



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

E.L.C CASE NO. 10 OF 2018

(FORMERLY E.L.C CASE NO. 398 OF 2014)

IN THE MATTER OF THE ESTATE OF THE ESTATE OF FRANCIS MURIUKI WAHOME (DECEASED)

JAMES GICHERU MURIUKI.....PLAINTIFF/DECEASED

VERSUS

PETER NGUNJIRI WAMBUGU.....DEFENDANT

AND

PHYLLIS MUMBI MURIUKI.....APPLICANT

RULING

1. The Applicant vide a Notice of Motion dated 19th July, 2021 and filed on 21st July, 2021 seeks the following orders: -

a) That the Honourable Court be pleased to substitute the deceased JAMES GICHERU MURIUKI with his Legal Representative, PHYLLIS MUMBI MURIUKI.

b) That the costs of this application be provided for.

2. The application is premised on the grounds set out on the face of the application, the affidavit in support as well as a supplementary affidavit of the applicant sworn on 19th July, 2021 and 18th October, 2021 respectively.

3. I have noticed from the depositions of the Supplementary Affidavit that the

Applicant was making reference to a Replying Affidavit sworn by the Defendant/respondent on 30th September, 2021. However, the said Replying Affidavit is not in the court file as I withdraw to write this ruling.

4. In the absence of the said Replying Affidavit by the Respondent/defendant, this court will refer the Application under review, the supporting as well as the supplementary affidavits and the submissions by the parties. The court will also look at the pleadings and proceedings on record.

5. When the application came up for hearing on 18th October, 2021, the parties through their advocates on record agreed that the application be canvassed by way of written submissions.

6 The Respondents filed his submissions on 2nd February, 2022 while the Applicant did not file submissions.

APPLICANTS CASE

6. The Applicant's position is that the original plaintiff in this case, one FRANCIS MURIUKI WAHOME (Deceased) who is the present Applicant's father died on 19th April, 2012.

7. The person who was substituted in his place as the plaintiff was his brother, one JAMES GICHURU MURIUKI who was issued with limited grant on 18th June, 2012.

8. However, the Applicant in this case has deposed that on 24th June, 2021 she was issued with Limited Grant of Letter of Administration Ad Litem in respect to the estate of her deceased father, FRANCIS MURIUKI WAHOME and that the ones issued to her Uncle JAMES GICHURU MURIUKI who is the immediate plaintiff (deceased) and who died on 21/10/2020 had become useless upon his death.

9. She stated that she was desirous of prosecuting the matter in place of the deceased plaintiff, JAMES GICHURU MURIUKI.

10. She stated that one Rose Mumbi Muriuki who is her step mother was given full grant her interest is averse to the interest of the estate of the deceased herein as she recorded a witness statement for the defendant in this case and thus, she cannot be a plaintiff and witness for the defendant.

11. She stated that the court had previously made a decision that her step mother cannot represent the estate of the deceased in this matter as she could not hold the position of the plaintiff and defence witness.

12. She stated that the said ruling was never challenged and thus urged that it was only meted and just that the application be allowed.

DEFENDANT'S SUBMISSIONS

13. The Defendant submitted that the applicant was guilty of non-disclosure of facts since she failed to disclose to the court that there is a full grant in respect of the Estate of Francis Muriuki Wahome issued to her step mother on 25th March 2013 in Nyeri P & A 997 of 2012.

14. He submitted that he holds the position that where there exists a full grant of letter of administration, no limited grant of letters can be issued and any limited grant issued thereby is rendered inoperative.

15. He submitted that under the laws of succession, a limited grant can only be issued where there is no full grant issued whatsoever under *Rule 38 (2) of the Probate & Administration Rules*. To support this, he relied on the cases of *In the Estate of the late Peter Muraya Chege (deceased) (2019) e KLR* and the case of *in Re Estate of Bhadrabala Amratlal Bhimji Davda (Deceased) (2021) e KLR*.

16. He submitted that the Applicant being fully aware that there was a confirmed grant in respect to the deceased's estate had failed to disclose the same to the Magistrate thus making the acquisition of the grant ad litem irregular.

17. He submitted that in the circumstances the only person who can substitute the plaintiff in the proceedings is the applicant's step mother who possess the full grant and prayed that the application be dismissed with costs.

ANALYSIS

18. I have considered the application herein, the affidavits, annexures thereto, submissions and the relevant law.

19. **Order 24 Rule 3 (1) and (2) of the Civil Procedure Rules, 2010** provides that: -

3. (1) *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.*

(2) *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: Provided the court may, for good reason on application, extend the time.*

20. It is clear from the above that an application for substitution ought to be made within one year upon death of the plaintiff, failure to which the suit abates.

21. The first step is therefore to consider whether the application has been brought timeously. From the certificate of death annexed to the supporting affidavit marked as **PMM2**, the deceased died on 21st October, 2020 and the application was filed on 21st July, 2021. This was approximately 10 months later and thus the application was brought on time.

22. The bone of contention in this matter is on the issue of the administration of the estate of deceased plaintiff, FRANCIS MURIUKI WAHOME.

23. The respondent has strongly argued that Rose Mumbi Muriuki who is the applicant's step mother is the only person who can substitute the plaintiff in the proceedings as she possesses the full grant.

24. The respondent reiterates that the limited grant ad litem issued to the Applicant and marked as **PMM1** in the supporting affidavit was irregular as it was acquired through non-disclosure of the fact that there was a confirmed grant in respect to the deceased's estate.

25. I notice that from the ruling annexed as **PMM3** in the Applicant's Supplementary Affidavit that the Applicant's stepmother's application to be substituted in place of her deceased husband had been dismissed on among other grounds that she was a defence witness and thus her

interests were averse those of the deceased despite her capacity as administrator of the deceased's estate.

26. The said ruling has never been challenged and I see no reason for this Honourable Court to deviate from it by reviewing or setting it aside suo moto.

27. The Respondent contends that a limited grant cannot issue where there exists a full grant, he relied on Rule 38 (2) of the Probate and Administration Rules.

28. I have considered the affidavit evidence and the submissions by the counsel for the Applicant and the respondent.

29. I have also looked at the pleadings and the proceedings on record. The original plaintiff in this case was one FRANCIS MURIUKI WAHOME (deceased) who passed away on 18/04/2012.

30. This suit was originally filed in Nyeri High Court by The said FRANCIS MURIUKI WAHOME through JAMES GICHURU MURIUKI as next friend.

31. When the said FRANCIS MURIUKI WAHOME died on 18/04/2012, On 18/06/2012, JAMES GICHURU MURIUKI applied and was issued with limited grant of letters of administration ad litem.

32. By a Notice of Motion dated 01/08/2012, the said James Gichuru Muriuki applied to be substituted in place of Francis Muriuki Wahome (deceased).

33. In a ruling delivered on 18/07/2012, Justice Ombwayo sitting in Nyeri High Court allowed the said application.

34. While this was going on and unbeknown to the parties, one ROSE MUMBI MURIUKI who is the wife to Francis Muriuki Wahome applied and was issued a grant of letters of administration ad litem on 25/03/2013.

35. Vide a notice of motion dated 04/04/2016, the said Rose Mumbi Muriuki applied to be substituted and replaced as plaintiff in place of James Gichuru Muriuki.

36. In a ruling delivered on 17/03/2017, the court dismissed the same with costs. In the said ruling, the court made the following observation.

“a) The applicant has ably demonstrated that she is presently holding a grant of letters of administration for the estate of the deceased though the same is under challenge as demonstrated by the respondent. I have taken the liberty of perusing the file in question and note that the matter has yet to be determined therefore the applicants' position remain firm.

b) However, I have noted her presence in the suit as a defence witness in this matter by virtue of her witness statement dated 9th march 2016. This matter has yet to go for pre-trial directions before the Hon. Judge on hearing of the suit therefore the witness statement has no evidentiary value at this point. Be that as it may, I am of the view that the applicant cannot hold two positions in this matter, as a plaintiff and defence witness at the same time. I am in agreement with the respondent to this extent, that prima facie presently her interests are in conflict with those of the deceased despite her capacity as the administrator of the deceased's estate.

c) Secondly, the capacity of the plaintiff in this suit remains firm and has not been rendered invalid by any court order. The applicant has failed to demonstrate any evidence of prejudice that would be suffered by the estate of the deceased should the plaintiff continue in his current capacity. I see no reason to rule against the respondent.”

37. The above synopsis of the facts of this case gives this Honourable Court a good understanding and the right lenses to resolve the issues at hand.

38. When the original plaintiff, Francis Muriuki Wahome died, James Gicheru Muriuki was issued with grant of letters of administration ad litem and the court found that he was the right/suitable person to substitute the deceased plaintiff.

39. Rose Mumbi Muriuki, the widow to Francis Muriuki Wahome who was subsequently issued full grant of letters of administration at Nyeri High Court on 25/03/2013 applied to substitute and replace the then plaintiff James Gichuru Muriuki but the court declined saying that grant had been challenged and that she was not suitable. That ruling has not been set aside or appealed against.

40. The applicant in the present application purported to seek and obtained a limited grant of letters of administration in respect of the estate of Francis Muriuki Wahome and not James Gichuru Muriuki who is the plaintiff in this case and who the law is seeking to be substituted and/or replaced.

41. The grant of letters of administration issued to the applicant herein by the Chief Magistrate court in MCSUCC/E294/2021 is of no evidentiary value as it relates to the estate of the original plaintiff, Francis Muriuki Wahome and not James Gichuru Muriuki whom the law seeks to substitute and/or replace.

42. In the circumstances, I find that the application dated 19th July, 2021 lack merit and the same is hereby dismissed with costs.

RULING READ, DATED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 4TH DAY OF FEBRUARY, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Amba holding brief for Magee for Plaintiff
2. Ms Wambui holding brief for Thuita for Defendant
3. Kabuta – Court clerk.