



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Succession Cause 1234 of 2009

**IN THE MATTER OF THE ESTATE OF NAOMI WANGUI MUNGAI alias NAOMI KABORO
MUNGAI (DECEASED)**

RULING

1. The applicant in the Summons dated 8th April 2010 and amended on 8th July 2011 and re-amended on 30th January 2012 seeks orders of the court as follows:

“1. That the ex-parte orders of nomination made herein be set aside.

2. That the costs of this application be borne by the respondent.”

2. The application, which is supported by the affidavit of the applicant sworn on 12th July 2011, is predicated on the following grounds:-

“A. That the said orders were intentionally taken ex-parte through avoidance of service of pleadings and/or hearing notices upon the applicant.

B. That the applicant had not only entered appearance herein, but had timeously filed his objection to such orders.

C. That it was therefore improper for the respondent to proceed ex-parte and the said orders ought to be set aside ex-debito justicie.

D. That in the interest of justice and fair play, this Honourable Court ought to find in favour of the applicant and proceed to set aside the orders in issue and hear the application on merit.

3. Written submissions were filed to support the parties’ opposing positions. The same have been carefully considered in light of the law and the record of the court, both in this cause and as per the extracts from the civil suit, No. H.C.C.C. 1357 of 2004 annexed to the various affidavits.

4. I have had to scrutinize the court record to understand what ex-parte orders the applicant is complaining about since his application is silent on the same and because the copies of the cause lists exhibited bear no date. In paragraph 4 of his supporting affidavit the applicant alludes to proceedings of 27th July 2010 which do not exist.

5. The relevant Notice of Motion seeking a review of Justice Rawal's decision in the proceedings which the applicant says proceeded ex-parte, is shown to have been for hearing on 27th July 2009. The respondent has deponed, in an affidavit sworn on 8th October 2009 that the application was not listed for hearing on that 27th July 2009 and that the Honourable Lady Justice Rawal declined to hear the same when presented before her on the same date under a certificate of urgency.

6. The record shows that the application was heard on 29th October 2009 and was allowed. The honourable judge's record reads as follows:-

“After reconsidering the facts which are now presented I direct that a limited Grant to prosecute the H.C.C.C No: 1357 of 2004 is granted.

Rawal J.29.10.2009”

7. Accordingly, the Grant as Litem was then issued to the applicant as the administrator of his mother's estate. It reads as follows:-

LIMITED GRANT OF LETTERS OF ADMINISTRATION AD LITEM

“Be it known that Letters of Administration ad Litem of all the Estate of the above NAOMI WANGUI MUNGAI who died domiciled in Kenya on 2nd day of July 2008 which devolves to and vests in his/her Personal Representatives but limited to the purposes only for prosecuting the HCC NO. 1357 of 2004 and until further representation is granted by this court to SAMUEL NYORO MUNGAI of P.O. Box 4132-00200, NAIROBI, He having undertaken to administer such estate according to law (limited as aforesaid) and until further representation be granted and render a true and just account thereof whenever required by law to do.

Issued by the High Court through the registry at Nairobi this 30th day of October 2009.”

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8. Having obtained an extension of time within which to substitute the deceased defendant in H.C.C.C No. 1357 of 2004 the respondent in this cause then proceeded to have the applicant herein substituted as the personal representative of the deceased defendant, having persuaded the family court that the nomination of the applicant was proper under **Section 54 of the Succession Act (Cap 160) and paragraph 14 of the 5th schedule of the Act** which provides that:

“14 when it is necessary that the representative of a deceased person be made party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein. Or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

10. Ordinarily, petition for Letters of Administration are filed ex-parte but with appropriate citations being served on parties entitled to take out Grants. It appears to me that citations are only necessary where the estate property and inheritance are in issue but not when it is a matter of a pending suit.

11. In view of the above and considering the facts of this case I would consider the service of the petition upon the applicant to have been merely a courteous gesture on the part of the respondent, particularly since they would not have been served with the petition that was rejected on 3rd June 2009. Moreover, Justice Rawal, who had directed that the petition be served appears to have reconsidered the question of service also when the matter was finally placed before her on 29th September 2009 and she proceeded to issue orders for the limited grant.

12. The applicant does not dispute being related to the deceased and has not shown this court what prejudice, if any the limited Grant ad Litem has caused him and I am not inclined to grant his application for the reasons given. If he has a problem with the substitution in the civil suit, which I am persuaded has not abated, he should file an appropriate application in that suit to be removed therefrom.

13. In view of the above the amended summons of 8th July 2011 is hereby dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 5th DAY OF JULY, 2012.

M.G. MUGO
JUDGE

In the presence of :

Mr. Mwaura holding brief for Mr. Njugi for the applicant.

Mr. Wawira for the petitioner/respondent.