



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 443 OF 2012

IN THE MATTER OF THE ESTATE OF THE LATE HAVATON KAVAVA MAINGI

JOSHUA MUTISYA MUTETI

HELLEN SYOMBUA MUTISYA.....APPLICANTS

AND

NICHOLAS MULWA MUTISYA

LUCY SYOMBUA KILONZO.....RESPONDENTS

RULING

1. The application dated 14th June, 2018 seeks substitution of one of the administrators of the estate, Lucy Syombua Kilonzo, who is said to have died on 14.3.2017. Copies of the death certificate is attached. It also seeks that a fresh grant be issued in the names of the applicants and the surviving administrator. The application is at the instance of a son and a grandson of the deceased.
2. The Respondent opposed the application via a notice of preliminary objection filed on 29.6.18 challenging the legal capacity of the applicants to replace the deceased administrator.
3. Directions were taken that the two applications would be disposed of simultaneously by way of written submissions. Both sides complied with the directions and filed their respective written submissions.
4. I have gone through the applications herein, inclusive of the affidavits and annexures, very carefully. I have also considered the written submissions filed herein. I have also perused through the entire record.
5. It emerges that there are two matters that I need to rule on. One, concerns the individuals that I should appoint as substitutes to the administrator on record who has since died and the other relates to the merit of the application and I shall address the issues concurrently.
6. The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative. The provision provides as follows –

‘Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executor or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.’

7. In tandem with the preliminary objection, Section 82(a) of the Law of Succession Act provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have powers to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate”

In interpreting the above provision of law, the Honourable Court in the case of **Alexander Mutunga Wathome v Peter Lavu Tumbo &**

Another [2015] eKLR noted that;

“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.”

8. In determining who should be appointed administrators to replace the dead ones, I should be guided by section 66 of the Law of Succession Act, which provides as follows –

‘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 in Part V;**
- c. The Public Trustee; and**
- d. Creditors.’**

9. The order of preference set out in section 66 of the Law of is discretionary and Section 66 refers to it as ‘a general guide.’ Priority is given to surviving spouses, followed by the other beneficiaries entitled in intestacy as set out in Part V of the Act, then the Public Trustee and creditors. The persons entitled in intestacy according to Part V, in their order of preference, include children (and grandchildren where their own parents are dead), parents, siblings, half-siblings and other relatives who are in the nearest degree of consanguinity up to and including the sixth degree.

10. It is settled that a succession court is duty bound to ensure the distribution of the estate of the deceased has inherent jurisdiction under Section 47 of the Law of Succession Act and Rule 73 of the probate rules and therefore power to grant orders to meet the ends of justice. This was observed in the case of **The Estate of George M’Mboroki (Deceased) [2008] eKLR** where the court held that **“it holds such intrinsic authority so as to observe the due process of the law, to do justice between the parties and to secure a fair trial between them”**.

11. The application before me is not aimed at dealing with the property of the deceased, but for appointment of personal representatives of the estate of the deceased, and therefore the preliminary objection is premature. As guided by the provisions of Section 66, the applicants are well suited to be personal representatives, and their capacity has not been contested by the protestors. **In the Matter of the Estate of Aggrey Makanga Wamira Mombasa HCSC No. 89 of 1996**, the court observed that children have priority in administration.

12. I am satisfied that if new administrators are not appointed, there will be a loophole because from the record there is a pending protest to grant of letters of administration.

13. From the foregoing, I find it necessary to make orders necessary to meet the ends of justice, to facilitate expeditious distribution of the estate of the deceased and facilitate speedy hearing of the protest that is yet to be heard and make the following orders:-

- a. The preliminary objection is dismissed for it lacks merit.**
- b. That the grant of letters of administration intestate made herein on 5.7.12 to Nicholas Mulwa Mutisya and Lucia Syombua Kilonzo is hereby rectified following the death of Lucia Syombua Kilonzo.**
- c. That I hereby appoint Joshua Mutisya Muteti and Hellen Syomuka Mutisya as administrators of the estate herein in the place of the said dead administrator.**
- d. That a fresh grant of letters of administration intestate shall accordingly issue in the names of Nicholas Mulwa Mutisya, Joshua Mutisya Muteti and Hellen Syomuka Mutisya.**
- e. Costs in the cause.**

It is so ordered.

Dated and Delivered at Machakos this 3rd day of April, 2019.

D. K. KEMEI

JUDGE