

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Succession Cause 1878 of 2005

IN THE MATTER OF THE ESTATE OF MIRIAM NJOKI GACHUHI-(DECEASED)

RULING

The summons dated 5th March 2008 seeks the substitution of a dead administrator with another person, It is premised on rule 49 and 73 of the Probate and Administration Rules.

The application is brought by John Karumwa Maina. He says that the grant in the matter had been made on 11th June 2004 to Elijah Mwangi Gachuhi. The said Elijah Mwangi Gachuhi is alleged to have died on 20th August 2007, however, no documentary proof has been availed to support this assertion. John Karumwa Maina prays that Elijah Mwangi Gachuhi be substituted with Miriam Njoki Gachuhi.

Both parties have filed lengthy written submissions. The respondents submission raise two pertinent points:-

- (a) That the Law of Succession Act does provide for substitution of a dead administrator.
- (b) That a person who does not intend to be an administrator cannot apply on behalf of another prays that the other be appointed administrator.

A grant of representation is made in personam. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of the grant dies, the grant made to his becomes useless and inoperative, and the grant vests for the purpose only of being revoked. Such grant is revocable under **Section 76** of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the issue way, following the procedures laid out in the Law of Succession Act and the Probate and Administration. I agree with the respondent that there cannot be a substitution of the dead administrator by his wife in the manner proposed by the applicant.

On the second issue, the legal position is that a grant of representation should only be made to persons who have applied for it. Appointment of administrators cannot be imposed. The Court of Appeal pronounced on this in *Florence Okutu Nandra and another –vs- John Atemba Kujwa* Kisumu Court of Appeal Civil Appeal number 306 of 1998, where it was held that a court should not issue a grant to a person who has not sought it.

Where persons who have priority is obtaining a grant fail to apply for it, the procedure is not another person moves the court praying that the grant be made to the person with priority, requiring the person to show cause why the grant should not issue to another person if they fail to apply for it within a specified period of time. This is underpinned by the principle that a grant should not be made to a person unless that person asks for it. The applicant has asserted that upon a fresh grant being made he would still argue his summons for revocation dated 8th July 2005. The legal position regarding the summons dated 8th July 2005 is that the said summons was predicated on the grant made to Elijah Mwangi Gachuhi. Once the grant to the said Elijah Mwangi Gachuhi is revoked and a fresh grant made to someone else the application seeking the revocation of the grant made to Elijah Mwangi Gachuhi becomes useless as it seeks the revocation of a grant which has since ceased to exist. Pursuing the application dated 8th July 2005 would be an exercise in futility.

Taking everything into consideration, I will make the following findings:-

- (a) a grant of representation cannot be the subject of substitution on transfer;
- (b) there is no proof that the holder of the grant is dead;
- (c) a grant cannot be made to a person who has not applied for it.

Consequently, I dismiss the application dated 5th March 2008 with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 7th DAY OF MARCH, 2013.

W.M. MUSYOKA

JUDGE