



REPUBLIC OF KENYA



In re Estate of Jairo Elloga Akibaya (Deceased) (Succession Cause 1 of 2024) [2026] KEHC 797 (KLR) (29 January 2026) (Ruling)

Neutral citation: [2026] KEHC 797 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION CAUSE 1 OF 2024
JN KAMAU, J
JANUARY 29, 2026**

BETWEEN

KENNETH IMBAHALE AKIBAYA 1ST PETITIONER

EZINA ALUSA AKIBAYA 2ND PETITIONER

AND

REBECCA WANJIKU AKIBAYA 1ST OBJECTOR

WILSON AMBOGA AKIBAYA 2ND OBJECTOR

AND

SAMUEL ELLOGA AKIBAYA APPLICANT

(IN THE MATTER OF THE ESTATE OF JAIRO ELLOGA AKIBAYA (DECEASED))

RULING

Introduction

1. In his Chamber Summons dated 6th February 2025 and filed on 7th February 2025, the Applicant herein sought that he substitutes Kenneth Imbahale Akibaya, who was 1st Petitioner herein, and that upon substitution, he be issued with a rectified grant and confirmed grant to facilitate transmission progress. He pointed out that the said 1st Petitioner was a Co-Administrator with the 2nd Petitioner herein who was their step mother.
2. He swore an affidavit in support of the said Summons on 6th February 2025. He averred that he was a brother to the said 1st Petitioner who passed away after the probate administration was concluded but before the transmission process was finalised.



3. He averred that there was a case in Nyandarua ELC Case No 50 of 2023 Kenneth Akibaya & Another vs Joseph Muchai Mindu & 19 Others which concerned land they inherited from the deceased through Kisumu Succession Cause No 821 of 2000 wherein the High Court in Nyandarua directed that the said 1st Petitioner, Kenneth Imbahale Akibaya, be substituted so that the aforesaid case could proceed. He contended that the children of the second house were the beneficial owners of land known as LR Nyandarua/Gorika/1343 having inherited the same from the deceased. He stated that the family members of the second house were in agreement that he be substituted in the place of the said 1st Petitioner.
4. He urged the court to allow his application and allow him to be a Co-Administrator of the deceased's estate with a view to taking care of the interests of the second house and finalise the succession process which ended at transmission.
5. The 1st Objector filed Grounds of Opposition dated 26th April 2025 on 28th April 2025 in opposition to the said application. She averred that the application was fatally defective having been brought under the wrong provisions of the law and that there was a substantive administrator of the estate who was managing the deceased's estate. She asserted that this court had no jurisdiction to substitute one of the deceased's Co-Administrator under Section 81 of the [Law of Succession Act](#).
6. On 26th April 2025, the Applicant filed a Supplementary Affidavit in response to the said 1st Objector's Grounds of Opposition. He argued that the Probate and Administration Rules preserved the court's inherent jurisdiction to make such orders as was necessary to meet the ends of justice and that the existence of a surviving administrator did not bar substitution. He added that the [Law of Succession Act](#) did not preclude the appointment of an additional or substitute administrator post-confirmation of grant where justice so demanded.
7. He further contended that the land dispute in Nyandarua ELC Case No 50 of 2023 was initiated by the said 1st Petitioner herein and that during his lifetime, he had pursued the cause together with him hence he was properly versed with the matter. He pointed out that upon the death of the 1st Petitioner herein, he made an application to be enjoined in the Nyandarua matter but that the court observed that being enjoined as an interested party was not the appropriate way to safeguard the estate's interests but that a substitution application ought to be pursued through the succession court. He was emphatic that this application was filed in compliance with the said directive.
8. The 2nd Objector swore a Replying Affidavit in opposition to the Applicant's Chamber Summons on 18th June 2025. The same was filed on 20th June 2025. He averred that the Applicant herein was visually impaired, which he had admitted before with the fact being known to all beneficiaries and, thus, he was not physically capable of handling the business at hand.
9. He contended that as per Section 81 of the Laws of Succession Act, as long as there was a surviving administrator to the estate, all powers and duties vested in the surviving administrator. He was categorical that there was one (1) surviving administrator who was a co-plaintiff in the suit at Nyahururu ELC No 30 of 2019. He added that it automatically became her duty to ensure that the interests of the second house with regards to subject parcel were protected.
10. He asserted that the Applicant did not seek the consent of the first house to substitute the 1st Petitioner and that from the consent of the second house that the Applicant had annexed, it was clear that the decision to allow him to substitute the 1st Petitioner was not unanimous as one beneficiary had not signed and had filed grounds of opposition opposing such substitution. It was his contention that this application was a waste of time and should be dismissed.



11. The Applicant's Written Submissions were dated 26th May 2025 and filed on 27th May 2025. The 1st Objector's Written Submissions were dated 2nd July 2025 and filed on 28th July 2025 while those of the 2nd Objector were dated and filed on 23rd June 2025. The Ruling herein is based on the said Written Submissions which all parties relied upon in their entirety.

Legal Analysis

12. The Applicant invoked Article 159 of *the Constitution* of Kenya and submitted that the guiding principle was that procedural rules were meant to aid and not to hinder the cause of justice. He asserted that a technical error in citation, where the intent and legal basis of the application were clear, should not defeat a deserving application.
13. He further cited Sections 1A and 1B of the *Civil Procedure Act* and argued that mis-citation of the provisions of law was a curable defect. He added that the focus had to remain on whether the court had jurisdiction and whether the substance of the application was clear. He argued that the 1st Objector had not demonstrated how the alleged procedural defect had occasioned any prejudice, delay or miscarriage of justice.
14. He pointed out that although succession proceedings were governed by the *Law of Succession Act* and the Probate and Administration Rules, the court retained inherent jurisdiction under Rule 73 of the Probate and Administration Rules to make appropriate orders in the interest of justice especially where circumstances so required to ensure the proper and fair administration of estates.
15. He added that the Probate and Administration Rules (particularly Rule 63) allowed the application of Civil Procedure Rules where necessary. He asserted that substitution applications fell squarely within the provisions of Order 24 Rule 3 of the Civil Procedure Rules as read with Rule 63 of the Probate and Administration Rules. He submitted that Section 81 of the *Law of Succession Act* did not oust the court's jurisdiction to substitute a deceased co-administrator.
16. He asserted that he was a beneficiary of the estate with a legitimate interest in its proper administration and had demonstrated capacity and willingness to act. He added that the substitution would not occasion any prejudice to the surviving administrator or other beneficiaries but that it would aid in the expeditious conclusion of the matter and prevent a vacuum in representation. He urged the court to allow his application. He was emphatic that his application was properly before the court and the court had the full discretion to grant the substitution in the interests of justice and effective estate administration.
17. On her part, the 1st Objector submitted that this was the second time the Applicant was bringing an application to substitute a deceased administrator. She argued that previously she and the Applicant filed similar applications dated 19th March 2015 and the other 7th May 2015 to substitute 2nd Petitioner then, who was Joyce Muthoni Akibaya when she passed away.
18. She asserted that the two (2) applications were heard together and declined in a Ruling of this court dated 8th October 2015 with the court citing Section 81 of the *Law of Succession Act*. She added that by then, the 1st and 2nd Petitioners herein were the surviving administrators, hence the court directed that they proceed to administer the estate jointly.
19. It was her contention that despite the passing of the 1st Petitioner, the estate still had a surviving administrator who was actively participating in these proceedings and administering the estate. She added that the 2nd Petitioner was a widow to the deceased and ranked higher than the Applicant



- who was but just one of the many children of the deceased. She pointed out that the said surviving administrator had not demonstrated difficulty in administering the estate herein.
20. The 2nd Objector also cited Section 81 of the [Law of Succession Act](#) and placed reliance on the case of Re Estate of Shadrack Githinji Njaruiri (Deceased)[2021]eKLR where it was held that the death of one administrator did not render a grant invalid and that the remaining administrator should administer the estate as provided for by Section 81 of the [Law of Succession Act](#).
21. He further cited the case of Florence Okutu Nandwa & Another vs John Atemba Kojwa Kisumu Civil Appeal No 306 of 1998 (eKLR citation not given) where it was held that a grant of representation was made in personam and was, therefore, specific to the person appointed that the issue of substitution of an administrator with another person should not arise. He also relied on the case of Re Estate of James Opuge Owuor (Deceased)[2022] KEHC 14894 (KLR) where it was held that upon the demise of the two (2) administrators, the surviving administrator was permitted in law to continue with the administration of the estate. He urged the court to allow the remaining administrator to proceed with administration of the estate herein.
22. This court had due regard to the case of Re Estate of Elijah Okitah Mikah Tsimbwele (Deceased) [2021]eKLR where the court therein rehashed the position in Section 81 of the Act to the effect that the powers and duties of personal representatives rested in the surviving personal representative on the death of one of them.
23. Notably, Section 81 of the [Law of Succession Act](#) Cap 160 (Laws of Kenya) provides as follows:-
- “Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall (emphasis court) become vested in the survivors of survivor of them
- Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him.”
24. In this case only one of the administrators had passed away. As he was not the only administrator, all the powers and duties of administering the estate of the deceased were now vested in the 2nd Petitioner herein who was the remaining administrator as provided in Section 81 of the [Law of Succession Act](#).
25. Even so, Section 81 of the [Law of Succession Act](#) had a proviso empowering the court to appoint a co-administrator where there was one (1) remaining administrator and there was a continuing trust. The Applicant herein did not demonstrate that there existed a continuing trust to justify the appointment of a co-administrator.
26. This court noted that the Applicant could apply for the revocation and/or annulment of the grant of letters of administration intestate if the 2nd Petitioner herein failed and/or wilfully refused to perform her duties under Section 76 (d) of the Law of Succession. Section 76 (d) of the Law of Succession provides that an applicant may seek for revocation or annulment of a grant of letters of administration if :-
- “ ... the person to whom the grant was made has failed, after due notice and without reasonable cause either-
- (i) to apply for confirmation of the grant within one year from the date thereof, or such longer period as the court order or allow; or



- (ii) to proceed diligently with the administration of the estate; or
- (iii) to produce to the court, within the time prescribed, any such inventory or account of administration as is required by the provisions of paragraphs (e) and (g) of section 83 or has produced any such inventory or account which is false in any material particular;”

27. Going further, the Applicant herein had indicated that the process of the administration was at the tail end with only transmission remaining. It was also evident that trustees for the different houses could be appointed as per the proviso of Section 84 of the *Law of Succession Act* which stipulated that:-

“Provided that, where valid polygamous marriages of the deceased person have resulted in the creation of more than one house, the court may at the time of confirmation of the grant, appoint separate trustees of the property passing to each or any of those houses as provided by section 40 (emphasis court).”

28. In view of the mandatory nature of Section 81 of the *Law of Succession Act* due to the use of the word “shall”, this court had no option but to leave Section 81 of the *Law of Succession Act* to regulate the remaining part of the administration of the deceased’s estate.

Disposition

29. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Chamber Summon application dated 6th February 2025 and filed on 7th February 2025 was not merited and the same be and is hereby dismissed.

30. As this was a family cause, this court deviated from the general rule that costs follow events and directs that each party bears its own costs so as to preserve the family ties.

31. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JANUARY 2026

J. KAMAU

JUDGE

