summons dated 8th April 2002, the same be and is hereby dismissed with no order as to costs as there are no provisions under the Law of succession Act and Rules empowering the court to authorize the Registrar, Deputy Registrar or any other officer of the court to perform the duties the Applicant before me wants the court authorize the Deputy Registrar to perform. Those provisions are not there, not by accident, but by design because it is undesirable and improper to have them there as I will just briefly demonstrate herein under.

Rules 49 and 73 of the probate and Administration Rules do not help the Applicant out. Rule 49 enables an applicant to file a summons supported, if necessary, by affidavit where no provision is made elsewhere in the Probate and Administration Rules for the form to be used to file the application. That is all that that rule provides for and indeed, the Applicants have used the rule to so file the summons before me. The rule does not entitle them to get the order prayed for.

Under rule 73 the court is authored to use its inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The court must be careful in using this rule so that it is used only in deserving situations where no specific provisions exist to deal the issue in question.

Provisions of the Law of Succession Act and Rules are carefully designed so that an administrator or executor or personal representative comes to be such a person only after a specialized procedure has been put through. No body is just picked from the streets and told to exercise the powers and carry out duties of a personal representative without such a person having been appointed personal representative through the specialized procedure set out in the provisions of the Law of succession Act.

The personal representative therefore performs his duties and carries out his responsibilities, signing documents like transfers, applications for consent of land control board, mutations and the rest, because he is administering the estate of the deceased and he is a personal representative because he has been

granted probate or letters of administration as an executor or an administrator consequent to which, by virtue of section 79 of the Law of Succession Act, the executor or administrator gets all the property of the deceased vest in him. That having been done, the personal representative exercises the powers specifically given to him by section 82 and performs the duties specifically imposed upon him by section 83 of the Law of Succession Act. I do not, therefore, think it will be lawful for this court exercising its inherent powers under rule 73, a mere rule, to overlook the legal effect of substantive provisions like sections 53, 71, 79 82 and 83 in the main Act bearing in mind that the same Act, having created such a special personal representative with powers and duties, has provided sanctions against the same personal representative if he fails to shoulder the powers given him and or fails to perform the duties imposed upon him.

If the Respondent, as a co-administrator, has refused to sign documents to effect the distribution of the estate, there are proper provisions in the Act, not only for dealing with personal representatives who fail to administer estates for which they have obtained grants of representation, but also for handling such a situation generally.

I am not the Applicant's advocate, but those are the provisions the Applicant should look for and rules 49 and 73 of the Probate and Administration Rules, as cited in this summons, have no place on that issue. The Registrar of this court or his deputy or any other officer of the court not having been granted Probate or letters of administration and therefore having had no property of the deceased vest in him and no powers and duties in accordance with provisions of the Law of succession Act, cannot become an executor or administrator and as such cannot administer the estate of the deceased person and the court to order him or authorize him to administer by signing any of those documents as requested in this summons, is to make an order which is not supportable under the Law of Succession Act and is therefore null and void. It be noted, and as I have said earlier, the Civil Procedure Act and its rules do not apply on this issue in proceedings under the Law of Succession Act and cannot come to the rescue of the Applicant.

Dated this 27th Day of January 2003.

J.M. KHAMONI

JUDGE