



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC CASE NO. 104 OF 2021

{Formerly at Kisii HCCC NO. 84 of 1996}

KABETE MBUGA.....PLAINTIFF

- VERSUS -

NYAKANGI NYAMACHE.....DEFENDANT

RULING

Before me is an Application dated 6/7/21 for orders that the administrator of the Estate of the late Kabete Mbuga, the Plaintiff/Respondent herein be substituted in the latter’s place. Further, that execution proceeds against the said administrator. The Respondent never filed any response to the said Application. None of the parties filed Submissions. It is indeed true that from the record Wilfred Moriasi Ombui urged this court to be substituted in place of the deceased (Plaintiff) in this case through 2 Applications respectively dated 12/08/04 25/08/04 and also in the Court of Appeal at Kisumu Court of Appeal No. 182 of 2004. He sought leave to appeal out of time by swearing an Affidavit on 14th July 2004 in an Application dated the following day. This was after being issued with a Grant of letters of administration on 19/11/02. Under paragraph 1 of his Affidavit in support of his chamber summons dated 25/08/04 Mr. Ombui describes himself as follows: -

“THAT I am an adult person of sound mind a duly appointed Legal Representative of the Estate of the late Kabete Mbuga the Plaintiff herein and hence competent to swear this affidavit. Annexed hereto and marked WMO1 are copies of the letters of Administration to confirm this.”

I also note from the court file that Mr. Ombui filed a chamber summons in this matter dated 29/10/04 and in the Affidavit in support of the said Application sworn on the same date he described himself in the same terms above. This was an Application for stay of execution. The Application for substitution was filed and dated 25/8/04. On 9/6/03 Mr. Ombui had been granted leave to be substituted in favour of his deceased father in the Court of Appeal at Kisumu in Civil Appeal No. 77 of 2002.

What then became of the Application for substitution dated 25/8/04 in this case? Still pending. Reason?

What are the obligations of an Administrator of a deceased’s Estate?

Section 79 of the Law of Succession Act Cap 160 Laws of Kenya provides that: -

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

Section 82 of the said Act provides:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

a. to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

b. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best;

Provided that—

- i. any purchase by them of any such assets shall be voidable at the *instance of any other person interested in the asset so purchased; and*
 - ii. no immovable property shall be sold before confirmation of the grant;
- c. to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- d. to appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Section 83 of the said Act provides:

“Personal representatives shall have the following duties—

- a.
- b.
- c.
- d. to ascertain and pay, out of the estate of the deceased, all his debts;
- e. within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- f. subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- g. within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration;
- h. to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- i. to complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

Section 83 (d) of this Act therefore compels the personal representative of the deceased to ascertain and pay out of the Estate of the deceased all his debts. Section 83 (e), (g) and (h) re-emphasize sub-section (d). Failure to act under Sec. 83 (e) and (g) is an offence under Section 95 of the Act.

Section 86 provides that:

“Debts of every description enforceable at law and owed by or out of an estate shall be paid before any legacy.”

It is clear from the Law of Succession Act Cap 160 Laws of Kenya that any legal representative has a duty to take the place of the deceased and out of the Estate of

the deceased, clear all the deceased’s liabilities. He should not just benefit or distribute the deceased’s Estate and forget the liabilities or consider them inconsequential.

I must also point out that it was not even necessary to apply for the substitution of the Deceased Plaintiff because the purpose for which such substitution is required is already provided for in the Civil Procedure Act. Under the sub-heading “Legal representative”, Section 37 of the Civil Procedure Act provides that:

1. Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court

which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.

2. Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.

The Applicant's Application dated 6/7/21 therefore succeeds in terms of the orders sought under paragraphs 1 and is specifically allowed in the following terms: -

“THAT Wilfred Moriasi Ombui be and is hereby substituted herein in place of the late Kabete Mbuga, the above-named Plaintiff”.

What then is the liability of the late Kabete Mbuga towards the Defendant in this suit?

1. **THAT the Plaintiff's claim be and is hereby dismissed.**
2. **THAT the Plaintiff do and is hereby ordered to pay Kshs. 100,000/= on the Counterclaim as Damages to the Defendant.**
3. **THAT the Plaintiff be evicted forthwith from the suit land parcel NO. NORTH MUGIRANGO/BOISANGA/147.**
4. **THAT injunction be and is hereby issued restraining the Plaintiff from trespassing on the Defendants suit land parcel NO. NORTH MUGIRANGO / BOISANGA.147.**

What then becomes of the rest of the other prayers? For prayers numbers 2, 3 and 4, at the stage of the Notice to show cause (since 1 year is already over from the date of the Decree), the Court issuing execution warrants/orders will first have to interrogate whether any of the actions sought is (are) time-barred under Section 4 (4) of the Limitation of actions Act (CAP 22 of the Laws of Kenya) which provides that:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

The upshot of this is that I will give further and conditional orders as follows:

1. **THAT the Applicant be and is hereby allowed to proceed with the execution process as ordered by the High Court of Kenya at Kisii herein on 15th November, 2000 strictly against the Estate of the late Kabete Mbuga.**
2. **THAT the Kshs. 100,000/= ordered to be paid by the deceased by dint of the Decree be paid by the personal representative of the deceased Mr. Wilfred Moriasi Ombui exclusively from the Estate of the late Kabete Mbuga.**
3. **THAT all the people who derive Title from the late Kabete Mbuga be forthwith evicted from the parcel of land known as NORTH MUGIRANGO/ BOISANGA/147.**
4. **THAT an injunction be and is hereby issued restraining anybody deriving Title from the late Kabete Mbuga from trespassing or further trespassing on to the Defendant's suit land parcel number NORTH MUGIRANGO/BOISANGA/147 or any part thereof.**
5. **THAT costs of this Application be and is hereby allowed against the Deceased's Estate.**
6. **The Decree herein shall be executed strictly in accordance with Orders 22 and 23 of the Civil Procedure Rules.**
7. **The aforesaid Decree shall be executed subject to time limitation under the Limitation of Actions Act CAP. 22 Laws of Kenya.**

These are the orders of the court.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 2ND DAY OF DECEMBER, 2021

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Plaintiff: N/A

Defendant: Ms. Nyandoro holding brief for Mr. Bosire