



Murimi & another v Murimi & 2 others (Miscellaneous Succession Cause 76 of 2013) [2023] KEHC 1894 (KLR) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
MISCELLANEOUS SUCCESSION CAUSE 76 OF 2013
RM MWONGO, J
MARCH 16, 2023**

BETWEEN

PETER MWANGI MURIMI 1ST APPLICANT

STEPHEN KAMAU MURIMI 2ND APPLICANT

AND

DANIEL KINYAU MURIMI 1ST RESPONDENT

JANE MUTHONI KARWERU (DECEASED) 2ND RESPONDENT

AND

SIMON MUTHII KARWERU INTENDED RESPONDENT

RULING

Background and Application

1. The applicant filed these summons for substitution on July 6, 2021 pursuant to rule 49 & 73 of [Probate & Administration Rules](#) seeking the following orders:
 1. That this court do appoint Simon Muthii Karweru as the legal representative of the 2nd respondent the late Jane Muthoni Karweru for purposes of these proceedings.
 2. That this court do substitute the late Jane Muthoni Karweru with Simon Muthii Karweru in these proceedings.
2. Prior to that, the applicant had filed summons for revocation of grant on September 13, 2013 against the two respondents and the matter dragged in court since then for various reasons.
3. The applicants assert in their grounds that the 2nd Respondent Jane Muthoni Karweru died on the July 28, 2020 while these proceeding were still pending; that the intended substitute 2nd respondent is



- the eldest surviving son of the late 2nd respondent and is in actual possession of the disputed property; that the family of the late 2nd respondent led by the intended substitute Simon Muthii Karweru has ignored to apply for letters of administration and substitution of their late mother; and that the cause will abate if no substitute is made as prayed to the great prejudice of the applicant.
4. Further the applicant asserts that the family of the late 2nd respondent led by the intended substitute Simon Muthii Karweru has ignored to apply for letters of administration and substitution of their late mother; and that the intended 2nd Respondent deponed that he is not a legal representative of the estate of Jane Muthoni Karweru, deceased.
 5. In addition to the grounds, the applicant has deposed a supporting affidavit, containing, inter alia, the following averments:
 - a. That the summons for revocation of grant was filed on September 13, 2013 against the two respondents and the matter has dragged in court since then.
 - b. That the 2nd Respondent Jane Muthoni Karweru died on the July 28, 2020, and is survived by several children the eldest being Simon Muthii Karweru.
 - c. That the family of the late 2nd respondent has failed ignored and or neglected to take steps towards substituting her within the prescribed period.
 - d. That Simon Muthii Karweru is in possession and cultivation of the land which is the subject matter of these proceedings and is best suited to substitute his mother.
 6. In their submissions, the applicants argued that the court has inherent unlimited jurisdiction to issue the Orders sought for the furtherance of justice; and that this court has inherent powers to appoint any relevant person as legal administrator of the estate of the deceased/ respondents upon being satisfied that person is an apparent administrator of the estate. In the instant case that the intended substitute is the eldest son of the deceased /Respondent.
 7. In his replying affidavit dated July 5, 2021, the 1st respondent states:
 - i. That he opposes the application and it should be dismissed with costs.
 - ii. That rule 20 of the 5th Schedule to Cap 160, deals with a deceased person to whom grant of representation had been issued by the Court. The Deceased, Jane Muthoni Karweru, had no grant of probate in this cause.
 - iii. That rules 49 & 59 do not grant this court the powers of substitution neither does rule 73.
 - iv. That he is not the legal representative of the estate of Jane Muthoni Karweru, deceased.

Applicant's Submissions

8. The applicants submit that the proceedings herein are pending hearing and final determination. They urge that the 2nd respondent was enjoined in this matter in her capacity as the widow and legal representative of her late husband estate. Her late husband was the administrator of the estate herein of Kithuri Rukenya.
9. They also submit that if substitution is not effected as sought herein, the Applicant will loss a substantial part of the claim since they will only left with the part of the estate, being administered by 1st Respondent. This would be an injustice on a technicality, and the inherent powers of this court should be invoked it stop such injustice.



10. The applicant urges this court to endeavour to develop jurisprudence and not down its judicial pen merely because the intended substitution has not obtained a grant. Thus they submit that this court should and has the power to make an Order appointing Simon Muthii Karweru as the legal representative of the Estate of the 2nd respondent and to thereafter make second order of substitutions.
11. The applicants urge that the authorities cited by the intended 2nd respondent are distinguishable since no order had been made appointing the persons substitute as “Legal representative” The substitution therein were made without first appointing the substitute as legal representative.

Respondent’s Submissions

12. The respondent argues that Simon Muthii Karweru cannot be a substitute because he is not an administrator or legal representative in the estate of Jane Muthoni Karweru.
13. The respondent refers to section 2 of *Civil Procedure Act* which defines a Legal Representative as a person who in law represents the Estate of a deceased person.
14. reference was made to the case of *Alexander Mutunga Wathome v Peter Lavu Tumbo & another* [2015] eKLR where Nyamweya, J, declined to substitute in a case where the applicant had not produced evidence to show that he has been given such a grant of representation with respect to the 2nd Protestor’s estate, and cannot therefore be substituted in place of the 2nd Protestor.
15. Further the respondent argues that order 24 of the Civil Procedure is not applicable in succession causes in pursuance with the provisions of Rule 63 of the *Probate and Administration Rules*. for this they cite In Re Estate

Issues for determination

16. the only issue is whether the 2nd Respondent should be substituted.

Analysis and Determination

17. The applicants submission is that the court has inherent unlimited jurisdiction to issue orders for furtherance of justice despite the applicant not being a legal representative of the person sought to be substituted.
18. The respondent refers to section 2 of *Civil Procedure Act* which defines a Legal Representative as follows:

“ means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.
19. In the case of *Alexander Mutunga Wathome v Peter Lavu Tumbo & Another* [2015] eKLR Nyamweya, J (as she then was) held:

“In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the *Law of Succession Act*. In addition section 82 of the *Law of Succession Act* provides that it is the personal representative who has the powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased. A personal representative is defined under section 3 of the Act as the executor or administrator, as the case may be, of a deceased person. The



Applicant has in this respect not produced evidence to show that he has been given such a grant of representation with respect to the 2nd Protestor's estate, and cannot therefore be substituted in place of the 2nd Protestor."

20. Rule 63 of the *Probate and Administration Rules* cap 160 provides which provisions of the CPA are applicable 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."

21. This was buttressed in the case *In Re Estate of Maringa Kiondo (deceased)* [2018] eKLR where Muchemi, J held:

"The question that arises here is where order 24 is applicable to succession causes. The Probate and Administration Rules are designed as the procedural guide in succession cases. The *Civil Procedure Rules* are applicable to civil cases and only a few of the rules are applicable in succession causes by virtue of rule 63 of the *Probate and Administration Rules*...order 24 of the *Civil Procedure Rules* is not among the imported orders and is therefore not applicable."

22. Accordingly, only a legal representative can properly substitute a deceased litigant. It is only a person who legally represents the estate of a deceased person that has capacity to represent that estate in all matters including litigation.

23. In the case of *Justin Boso & others v Mwauchi Bembito & 2 others* [2020] eKLR Munyao J held:

"To ask the court to appoint a person who is not the legal representative to take charge of affairs relating to the estate of a deceased person would be misplaced. In as much as Janja Mwauchi is son of the deceased 1st respondent, that is not the equivalent of a legal representative. It also matters not that he is the first son of the deceased 1st respondent. That still does not give him mandate to represent the estate of the deceased and the fact of being the first born does not make him the legal representative of the estate of the deceased. For one to be a legal representative, the appointment needs to be formally made by court. It is not left for an individual to pick out any of the children of a deceased person and impose upon him/her the title of "legal representative."

24. The applicants claim that this matter had dragged in court due to the failure of the respondents substituting the deceased 2nd respondent. It upon them to seek to cite the 2nd intended Respondent so as to take up administration of the estate of the deceased 2nd Respondent.

25. Section 66 of the *Law of Succession Act* provides:

"When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference—

- (a) surviving spouse or spouses, with or without association of other beneficiaries;



- (b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;
- (c) the Public Trustee; and
- (d) creditors.”

26. In addition, rule 22(1) of the [Probate and administration Rules](#) is explicit that:

“A citation may be issued at the instance of any person who would himself be entitled to a grant in the event of the person cited renouncing his right thereto.”

27. In the case of [Justin Boso & others v Mwauchi Bembito & 2 others](#) [2020] eKLR Munyao J held:

“Indeed, litigation may get stuck, or the suit may abate solely because there is nobody to represent the estate of the deceased. I think in circumstances such as this, it is for the party to seek to cite a suitable person, generally in the succession order of priority, to take up letters of administration, with a default that if such person does not take up the grant of letters of administration, then The Public Trustee be appointed to so represent the estate, even if it be limited for purposes of the suit.”

Conclusion

28. I think enough has been said to show that the only person that can legitimately substitute the deceased litigant is a personal representative. Accordingly, I hold that the applicant’s application cannot succeed, and the same is dismissed

DATED AT KERUGOYA THIS 16TH DAY OF MARCH 2023

R. MWONGO

JUDGE

In the presence of:

Mwaniki holding brief for Wahome for Respondent.

No representation Kiama for Applicant

Court Assistant, Murage

