



**In re Estate of Stephen Mbau Githicha (Deceased) (Succession Cause
83 of 2006) [2024] KEHC 4575 (KLR) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 83 OF 2006**

SM MOHOCHI, J

MAY 2, 2024

IN THE MATTER OF STEPHEN MBAU GITHICHA (DECEASED)

IN THE MATTER OF

SAMWEL MBAU GITICE APPLICANT

RULING

1. This is a probate and administration process that classically showcases the pervasive challenges that continue to frustrate conclusion and settlement of estates of deceased persons that die intestate in Kenya.
2. The History of this succession cause might be mistaken for a roll-call list of deceased administrators and protestors and frequent substitutions eventually culminating in the Ruling dated 21st April 2022.
3. The Deceased herein Stephen Mbau Githicha died on 22nd March 1986. According to the Chief's letter of Chinga Location dated 4th July, 2005, he was survived by 2 widows: - Susan Nduruki Mbau and Muthoni Mbau. (It turns out the person described as Muthoni Mbau is the same as Rose Wairimu Mbau).
4. The three wives of the deceased had ten (10) children, seven (7) of whom appear to have survived him, and three to have pre-deceased or died before the cause was filled.
5. A Grant of Letters of Administration Intestate was made to Susan Nduruki Mbau on 9th August, 2006 and she filed Summons for Confirmation of Grant dated 2nd April, 2007. She proposed that the entire estate of the deceased be shared equally between her and Muthoni Mbau. It composed of plots No. 11, 20, 21 Subukia, Plot No.6 Commercial Mumui, Subukia/Subukia Block 9/4 and 8, Kieseges/Nyamamithi Kieseges No.217, 218, 219 and 220.
6. An Affidavit of Protest was filed by Jonathan Giticha Mbau on 19th July, 2007 to the effect that his mother, one Mary Rose Waweru Mbau was the 1st wife of the deceased. He disputed the date of death as indicated in the Petition, and the list of properties set out at form P & A 5. He contended that his



father had more properties than those listed and had distributed his properties in his life time between his mother and Susan Nduruki.

7. The Grant of Letters of Administration intestate dated 9th August 2006 and confirmed on 23rd February 2009 with Susan Nduruki and Wairimu Mbau to hold in trust for themselves and for their children the six (6) assets listed in paragraph 6 above and within 4 months, a summons for revocation was filed on the 29th June 2009 by Rose Wairimu Mau contending that Subukia/Subukia Block 9/4 and 8, were registered in the name of Susan Nduruki and not in the name of the deceased.
8. On the 2nd of June 2010 the Court revoked her registration and the estate remained with Susan on the 21st April 2022.
9. Before me is a Notice of Motion Application dated 7th August 2023, filed pursuant to Order 24 Rules 1 & 2 of the Civil Procedure Rules 2010 Section 1A,1B of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, seeking that this Court be pleased to substitute Samuel Mbau Giticha in place of Lawrence Gakuna Mbau (deceased) as the Applicant in this case and that costs of this application be in the cause.
10. The Application is premised on the following grounds;
 - a. That, the Applicant herein Lawrence Gakuna Mbau passed on the 20th day of November 2022.
 - b. That, Samuel Mbau Giticha is the nephew to the 1st protestor and is the individual who has been selected by the family members of the deceased to take conduct of this suit herein.
 - c. That, a limited grant of administration ad-litem was issued to Samuel Mbau Giticha on the 27th day of February 2023 therefore he is competent to be substituted in this matter.
 - d. That, failure to substitute the parties will hinder the conduct of this matter owing to the demise of the respondent.
 - e. That, the administrators' will not be prejudiced at all if this application is allowed as prayed.
11. The Application came up before Court on the 30th October 2023 Ms. Awuor Advocate holding brief for Mrs Ndeda Advocate for the Applicant and Mr Njoroge Advocate appeared for a beneficiary Lawrence Chege where the Applicant was directed to serve the motion upon the Interested Party and file a return of service. The Court fixed a hearing date for the 8th February 2024 allowing parties twenty-one (21) days to file written submissions.
12. On the 8th February 2024 the matter came before me and Ms. Awuor Advocate holding brief for Mrs Ndeda Advocate for the Applicant and Mr Njoroge Advocate holding brief for Lawrence Mwangi for the Interested party appeared and Mr. Njoroge sought seven (7) days to file a response the Court allowed the Application and fixed the Ruling date.
13. This Court has a profound duty to scrutinise all motions before it including the uncontested motions and the decisions of this Court is irrespective as to whether the motion is contested or not, which exercise I have thus undertaken.

Analysis and Determination

14. Upon Considering the notice of Motion dated 7th August 2023, the Court has refined a solo issue for determination being, Whether the Applicant has made a case warranting the prayer(s) sought?



15. Succession proceedings are governed by the *Law of Succession Act* and the Regulations made thereunder. Rule 63 of the Probate and Administration Rules Cap 160 provides as follows:-

“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 (Cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.”
16. Rule 63 specifically provides for what provisions of the *Civil Procedure Act* will apply to succession matters.
17. It is clear from the above provision that Order 24 of the Civil Procedure Rules do not apply in succession proceedings. Thus, as it was held in *Re: Estate of Omar Abdalla Taib (2017) eKLR*, the concept of abatement does not apply in succession proceedings. It goes without saying that the application for revocation cannot also be dismissed for abatement and since the petitioner is deceased, it cannot be dismissed for want of prosecution.
18. The cure for substitution of deceased persons in succession proceedings is found in Paragraph 14 of the 5th Schedule of CAP 160 which states: -

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis)
19. What then happens if a representative of the deceased person is unable or unwilling to act on behalf of the deceased? In the *Matter of the Estate of Gilbert Kibiti Rinchuni (Deceased) (2013) eKLR* the Court held that: -

“In this case there is no evidence that the respondent has sought and obtained letters of administration. She is wife of the deceased and most likely entitled to administration of the deceased’s estate and she is most likely unable and/or unwilling act. There is equally a pending suit which has not been disputed. The fifth schedule under Rule 14 clearly states that letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased in a suit and until a final decree shall be made therein and carried into complete execution.”
20. Similarly, before this Court, there is no evidence that there is a pending application for grant of letters of administration ad litem to substitute the deceased petitioner.
21. The Applicant disregarded or ignored the determination by the Court, revoking the grant made to Susan Nduruki Mbau confirmed on 29th February 2009, the Court Order for the beneficiaries of the deceased to apply for a fresh grant as is provide for under Sections 51 and 66 the *Law of Succession Act* within forty-five (45) days of the Court ruling dated 21st April 2022.



22. Rule 67 of the Probate and Administration Rules which provides;
- “Where any period is fixed or granted by these rules or by an order of the Court for doing any act or thing the Court upon request or on its own motion may from time to time enlarge such period notwithstanding that the period originally fixed or granted may have expired.”
23. From the above provision, enlargement of time in succession proceedings is permissible. The Court may on its own motion enlarge time for purposes of the furtherance of justice to all parties involved. There being no step taken in filing of fresh letters of administration intestate, the Applicant is allowed to do so within Thirty (30) days of this ruling.
24. In light of the provisions of Paragraph 14 of the 5th Schedule, Cap 160, the Court has the powers to issue the letters of administration ad litem to the personal representative of the deceased whether or not they are willing to act.
25. The procedure as stated above carries a mandatory requirement. Undoubtedly, the Applicant did not comply. It is trite that rules of procedure are handmaidens and not mistresses of justice, and they are meant to aid in the administration of justice and not to cause injustice. (See Nairobi Civil App. No. 810 of 2001 Microsoft Corporation v Mitsumi Computer Garage Ltd & another [2001] eKLR).
26. Article 159(2) (d) of *the Constitution* and the oxygen principles as drafted were meant to cure technicalities in the process of administering justice. However, this Court concurs with the findings of Kiage J in Nairobi Court of Appeal Application No. 228 of 2013 Nicholas Kiptoo Arap Korir Salat VS Independent Electoral and Boundaries Commission & 6 others [2013] eKLR, where he held that:
- “I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command Courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all Courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules.”
27. In the Upshot, this Court is persuaded that the instant Application cannot be maintained in the absence of an existing grant, that the procedure utilized is irregular and the disregard of the Court ruling dated 21st April 2022 and it is this Court’s view that it would be a travesty of justice, given all the circumstances of this matter, to allow the Application as it is. The Court accordingly finds the Application to be without merit and the same is dismissed.
28. This Court is accordingly inclined to issue the following orders;
- i. The Notice of Motion Application dated 7th August 2023 is dismissed for want of merit.
 - ii. The Applicant is directed to comply with the Court ruling dated to apply for a fresh grant as is provide for under Sections 51 and 66 the *Law of Succession Act* within Thirty (30) days of this ruling.

It is so Ordered.



DATED, SIGNED AND DELIVERED AT NAKURU ON THIS DAY OF 2ND DAY OF MAY, 2024.

S. MOHOCHI

JUDGE

