



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. SUCCESSION CAUSE NO. 414 OF 2015**

***In the matter of the Estate of NGARI NGURU (Deceased)***

**SICILY MWENDIA.....1ST APPLICANT**

**MARY WAWIRA.....2ND APPLICANT**

**V E R S U S**

**CYRUS KARACHI MACHARIA.....RESPONDENT**

**R U L I N G**

1. This is a ruling on the application dated 6/06/2016 seeking for substitution of Mary Wawira Nyaga in place of Igoki Nguru. The application had a second prayer seeking to restrain the respondent from interfering with certain land parcels belonging to the deceased. This prayer was later abandoned.
2. This application is grounded on the affidavit of the applicants Sicily Mwendia Ngari and Mary Wawira Nyaga. It is deposed that Igoki Nguru and Sicily Mwendia were granted limited letters of administration in this citation matter by consent of the parties.
3. The inclusion of the name of Igoki Nguru was a mistake since she is an old lady over seventy years and incapable of following proceedings in ELC case No. 92 of 2009 where she is stepping in as a party.
4. Mr. Muraguri for the applicants argued that he represented one Ngari Nguru in the ELC case who passed on before the case was determined. The respondent then cited Igoki Nguru and Sicily Mwendia Ngari in this citation. The parties entered a consent and the two were granted limited grant so as to substitute the deceased in the pending land matter.
5. The counsel said he only came to know who Igoki Nguru was after the orders for issue of limited grant were made. He argues that the orders made by consent of the parties can be reviewed.
6. The application was opposed by the respondent. Ms. Chege argued on his behalf that it is the respondent who filed this citation. The applicants were the respondents in this citation. They did not file any grounds of opposition on any replying affidavit to plead the alleged incapacity of the said Igoki Nguru.
7. The orders to issue the said Igoki Nguru and Sicily Mwendia Ngari with the limited grant was consent of the parties. The applicants cannot bring in any facts at this stage to support the review of the order.
8. Ms. Chege further argued that Igoki Nguru is in occupation of the land and was rightly cited by the respondent. Any other party who wishes to join in the ELC case may apply to do so in this case. It was further argued that this application is misconceived and ought to be dismissed for there are no new facts.
9. Mr. Muraguri in response said that since the limited grant was issued in this matter and it is therefore in order to apply for amendment herein.
10. The court notes that the proceedings in this case commenced as a citation instituted by the respondent who wanted Igoki Nguru and Sicily Mwendia Ngari compelled to take out letters of administration so as to take over on behalf of the deceased Nyaga Nguru as parties in the ELC case No. 92 of 2009.
11. The firm of Macharia Muraguri filed a notice of appointment to represent the citees Igoki Nguru and Sicily Mwendia Ngari. Thereafter a consent was recorded by the parties that the two citees be issued with limited grant to facilitate them to succeed the deceased as parties in the ELC case.

12. This application seeks to make an amendment to the consent order by removing the name of Igoki Nguru the mother of the deceased with that of the deceased's wife Sicily Mwendia Ngari.

13. As argued by the respondent's counsel, these proceedings were instituted by her client. The citees entered appearance through their advocate Mr. Muraguri. The record bears Ms. Chege witness that no pleadings, affidavit or grounds of opposition were filed by the citees. The parties recorded the consent without any evidence or opposition to the citation.

14. Order 45 provides that a party may apply for review of an order based on the fact that new and important evidence has been discovered since the order in question was given. In this case, it is clear that this review is based on the alleged incapacity of the said Igoki Nguru. The order was issued on 22/04/2016. The said party was still over seventy years at that time which was of course within her knowledge.

15. The applicants have not presented any new and important evidence that has come to their knowledge after the order was made which would justify review. Even if there was new and important evidence, there would be no basis of introducing it since there were no prior facts presented by the applicants at the time the order was recorded or issued.

16. It is the applicant's counsel who states from the bar that he did not know who igoki Nguru was until after the consent order was recorded. He says he came to learn that the lady is over 80 years after the order was issued. The applicants to the contrary state that the person is over seventy years old.

17. The applicants are the close relatives of Igoki Nguru and were aware of her age at the time the order was recorded. There can be no new and important matter on the age of the person that could have arisen only after two months. This application was filed only two months after the said order.

18. This being a consent order, it may be amended by consent of the parties in the event that they agree to the amendment. This is not the position in this application. Such a window is therefore not available for the applicants herein.

19. The other issue raised is whether the application is competent. The citation was a matter brought by the respondent and was aimed at getting the persons named therein to take over as parties in place of the deceased in the pending ELC case. This purpose was achieved by recording of the consent order thus bringing the citation to a close. It is therefore not appropriate to apply for amendment of the order in this citation for it has already been disposed of.

20. It is important to note that Mary Wawira Ngari is a stranger to this citation and has not even applied to be joined as a party. Even assuming that the citation could be re-opened, Mary Wawira Ngari's application would not be successful for reasons aforesaid.

21. The way forward for the parties is to proceed to move the court in the ELC case and apply for for substitution or addition of another party if need be. The ELC case like any other case remains open for joinder of parties if need arises and upon satisfying the court on the evidence on legal requirements of such an application. The applicants should pursue their interests in the right forum.

22. It is my finding that this application is misconceived and is incompetent.

23. It is hereby dismissed with costs.

24. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF APRIL, 2018.**

**F. MUCHEMI**

**J U D G E**

**In the presence of:-**

**Ms. Kimotho for Chege for citor**

**Mr. Guantai for Muraguri for citees**