



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**SUCCESSION CAUSE NO. 416 OF 2012**

**IN THE MATTER OF THE ESTATE OF NGAIGWO M'SHOMBA alias NGAIGUO MWARACOMBA alias NGAIGUO M'CHOMBA alias NGAIGUO MICHOMBA alias NGAIGUO MWARACHOMBA (DECEASED)**

**NYAGA NGARI NGAIGUO.....APPLICANT**

**VERSUS**

**KINYUA MASINDANO.....RESPONDENT/PROTESTOR**

**RULING**

**A. Introduction**

1. This ruling pertains to the summons for rectification of grant dated 14<sup>th</sup> August 2019 in which the applicant moves the court to rectify the grant and replace the deceased administrator Ngari Ngaigwo with himself in his capacity as the son.
2. The applicant states that he was issued with letters of administration *ad litem* on the 18<sup>th</sup> July 2019 which gives him authority to complete this succession cause.
3. The respondent/protestor who is one of the beneficiaries of the estate of the deceased, is opposed to the rectification arguing that the applicant herein petitioned secretly for letters of administration *ad litem* to the estate of the administrator.
4. The protestor also is opposed on the grounds that the applicant does not stand to be administrator over the estate his grandfather, the deceased, whereas the sons of the deceased are alive and have not consented to the same.
5. The parties disposed of the matter by way of their affidavits.

**B. Analysis & Determination**

6. Following the death of the administrator, the applicant petitioned for a grant of representation vide Misc. Succession Cause No. 52 of 2019 for purposes of substitution in the instant succession suit a copy of which is attached to these summons.
7. It is on that basis that the applicant is seeking to substitute the deceased administrator so as to complete the administration of the estate. The respondent is opposed to the application on the grounds that the applicant did not consult anyone when he applied for the letters of administration *ad litem* over the estate of the administrator and further that the applicant is a grandson to the deceased and thus has no priority to apply for substitution as there are sons of the deceased alive who have priority.
8. I have carefully considered application herein, supporting affidavit and affidavit in opposition for substitution. Rectification of a grant is well captured under Section 74 of the Law of Succession and rule 43(1) of the Probate and Administration rules. Section 47 aforesaid only grants general powers to the High Court to grant any orders it deems expedient in the circumstances but does not deal with rectification.
9. Under Section 74, a court can cause alteration or amendment hence rectification of a grant only if there are errors in names and descriptions or in setting out the time and place of the deceased's death, or the purpose in a limited grant. None of these elements fit in the instant application.
10. The application herein is seeking to substitute a single administrator who died before completion of the estate. Section 47 of the Law of Succession is not the appropriate provision to seek such prayers. Where a single administrator or executor dies, before completion of the succession proceedings, the appropriate direction to take is for the applicant to apply for a grant of *letters of administration de bonis non*. This can only be done by revoking the grant under Section 76 (e) and rule 44 of the Probate and Administration rules and paragraph 16 of the

5<sup>th</sup> schedule. Technically or legally, the grant has become useless and inoperative.

11. It is worth noting that, there is no specific provision in succession law which provides for substitution of a single deceased administrator/executor or deceased administrators or executors. In case of such a scenario Section 76 (e) comes to play and a fresh grant of letters of administration de bonis non is issued.

12. This position was aptly considered in the matter of the estate of **Mwangi Mugwe alias Elieza Ngware (deceased)** and in the matter of the estate of **Mary Wairimu Ngware (deceased) in Nairobi High Court Succession Cause No. 2018 of 2001** where Justice Khamoni dismissed an application seeking substitution of a deceased single administrator without revoking the grant first under Section 76(e). Similar position was held by Judge Angawa in the matter of the estate of **Peris Wanjiku Nduati (deceased) Nairobi High Court Succession Cause No. 2349/2001** in which she held that:

***“where an administrator dies before completion of administration, the right course of action should be to seek his replacement through an application for grant of administration de bonis non”. Also see Maamun bin Rashid bin Salim EL-Rumhy vs Haider Mohammed Bin Rashid El-Basamy (1963)(EA.438).***

13. For the above reasons stated, the application before me and the prayers seeking to directly substitute the deceased administrator is not legally and procedurally correct.

14. The applicant advised to make appropriate application for revocation of the grant and then seek issuance of a fresh grant of letters of administration *de bonis non* and subsequent confirmation of the grant.

15. The process under Section 76 if followed, will resolve the issue of who will become the administrator of the estate herein.

16. This application is therefore incompetent and not properly before the court. It is accordingly struck out.

17. Each party to meet their own costs.

18. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 12<sup>TH</sup> DAY OF NOVEMBER, 2019.**

**F. MUCHEMI**

**JUDGE**

**In the presence of: -**

**Both parties present**