



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

PROBATE AND ADMINISTRATION NO. 58 OF 1994

IN THE MATTER OF THE ESTATE OF ODHIAMBO OBILO.....DECEASED

AND

IN THE MATTER OF JOSEPHINE ALOO OTHIENO....DECEASED ADMINISTRATRIX

AND

MAURICE OWINO ONYANGO.....APPLICANT

VERSUS

FRANCIS LUKIO MULAMBA.....RESPONDENT

RULING

(Chamber Summons application dated 27th November, 2015)

1. Maurice Owino Onyango through his application dated 27th November, 2015 brought under Section 76 of the Law of Succession Act and Rules 44 and 73 of the Probate and Administration Rules seek orders as follows:-

“1. THAT, the Grant of Letters of Administration intestate issued to the late JOSEPHINE ALOO OTHIENO on 24/11/1994 and confirmed on 6/12/1994 be revoked and/or annulled.

2. THAT, the Interested Party/Applicant herein be substituted in place of the late JOSEPHINE ALOO OTHIENO in the matter.

3. THAT, upon prayer (1 and 2) being granted, a Grant of Letters of Administration be issued in the name of the Interested Party/Applicant and confirmed as prayed in paragraph 18 of Supporting Affidavit.

4. THAT, costs of this Application be provided for.”

2. The Applicant has named Francis Lukio Mulamba as the Respondent.

3. When the matter came up for hearing on 31st January, 2017 Mr. Fwaya for the Respondent indicated that they had reached an agreement with the Applicant that the issue of substitution of the deceased

Petitioner/Administratrix Josephine Aloo Othieno be dispensed with before the other prayers can be considered. I find this agreement most reasonable as a decision on the application by the Applicant to substitute the deceased Administratrix may as well dispose of the entire application.

4. A brief background is necessary. This cause (P&A No. 58 of 1994) relates to the estate of the deceased Odhiambo Obilo (hereinafter referred to as the deceased). The deceased Administratrix Josephine Aloo Othieno (hereinafter simply referred to as Josephine) subsequently commenced proceedings to administer the estate of the deceased. A grant was issued to her on 24th November, 1994.

5. The grant was confirmed on 6th December, 1994 with the schedule to the certificate of confirmation indicating as follows:

<u>“NAME</u>	<u>DESCRIPTION OF PROPERTY</u>	<u>SHARE OF HEIRS</u>
1. JOSEPHINE ALOO OTHIENO	MARACHI/BUMALA/510	SOLE HEIR
2. FRANCIS LUKO MULAMBA	MARACHI/BUMALA/510	PURCHASER TO GET 2ACRES.”

6. Everything went quiet upto 9th December, 2015 when the Applicant brought the instant application.

7. The application is supported by grounds on its face and an affidavit sworn by the Applicant on 27th November, 2015. In summary the Applicant alleges that Josephine who was old and illiterate was coaxed by the Respondent who was the then area Chief into obtaining a grant of letters of administration to the estate of the deceased by concealing material information from the Court. It is the Applicant’s case that the list of the deceased’s dependants was not disclosed. Further, that the confirmation of the grant was done hastily in order to circumvent and defeat justice.

8. It is the Applicant’s case that the other beneficiaries never consented to Josephine’s administration of the estate of the deceased. He also claims that the Respondent did not purchase two acres from the estate of the deceased.

9. In opposing the Applicant’s prayer to be substituted in place of Josephine, counsel for the Respondent pointed out that the Applicant’s aim is to undermine what was voluntarily done by Josephine several years ago. It is Mr. Fwaya’s submission that the Applicant is not the proper party to be given the go ahead to represent the interests of the deceased Administratrix as his interests are in conflict with the wishes of the late Josephine.

10. The question to be answered in this ruling is whether the Applicant’s prayer to substitute the deceased Administratrix is merited.

11. A perusal of the Applicant’s prayers discloses that his interests are hostile to those of the deceased Administratrix (Josephine). In bringing on board a person in place of a deceased party, the incoming person is expected to come and agitate the position of the deceased party. The incoming party is not expected to come and upset the position that had been taken by the deceased party in the litigation.

12. Here, the Applicant intends to undo that which was done over twenty years ago by Josephine. Josephine lived for over seven years from the time the grant was confirmed. Nobody challenged her authority to administer the estate of the deceased. She completed the process of administering the estate of the deceased and there is nothing left for anybody else to administer.

13. It is indeed correct that the grant was confirmed before the expiry of six months. The record however shows that an application was made in accordance with the law and the Magistrate who confirmed the grant on 6th December, 1994 was satisfied that there was need to confirm the grant before the expiry of six months. The law allows the action taken by the Court.

14. Looking at the application before me in its entirety, I agree with counsel for the Respondent that this is not a proper matter for allowing an application for substitution.

15. The Applicant's prayer for substitution therefore fails. Without an order for substitution, all the other prayers in his application are untenable.

16. His application dated 27th November, 2015 fails in its entirety. The same is dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 9th day of March, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT