



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

SUCCESSION CAUSE NO. 386 OF 2000

IN THE MATTER OF THE ESTATE OF MUKITA MUVINGO ALIAS MUKITA MWANIKI (deceased)

MALILA MWANIKI

KANYELE MWANIKI

KIOKO MWANIKI.....APPLICANTS/OBJECTORS

VERSUS

MBULU MUKITA

MUKONYO MUKITA

MUTINI MBITHI.....PETITIONERS/ADMINISTRATORS

RULING

1. Before me for determination are two applications. The first one is dated 27.12.18 by way of a notice of motion indicated as being brought under Order 24 rule 3(1) and (2), (7), Order 51 of the Civil Procedure Rules 2010 and Section 1A and 1B of the Civil Procedure Act in which the Applicants herein seek the following:

“1. THAT the 3rd Objector/Applicant be substituted with Isaac Mungala Kioko and Muendo Kioko.

2. THAT the time within the substitution by the 3rd Applicant/Objector should have been done be enlarged to the date of hearing of this application.

3. THAT the 3rd Applicant/Objector’s suit be revived

4. The costs of this application be in the cause.”

2. The Application is premised on the grounds that the applicants/objectors are since deceased and the 3rd objector died in 2011 and **Isaac Mungala Kioko and Muendo Kioko** applied for limited grant which grant was issued by the High Court of Kenya at Machakos on 10th May, 2017. The application is supported by an affidavit sworn by Jacob M. Malelu from the firm of advocates on record in conduct of the matter on behalf of the objectors. The deponent averred that **Isaac Mungala Kioko and Muendo Kioko** being the sons of the deceased 3rd Objector/Applicant were granted limited grant in respect of his estate and therefore are interested in pursuing this matter on behalf of their deceased father and it is in the interest of justice that the application is allowed.

3. By grounds of objection dated 1.2.2019, the administrators opposed the Application on the grounds that the cause of action abated by the death of the last surviving objector and therefore the application is bad in law, unsustainable, filed after inordinate delay and the same will unduly prejudice the administrators.

4. Contemporaneously with the grounds of opposition, the administrators filed a summons dated 1.2.2019 indicated as being brought under Rules 49, 59 & 73 of the Probate and Administration Rules and Order 24 Rules 3 and 7 of the Civil Procedure Rules and Section 1A, 1B, 3 & 3A of the Civil Procedure Act. In the said application the administrators seek for orders that; the applications dated 22.6.2010 has abated by operation of law by the death of the objectors on 9.12.2011, 21.2.2015 and 16.7.2011 and that the cautions or other restrictions registered against plot Number Wamunyu/ Kwakala/67 be removed; that the administrators costs be taxed; an order that all proceedings undertaken in

the names of the deceased objectors without enjoining the personal representatives be declared null and void.

5. The application is supported by the affidavit of Mutini Mbithi who deponed that the objectors are long deceased and therefore their objection abated automatically by operation of the law and in this regard the instant application be dismissed for the same is untenable in law.

6. In their submissions dated 12th February, 2019, the applicants framed three issues for determination, *to wit*; whether the objector's case has abated as a result of their deaths; whether the deceased objectors can be substituted and which part bears the costs. On the first issue, it was asserted that abatement is otiose to succession matters and that this is a succession cause where the applicable law is the Law of Succession Act. The case of **Re Estate of Omar Abdalla Taib (2017) eKLR** was relied upon. Counsel added that the court had inherent powers and jurisdiction under Section 47 of the Law of Succession Act and Rule 17 of the Probate and Administration Rules to make such orders as are necessary to meet the ends of justice.

7. The Applicants have further submitted on the 2nd issue that the court be guided by the 5th Schedule of the Law of Succession Act and to allow the Application for the applicants have successfully obtained *ad litem* and therefore have done all that the law requires for them to substitute the 3rd objector. On the third issue, it was submitted that they are well deserving of costs.

8. In opposition to the application, counsel pointed out two issues. Firstly, the application of Order 24 of the Civil Procedure Rules to the instant proceedings and Secondly the entitlement of the deceased applicants to benefit from the estate of the deceased. For the applicability of the civil procedure rules, it was submitted that Section 2(1), 45(1) of the Law of Succession Act and 47 as well as Rule 63 and 73 of the Probate and Administration Rules provide for the applicability of any other written law and from the lens of the administrators this included Order 24 rule 7 of the Civil Procedure Rules whose mandatory requirements ought to be fulfilled by the applicants and because they have not done so, the grounds of opposition ought to be upheld. On the 2nd issue, counsel submitted that the applicants who are now deceased are not entitled to a grant as they are not entitled to revocation of the same because in order to be entitled to a claim for revocation, one ought to be entitled under Section 35 and 66 of the Law of Succession Act to a grant. Counsel cited the case of **Estate of Peter Kiguru Njuguna (2013) eKLR**

9. The record shows that the applicants were the original protestors in this cause. Unfortunately, they passed on sometimes on 9.12.2011, 21.2.2015 and 16.7.2011 respectively before the protest could be determined. No one was joined in place of the said protestors. However annexed to the application dated 27.12.2018 is an *ad litem* that was issued in the Chief Magistrates Court in Machakos and not the high court as averred by the applicant. Now it has been claimed on the footing of the said *ad litem* that the applicants be substituted with the deceased objectors for purposes of pursuing this cause. The Petitioners, however, have denied the merit of the application for they say that the objection abated with the death of the deceased protestors.

10. The issues for determination are as follows;

a. Whether the Probate and Administration Rules grant the court any power to substitute a protestor.

b. Whether the concept of abatement applies in a succession suit.

c. Whether this court has jurisdiction to allow Isaac Mungala Kioko and Muendo Kioko who were appointed *ad litem* administrators in Chief Magistrates Court Probate and Administration Cause 15 of 2017 to be legal representatives of the deceased Protestor in the High Court.

d. What orders the court may make

11. In addressing the first issue, the sections of the law relied on by the Applicants in their Notice of Motion in this regard are Order 51 and Order 24 Rules 3 and 7 of the Civil Procedure Rules. Order 24, Rules 3 and 4 of the Civil Procedure Rules provides the procedure to be followed in the substitution of a deceased Plaintiff or Defendant, and provide that the court can upon application cause a legal representative of the deceased Plaintiff or Defendant to be made a party to a suit, and that party shall proceed with the suit. In the case of **Re Estate of Omar Abdalla Taib(2017) Eklr** the court observed that a succession matter is governed by the Law of Succession Act. Rule 63 of the Probate and Administration Rules provides:

“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.”

12. The case observed that Order 24 is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act by virtue of the above provision and that the Law of Succession Act has its very own provisions for substitution of a deceased party. Section 54 of the Act provides that a Court may limit a grant of representation ***which it has jurisdiction*** to make in any of the forms described in the Fifth Schedule Paragraph 14 of the Fifth Schedule provides:

“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.”

13. In light of the foregoing provision, an applicant armed with a limited grant of representation for the estate of the deceased objector may represent the deceased in the suit herein. In addition, this Rule 40(6) of the Probate and Administration Rules allows any person wishing to object to the proposed confirmation of a grant to file an affidavit of protest against such confirmation stating the grounds of his objection. The Applicant can also in his own right and on behalf of other beneficiaries file an affidavit of protest without necessarily substituting the deceased Protestor.

14. In addressing the 2nd issue, the concept of abatement of suits is provided for in Order 24 of the Civil Procedure Rules and in light of the above observation from the case of **Re Estate of Omar Abdalla Taib (2017) eKLR** that Order 24 is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act, the concept of abatement does not apply to succession matters.

15. In addressing the 3rd issue, it should be noted that in terms of Section 54 of the Law of Succession Act only the court with jurisdiction in the succession cause has power to appoint an ad litem. The record bears witness that the ad litem was granted in the Magistrates court. Therefore the same cannot be used in a suit in the high court because of the issue of jurisdiction. In the same limb I have examined P&A 5 which is the affidavit in support of petition for letters of administration intestate and the declared value of the assets forming the estate of the deceased **Mukita Mvingo alias Mukita Mwaniki** is Kshs 200,000 (two hundred thousand Kenya Shillings). It cannot, therefore be said in all certainty that within 19 years or so, the said assets have appreciated in value to exceed 50,000,000 fifty Million in the absence of a valuation report before this court to show that the estate has since appreciated in value by over fifty million Kenya shillings, from the value disclosed in the **P & A 5** of two hundred thousand Kenya shillings in the petition before the high court.

16. Before concluding this matter, I note that there is no effort to explain the delay in filing the present application since two of the protestors died seven years ago and the 2nd protestor died four years ago. Therefore the behaviour of the applicants herein to move the court is rather indolent and thus the present application for substitution is rather late in the day and likely to prejudice the petitioners. Clearly the delay is inordinate.

17. In addressing the last issue, **Rule 44** of the **Probate and Administration Rules, 1980** requires applications seeking the revocation or annulment of grants to be exclusively filed in the High Court and the same was not amended. However, given that the **Probate and Administration Rules, 1980** are subsidiary legislation, they cannot override any of the provisions of **the Act** and as such the Magistrates' Court have jurisdiction to deal with applications for revocation or annulment of grants issued by those courts subject to their pecuniary jurisdiction in light of the provisions relating to the jurisdiction of the magistrates courts in succession matters under **Section 48(1)** of the **Law of Succession Act, Cap. 160** of the Laws of Kenya. The said provision stated as follows: -

'Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49 of this Act, a Resident Magistrate shall have jurisdiction to entertain any application other than an application under section 76 of this Act and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed one hundred thousand shillings:

Provided that for the purpose of this section in any place where both the High Court and a Resident Magistrate's Court are available, the High Court shall have exclusive jurisdiction to make all grants of representation and determine all disputes under this Act.'

18. In 2015, **Section 48(1)** of **the Act** was amended by the enactment of the **Magistrates' Court Act, Act No. 26 of 2015**. **Section 23** of the **new Act** repealed the said **Section 48(1)** of **the Act** and substituted it with the following new subsection: -

'23. The Law of Succession Act is amended, by repealing section 48(1) and substituting therefor the following new subsection
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1. Notwithstanding any other written law which limits jurisdiction, but subject to the provisions of section 49, a magistrate shall have jurisdiction to entertain any application and to determine any dispute under this Act and pronounce such decrees and make such orders therein as may be expedient in respect of any estate the gross value of which does not exceed the pecuniary limit prescribed under section 7 (1) of the Magistrates' Courts Act, 2015.'
(emphasis added).

19. In this regard the summons for revocation of grant issued to the petitioners may be filed in the magistrate's court which issued the limited grant for hearing and final determination where the value of subject matter is within the pecuniary jurisdiction of the subordinate court.

20. In this regard, the court finds that the applications dated 27.12.2018 and 1.2.2019 as well as the grounds of opposition lack merit and the same are dismissed. In the interests of justice and for the expedient handling of this matter, the court makes the following orders;

a. The parties shall cause to be filed in court a valuation report before this court within thirty(30) days from the date hereof to show the value of the estate so that the matter may be transferred to the lower court for final hearing and determination;

b. The applications dated 27.12.2018 and 1.2.2019 as well as the grounds of opposition are dismissed with no order as to costs,

c. Each party shall bear their own costs in this matter.

It is so ordered.

Dated and delivered at Machakos this 3rd day of July, 2019.

D.K KEMEI

JUDGE.