



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 442 OF 2014**

**(Formerly NYERI HIGH COURT NO. 51 OF 2011)**

**MUCHEMI MUTUNE ..... PLAINTIFF**

**JOSEPH NDIRITU THUITA ..... APPLICANT/SUBSTITUTE**

**-VERSUS-**

**BENARD KIMANTHI GITONGA ..... 1ST RESPONDENT**

**JOYCE WANJIRA NDUHIU ..... 2ND RESPONDENT**

**RULING**

1. Following the passing on of the plaintiff on 17th October, 2013 **Joseph Ndiritu Thuita** (hereinafter referred to as the applicant) filed the application dated **1st October, 2014** praying that he be substituted in place of the plaintiff.
2. The application is premised on, among other grounds, that the plaintiff passed on before the case herein was heard and determined.
3. In the affidavit that the applicant swore in support of the application of even date the applicant has, *inter alia*, deposed that he is the deceased's next of kin and the beneficiary of the deceased's estate; that he has applied for and obtained letters of administration *ad litem* allowing him to substitute the plaintiff in the case herein. The applicant has annexed and marked as **JNT-1** the said letters which were issued to him on 20th June, 2014.
4. The Application is opposed through the affidavits of the 1st respondent sworn on **8th October, 2014** and **13th May, 2015**. In those affidavits, the respondents and in particular the 1st respondent, contends that the applicant has no *locus standi* to apply to be substituted for the plaintiff in this suit; that the applicant has not demonstrated what his interest in the suit is. In this regard, it is submitted that the applicant being a distant relative of the deceased, has no basis to lay claim on whatever property he believes the deceased had. It is further submitted that even if the deceased bequeathed his properties to the applicant, he could not have done so in respect of the properties which are the subject of this suit because they were not registered in his name.
5. Vide the affidavit he swore on **13th May, 2015** the 1st respondent contends that the applicant's application has no basis in civil law.

6. When the application came up for hearing, the applicant told the court that the deceased had given him permission to proceed with the suit before he passed on and that he obtained letters of administration *ad litem* allowing him to substitute the deceased. He maintained that the respondents' illegally/unlawfully obtained title to the properties that are the subject of this suit.

7. Counsel for the respondents **Mr. Kiminda**, submitted that the grant held by the applicant does not give him any right of standing in any suit. Arguing that the applicant wants to be substituted in place of the deceased plaintiff in order to administer the deceased plaintiff's estate, he wonders what estate the deceased plaintiff had in respect of which the applicant can administer. In this regard, counsel for the respondents submitted that the parcels of land which are the subject of this suit do not form part of the estate of the deceased. Mr. Kiminda further submitted that allowing the application will be tantamount to engaging in an academic exercise.

8. Arguing that the applicant is not the deceased's next of kin, Mr. Kiminda urged the court to dismiss the application with costs to the respondents.

9. In a rejoinder, the applicant stated that he is the closest relative of the deceased and reiterated that the respondents obtained the title deeds they have by fraud.

### **Analysis and determination:**

10. The suit herein was brought by the plaintiff (now deceased) against the respondents for a declaration that the Land Dispute Tribunal had no jurisdiction to entertain a matter touching on registered land and an order for cancellation of the titles held by the respondents being L.R. Thegenge/Kihora/761 and 762 so that they revert to their original position to wit, L.R. Thegenge/Kihora/128.

11. When the plaintiff passed on during the pendency of the suit, the suit became subject of the provisions of **Order 24 Rule 3(1)** and **(2)** which provides as follows:-

**(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.**

**(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:**

**Provided the court may, for good reason on application, extend the time.”**(Emphasis supplied)

12. Did the cause of action herein cease to exist merely because the plaintiff passed on?

To answer this question, one needs not consider anything else but the kind of claim the deceased plaintiff raised against the defendants/respondents and find out whether such claim was personal to the deceased or is something that could be passed to his estate.

13. Noting that the claim concerns a parcel of land that the deceased believed was unlawfully alienated from him by the respondents, it cannot reasonably be said that following the passing on of the deceased, the titles held by the respondents were legitimised. My view of the matter is that the dispute was not personal to the deceased. For that reason it survived to the deceased legal representative.

14. Concerning who a legal representative of a deceased person is, **Order 24 Rule 5** gives the court the power to determine whether or not any person is or is not the legal representative of a deceased person. The rule provides as follows:-

**“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”**

15. It is noteworthy that **Order 24** does not provide the criteria for determining the question. For that reason and given the fact that the issue to be determined touches on matters relating to a deceased person, my view is that the court has to revert to the Law of Succession Act (LSA) and the rules made there under in determining such a question. In that regard, **Section 54** of the LSA gives discretionary power to a court to issue limited grants of representation. The section provides;

**“54. A court may, according to the circumstances of each case, limit a grant of representation which it has jurisdiction to make, in any of the forms described in the fifth schedule.”**

16. **Section 56** on the other hand, lists persons who are otherwise not entitled to be issued with a grant of representation. The Sections provides-

**56(1) No grant of representation shall be made-**

- **To any person who is a minor, or of unsound mind or bankrupt or**
- **To more than four persons in respect of the same property.**

**2) No grant of letters of administration, with or without the will annexed, shall be made to a body corporate other than the Public Trustee or a trust Corporation.”**

17. In the circumstances of this case, the applicant moved the court for exercise of the power conferred on it under **Section 54** of the LSA and the court being satisfied that the applicant was entitled to issuance of a limited grant of representation of the estate of the deceased plaintiff, did issue him with a limited grant of letters of administration *ad litem*. Those letters allowed the applicant to continue the suit herein which survived the deceased.

18. There being no provision of law cited to prove that the fact that the applicant is a distant relative of the deceased plaintiff disentitled him to the grant he has, on the strength of the provisions of **Section 56** aforementioned, which does not recognise relationship as one of the factors the court considers in issuing a grant of letters of administration, I find the respondent’s contention to be baseless and determine that the applicant is a legal representative of the deceased plaintiff for purposes of prosecuting the suit herein.

19. Having determined that the suit herein survived the deceased plaintiff, I cannot agree with the contention by the respondent’s counsel that there is no estate of the deceased plaintiff that the applicant can pursue. In regard to that contention I have already stated that the passing on of the plaintiff did not confer on the respondents better rights to the suit property than the rights that were being challenged by the deceased plaintiff. By coming on board this suit, the applicant is merely going to continue the battle that the deceased plaintiff had begun concerning the suit property.

20. The upshot of the foregoing is that the application has merit and is allowed as prayed.

**Dated, signed and delivered at Nyeri this 7<sup>th</sup> day of October, 2015.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Joseph Ndiritu Thuita – Applicant

Mr. Kiminda for 1st & 2nd respondents

Court Assistant - Lydia