



REPUBLIC OF KENYA



KENYA LAW
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**Mugo v Mburia; Kathara (Applicant) (Miscellaneous Succession Cause
63 of 2013) [2023] KEHC 954 (KLR) (14 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 954 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS SUCCESSION CAUSE 63 OF 2013
RM MWONGO, J
FEBRUARY 14, 2023**

BETWEEN

ESTHER WAKUTHI MUGO APPLICANT

AND

PATRICK GACHOKI MBURIA RESPONDENT

AND

FAITH MARY WARUGURU KATHARA APPLICANT

RULING

1. The applicant filed this summons pursuant to Rule 73 of the *Probate and Administration Rules*. It seeks the following orders:
 - i. That the applicant herein Esther Wakuthii Mugo be substituted with her daughter Faith Mary Waruguru Kathara.
 - ii. That cost be in cause.
2. The application is based on the following grounds:
 - a. That the applicant is deceased having died on January 17, 2018.
 - b. Applicant took out limited grant of letters of administration ad litem for the sole purpose of proceeding with this case.
 - c. No prejudice shall be occasioned to the respondent if the orders sought herein are granted.
3. In addition to the grounds, the applicant has deposed to a 6 paragraph supporting affidavit, of which the following are the major averments:
 - i. That my mother now deceased was the applicant in this suit.



- ii. That my mother passed away on 17th January, 2018 before the suit was concluded.
 - iii. That I took out limited grant of letters of administration ad litem for the sole purpose of proceeding with this case.
 - iv. That I now request this honourable court to substitute the applicant with my name so that I pursue the matter to its conclusion.
4. The respondent filed a notice of preliminary objection dated January 11, 2020 which raises the following issues:
- i. The main suit has abated since no application for substitution was made within one (1) year of the death of the plaintiff as provided for under Order 24 of the Civil Procedure Rules. The evidence shows the plaintiff died on the January 17, 2018.
 - ii. The applicant has not demonstrated in what way the cause of action has survived. In this case no cause of action survived.

Applicant's case

5. The issue that the applicant is focused on is whether the application by her mother, who she seeks to substitute, has survived and not abated. Her argument is that the cause of action survived the length of time it took for her to seek substitution. She argues that the application being a summons for revocation of grant was filed by the applicant as a widow of Mugo Simon. The applicant is merely seeking to substitute her mother as she is a daughter of Mugo Simon.
6. She argues that the grounds upon which the application was founded will clearly apply even if it is the applicant prosecuting the said summons. In fact, she argues, ground 4 of the said summons indicates that the respondent did not notify the applicant and the deceased's children who rank higher in priority than him when he applied for grant and had the grant confirmed. She asserts that she is among the children of the deceased who were not informed of the proceedings to obtain the grant by the respondent.
7. The applicant further argues that the application for substitution is made within the law. She cites the provisions of Order 24 rule 3 of the Civil Procedure Rules 2010 which provide that:
- “(1) Where one or 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”
8. The applicant admits that although the application for substitution was filed late, the process for obtaining limited letters of administration took a chunk of that time making it impossible for the applicant to file this application within the one-year rule. She submits that article 159(2) (d) of the Constitution provides: Justice shall be administered without undue regard to procedural technicalities,



an further that article 25(1) demands that the court consider the right to fair trial cannot be limited. She urges that since the delay in filing the application was not deliberate on the part of the applicant the court should exercise its judicial discretion as indicated in the said Order 24 rule 3(2) that the honourable court can extend the time in her favour.

Respondent's case

9. According to the respondent, the only issue for determination is whether the application dated 7/8/2019 is meritorious in which case it should be allowed or it is merely vexatious in which case it should be dismissed with costs.
10. The respondent's position is that Order 24(1) Sub rule 4(1) of the *Civil Procedure Rules* provides that the death of a plaintiff or defendant should not cause the suit to abate if the cause of action survives or continues and a legal representative can and may be substituted. However, sub-rule (3) thereof provides that where within one year no application is made under sub rule (1), the suit shall abate against the deceased plaintiff.
11. The application having abated against the deceased applicant, the respondent acquired a legal defence by limitation under Order 24 (4) (3). This defence cannot be taken away or dismissed or wished. It is vested.
12. The respondent is thus of the view that the grounds advanced by the applicant in her summons dated 7/8/ 2019 and in her supporting affidavit of the same date are bare of any material facts, or circumstances or any judicial principle that would move this Honourable court's discretion.
13. The only issue for determination is whether the application for sub has a legal underpinning and is merited.

Analysis and Determination

14. It is not disputed that Esther Wakuthii Mugo is the original party in the proceedings; that the said Esther passed away on January 17, 2018; that she was the widow of the deceased; and that her daughter, the applicant Faith Mary Waruguru Kathara, obtained a limited grant of letters ad litem in the estate of her late mother Esther, specifically for the purposes of "proceeding with Misc Succession Cause No 63 of 2013".
15. The deceased applicant herein seeks to be substituted with her daughter Faith Mary Waruguru Kathara. The applicant is deceased having died on January 17, 2018. The applicant, Faith Mary Waruguru Kathara, took out limited grant of letters of administration ad litem for the sole purpose of proceeding with this case
16. The preliminary objection by the respondent raised the following issues: that the main suit has abated since no application for substitution was made within one (1) year of the death of the plaintiff as provided under Order 24. The evidence shows the plaintiff died on the January 17, 2018. Thus the respondent submits that the application is statute barred as it breaches the provisions of Order 24 Rule 3 of the *Civil Procedure Rules* 2010. It provides that where within one year no application is made under sub rule (1), the suit shall abate against the deceased plaintiff.



17. Succession proceedings are, however, which are governed by the Law of Succession Act and the Regulations made thereunder, unless otherwise specified. 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 Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (cap. 21, Sub. Leg.), ...shall apply so far as relevant to proceedings under these Rules.”

18. It is trite that the Law of Succession Act is a stand-alone piece of legislation with its own procedural rules; and therefore, that the Civil Procedure Act, unless specifically provided for in the Act or the rules thereunder, and in particular Rule 63 aforementioned, is inapplicable. This was emphasised by the Court of Appeal in *Josephine Wambui v Margaret Wanjiru Kamau & Another* [2013] eKLR as follows:

“We hasten to add that the Law of Succession Act is a self-sufficient Act of Parliament with its own substantive law and Rules of procedure. In the few instances where the need to supplement the same has been identified some specific rules have been directly imported to the Act through Rule 63(1).”

19. Consequently, the argument that the matter abated pursuant to Order 24 Rule 3 is unsustainable.

20. The respondent submitted that the parent application for revocation of grant was filed on 11/01/2001 and has been pending in court for the last 21 years. Hence, the same has been overtaken by time.

21. However, under section 76 of the Law of Succession Act, there are no time limits for a challenge to a grant confirmed or otherwise. The provision is as follows:

“A grant of representation, whether or not confirmed, may at any time be revoked or annulled if the court decides, either on application by any interested party or of its own motion”

22. In *Patrick Mwangemi Wanjala & 3 others v Jackson Ngoda Jumwa*, [2016] eKLR, the court held as follows-

“Although the Summons herein was filed on 12.8.14, six years after the Grant was issued on 28.3.08, and ten years after the demise of the deceased on 24.12.04, the law is clear that a “grant of representation, whether or not confirmed, may at any time be revoked or annulled ...” There is therefore no limitation as to the time for filing summons for revocation of Grant. The law does not even provide that a party must explain any delay in seeking revocation of a grant. Consequently, this court makes nothing of the fact that the Summons herein was filed 8 years after the grant was issued.”

23. Accordingly, there is no time limitation for a party to challenge a grant whether by statute or in practice. It is clear that the concept of abatement under the Civil Procedure Act does not apply in succession matters. Thus, an application for revocation of grant cannot be dismissed for abatement or for want of prosecution due to the death of the deceased. I so hold.

24. Accordingly, the application is allowed, and I so order.

DATED AT KERUGOYA THIS 14TH DAY OF FEBRUARY, 2023

R MWONGO



JUDGE

