



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 229 OF 2011

IN THE MATTER OF THE ESTATE OF MARTHA MULWA

1. JOSEPH MUTUA MULWA
2. DAVID MUEMA MULWA PETITIONERS/ADMINISTRATORS

VERSUS

SARAH EUNICE NTHENYA MUEMA BENEFICIARY/APPLICANT

R U L I N G

1. The application dated 4/4/2013 is brought under **section 47 of the Law of Succession Act Cap 160 Laws of Kenya** and **Rule 73 of the Probate and Administration Rules**. The application seeks orders that the 2nd Petitioner, **David Muema Mulwa** be removed from his position as an Administrator and substituted with the Applicant.
2. The Applicant, **Sarah Eunice Nthenya Muema** is a daughter in law to the deceased. Her late husband, **David Muema Mulwa** was a son to the deceased and was also a co-administrator in the estate of the deceased.
3. The Applicant's case is that since the death of her husband on 10/6/2013, the 1st Administrator has not taken any steps to have the deceased 2nd Administrator substituted. The Applicant wants her late husband's name substituted with hers.
4. The application is opposed. It is contended in the replying affidavit that the family of the deceased held a meeting and elected one of the sons of the deceased, **John Muisyo Mulwa** to substitute the 2nd Administrator. It is further averred that the Applicant is not entitled as a matter of right to substitute her late husband.
5. **Section 66 of the Law of Succession Act Cap 160 Laws of Kenya** provides as follows:-

“When a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

- (a) surviving spouse or spouses, with or without association of other beneficiaries;

(b) other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;

(c) the Public Trustee; and

(d) creditors...”

6. Both the Applicant and **John Muisyo Mulwa** are beneficiaries in the estate of the deceased, **Martha Mulwa**. They therefore qualify to substitute the late **David Muema Mulwa**. However, the uncontroverted evidence as deposed in the replying affidavit is that the majority of the beneficiaries have unanimously elected **John Muisyo Mulwa**, a son to the deceased, to substitute their late brother. The degree of consanguinity also favours the said **John Muisyo Mulwa**.

7. The apportionment of the said **John Muisyo Mulwa** as a 2nd Administrator will not prejudice the interests of the Applicant and her children as they are at liberty to participate in the distribution of the property.

8. For the above stated reasons, I allow **John Muisyo Mulwa** to substitute his late brother as the 2nd Administrator. Each party to meet own costs of the application.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 5th day of February 2015.

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B. THURANIRA JADEN

JUDGE