



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**SUCCESSION CAUSE NO.83 OF 2003**

**In the Matter of the Estate of Mugambi Kobia Alias M' Mugambi Kobia**

**BEATRICE GAKII MUGAMBI (applying for and on behalf of)**

**GEREMANO MUGAMBI MURIIRA.....APPLICANT**

**-VS-**

**FRANCIS MUTUA MUGAMBI.....PETITIONER**

**RULING**

[1] Before me is a Chamber Summons Application dated 12<sup>th</sup> August 2016 which is expressed to be brought pursuant to Rule 49 and 73 of the Probate and Administration Rules. In the application the following orders have been sought:

- 1. That this honourable court be pleased to appoint the Applicant to act on behalf of the Protestor GEREMANO MUGAMBI a person suffering from mental sickness or infirmity.**
- 2. That costs of this application be provided for.**

[2] The application is premised *inter alia* upon the grounds that Geremano Mugambi the Protestor herein has been suffering from some mental infirmity and that the Applicant was appointed the guardian in lunacy for the said GEREMANO MUGAMBI, for she was best placed to protect his interest as she was his wife. According to the Applicant, her father in law the late Muriira M' Mugambi was the Protestor in this succession cause but he passed on before this matter could be concluded. Thereafter, her husband Geremano Mugambi was joined in place of the said Muriira M' Mugambi. Unfortunately, sometimes in March 2014, the said Geremano Mugambi became sick and has had to attend Psychiatric clinics for treatment as a result of which the Applicant applied in Meru Chief Magistrate's court to be and she was appointed the guardian in lunacy for him. She was appointed the guardian of, for she was the wife to Geremano Mugambi who was sick and unable to proceed with this succession cause. Consequently, she prayed that she be appointed in this succession cause to proceed with the protest on behalf of her husband.

[3] The petitioner opposed the application and filed a Replying Affidavit filed in court on 19<sup>th</sup> September 2015. The Petitioner deposed *inter alia* that the Objector was not mentally challenged as alleged by the Applicant and that Muriira M' Mugambi's wife was still alive and should be the one dealing with the case. Consequently, she urged the court to dismiss the Applicant's application with costs.

## **Directions**

[4] When the matter came up for hearing on 14<sup>th</sup> November 2011, it was agreed and the court directed that the application dated 12<sup>th</sup> August, 2016 shall be canvassed by way of written submissions. Parties filed their respective submissions in support of the positions taken by them herein in respect of the issue in controversy.

## **Applicant's submissions**

[5] The Applicant submitted that she was not a stranger in the estate and that she was simply asking the court that to allow her to act on behalf of Germano Mugambi who will be proceeding with this succession cause through her. She further argued that this being a succession matter, any person who has an interest in the estate was at liberty to apply and that the respondent could not chose who among the children of the late M' Mugambi should now take up the protest as none of the said person had applied. She appealed to the court to invoke its inherent powers under Rule 73 of the Probate and Administration Rules and appoint her and any other person to take up the Protest so that all the interest of the persons claiming any interest on the property can be secured.

## **Petitioner's submissions**

[6] On the other hand, it was submitted for the Petitioner that Rules 49 and 73 of the Probate and Administration Rules do not grant the court any powers to substitute a Protestor with an agent and that the Law of Succession has no provision for substitution of a Protestor. Consequently, the Petitioner urged the court to dismiss the application with costs.

## **DETERMINATION**

[7] The Applicant's father in-law the late Muriira M' Mugambi was the original protestor in this cause. Unfortunately, he passed on before the protest could be determined. Thereafter, the Applicant's husband Germano Mugambi was joined in place of the said Muriira Mugambi. He submitted that the Protestor seems to have lost interest in the protest as a result of which an application for its dismissal dated 4<sup>th</sup> August, 2015 was made to court. Now it has been claimed that Germano Mugambi became sick and is attending psychiatric clinics. And due to his illness and inability to proceed with this cause, the Applicant was appointed as his guardian in lunacy. She now applies to be appointed herein as the person representing the Protestor for purposes of pursuing this cause. The Petitioner, however, has denied the alleged illness of Germano Mugambi and claims that he is well and a welder at Mwangi's Workshop at Nkubu. But, I wish to first tackle one submission by the Petitioner; that the Probate and Administration Rules do not grant the court any power to substitute a protestor with an agent. This submission is of great preliminary significance and I will determine it as such.

## **Power to substitute**

[8] First of all, the above submission by the Petitioner is oblivious of the purport of article 159(2) (d) of the Constitution which completely diminished the prospects of technicalities standing in the way of substantive justice. In fact, contrary to the submission by the Petitioner, in succession cases, the court has wide powers under its inherent powers as a court of law to make such orders which are necessary for the ends of justice. See rule 73 of the Probate and Administration Rules which provides as follows:

### **73 Saving of inherent powers of court**

**Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court**

Even where there is no specific provision on a particular subject, the court still has power to entertain an application made in that behalf in a succession cause. See rule 49 of the Probate and Administration Rules

below;-

#### **49 Applications not otherwise provided for**

**A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported if necessary by affidavit.**

Therefore, in litigious succession proceedings, where a necessary party is suffering from some deficiency or impediment which makes such party to be incapable of protecting his interest in the cause, the court has power to appoint a person to represent such party. Accordingly, where a protestor is said to be of unsound mind, the court will have to interrogate the issues raised and if it finds him to be of unsound mind to an extent as to be incapable of protecting his interest in the proceeding, the court will appoint a person to represent him for purposes of prosecuting his protest. The said power draws from the Constitution which states that all persons including persons with disabilities have rights and state organs should only provide sufficient accommodation to facilitate realization of those rights. For instance, rights of a person who is said to be suffering from mental disorder should not be prejudiced in judicial proceedings simply because he suffers from mental infirmity or disorder. Such persons are not second graded; they are real human beings who are protected by the Constitution and must be treated with dignity and respect. Indeed, the Constitution in article 27 prohibits discrimination of a person on grounds of health status. I dare state that it is by-gone notion to refer to a suit by or a person suffering from mental infirmity or disorder as incompetent. Newer terminologies which are not worn-out demeaning tags and which give effect to the Constitution must now be developed by the law in reference to capacity of such persons. Therefore, the court will stand in for such person and guarantee his rights in any judicial proceeding including a succession cause. Having said that, it is time I turn to the main issue for determination.

#### **Issue for determination**

[9] The single issue in controversy is:

**(i) Whether the Applicant who was appointed a guardian in lunacy under PART XII of the Mental Health Act and Order 32 rule 15 of the Civil Procedure Rules should be appointed to represent the Protestor- a person claimed to be suffering from mental disorder or illness.**

The law is the guide here. By order dated 14<sup>th</sup> June 2016 issued in Meru Chief Magistrate's Court Miscellaneous Application No 10 of 2016 the Applicant was appointed guardian in lunacy for Germano Mugambi for purposes of defending his interest in this cause. I, however, see one major flaw with the said order representing; the lower court attempted to appoint the Applicant to represent the Protestor in this cause. It should be noted that only the court handling the succession cause has power to appoint the next of friend for a party who is found to be of unsound mind to the extent that he is incapable of protecting his interest in the cause. And such appointment is limited for purposes of enabling the party found to be of unsound mind to protect his interest in the cause. This should not be confused with appointment of a manager and guardian under the Mental Health Act which is for purposes of management and guardianship of the estate of and the person found to be of unsound mind under that Act. That notwithstanding, however, the Applicant was appointed as guardian in lunacy under section 26 and 28 of the Mental Health Act and such appointment should be taken into account when the court is considering a request for appointment of next of friend in these proceedings. The reason for this is that the appointment of manager and guardian under the Mental Health Act is made after an elaborate inquiry is carried out by the court into and finds that the person is suffering from mental disorder to such extent as to be *inter alia* incapable of managing his affairs and or himself. Accordingly, such finding by a competent court in a proceeding under the Mental Health Act will be deemed to be prima facie evidence that the person has been adjudged to be of unsound mind and will be considered for purposes of appointing a suitable person through whom the proceedings will be conducted. This means that it is not automatic that a manager and guardian appointed under the Mental Health Act will be appointed to represent the protestor in judicial proceedings. Such manager and guardian may or may not be appointed to represent the sick protestor in

these proceedings. But, reasons for not appointing the guardian should be recorded by the court indicating that it is for the person's welfare that another person should be permitted to act, or be appointed, as the case may be. Matters such as that the guardian has or has no interest which is adverse to that of the protestor will be considered. The ultimate decision therefore is reached upon careful inquiry into the entire circumstances of the case. The entire process, considerations and principles set out by Mativo J in the case of MMM vs. MK [2016] eKLR are quite apt and would apply in succession cause such as this. I think the procedure for carrying out an inquiry to establish the status of mind of the Protestor and whether he is incapable of protecting his interest should follow after Order 32 rule 15 of the Civil Procedure Rules which provides as follows:

**The provisions contained in rules 1 to 14, so far as they are applicable, shall extend to persons adjudged to be of unsound mind, and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued.**

It bears repeating that the Applicant has been appointed as guardian under the Mental Health Act. But, in this case, I note that the record of the court which appointed the Applicant as guardian in lunacy of the Protestor was not annexed to this application. Yet it is vital information in these proceedings. The Applicant has also alleged that the Protestor is of unsound mind and so she should be appointed as next friend for purposes of these proceedings. The Petitioner has strongly denied the alleged Protestor's illness and has stated under oath that the Protestor is a welder in Mwangi's Workshop at Nkubu. As a matter of law, where one party alleges that a party in the suit is of unsound mind, and the other party denies it, the court must hold a judicial inquiry to establish or otherwise deny the state of mind of the party alleged to be of unsound mind. See the case of **DUVVURI RAMI RADDI vs. DUVVUDU PAPI REDDI AND OTHERS**. For those reasons, I will carry out own inquiry to determine whether the Protestor is of unsound or weak mind or suffers from mental infirmity as to be incapable of protecting his interest. As part of the inquiry, I hereby call upon the record of court in MERU CMC MISC APPL NO 10 OF 2016 to be produced before this court. I will thereafter render myself on the request for appointment of the Applicant as next of friend on behalf of the Protestor. It is so ordered.

**Dated, signed and delivered in open court at Meru this 2<sup>nd</sup> day of May 2017**

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**F. GIKONYO**

**JUDGE**

Ruling delivered in open Court in the presence of:-

Mrs Ntarangwi for Applicant, M/S Mbaikiata for Petitioner,

Appellant and petitioner present.

C.C Mwenda  
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**F. GIKONYO**

**JUDGE**