

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
SUCCESSION CAUSE NO. 518 OF 2015
IN THE MATTER OF THE ESTATE OF KAILU NG’OKA
(DECEASED)

MICHAEL MWAKAVI MASILA
APPLICANT

AND

SERAH MBWIKA 1ST
RESPONDENT

ONESMUS KING’O MBWIKA..... 2ND
RESPONDENT

PATRICIA MUMBUA MBWIKA..... 3RD
RESPONDENT

GIDEON MBITHI MBWI 4TH
RESPONDENT

RULING

1. Before this court for determination is an application dated 3rd February 2025 seeking orders that the administrator herein Masila Ng’oka be substituted by Michael Mwakavi Masila.

2. The application is premised on the grounds set out on the face of the summons and the supporting affidavit sworn by the applicant. The crux of the application is that the applicant is a beneficiary of the estate and a son of the late, Masila Ng’oka who was one of the administrators in the estate of Kailu Ng’oka. The applicant avers that this court issued a grant of

letters of administration intestate in respect of the estate of the deceased Kailu Ng’oka on 7th November 2018 appointing, among others Masila Ng’oka as an administrator. He further states that Masila Ng’oka passed on 16th July 2024 and that he now seeks to be substituted in place of his deceased father as an administrator of the estate.

3. In opposing the application, the Respondents filed grounds of opposition dated 13th May 2025 contending that the applicant is not an administrator of the estate of Kailu Ng’oka; that the application is misconceived and incompetent; that it lacks merit and sufficient basis; that it is bad in law and defective and that it constitutes an abuse of the court process.
4. The application was canvassed by way of written submissions.

Applicant’s submissions

5. The Applicant outlined the background to the summons and crystallised two issues for determination, namely; whether the Applicant has proven his case on a balance of probabilities so as to warrant the orders sought, and whether the applicant is entitled to an award of costs.
6. On the substantive issue, the Applicant relies on documentary evidence annexed to his supporting affidavit including a Chief’s letter dated 5th August 2024 confirming his relationship with the late Masila Ng’oka (his father), a certified copy of the death certificate evidencing the father’s demise, and a certified Certificate of Confirmation of Grant

issued in respect of the estate of Kailu Ng'oka (deceased) which had appointed Masila Ng'oka among the administrators. The Applicant submits that, contrary to the Respondents' assertions, he has never claimed to be an administrator of the estate of Kailu Ng'oka. His sole intention is to substitute his deceased father in the administration of his grandfather's estate. He further pointed out that the Respondents do not dispute either his relationship to the deceased administrator or the deceased whose estate is under administration. The applicant argued that the proposed substitution is necessary for the effective and continued administration of the estate and would occasion no prejudice to the respondents or any beneficiaries. He urges the court to exercise its discretion judiciously and allow the application.

7. On the issue of costs, the Applicant submitted that although costs ordinarily follow the event, their award remains a matter within the Court's discretion. He relied on the case of **Supermarine Handling Services Ltd v Kenya Revenue Authority, Civil Appeal No. 85 of 2006**, where the court affirmed that such discretion must be exercised judicially and based on established facts. The Applicant contended that he had incurred costs in prosecuting the application, including participation in mediation proceedings in which, he claimed, the Respondents initially agreed to a settlement but subsequently reneged in bad faith.

8. In conclusion, the Applicant prays that the court finds the Summons application meritorious, allows the Application as prayed and award him costs.

Respondent's submissions

9. The Respondent raise three issues for determination namely; whether the applicant has demonstrated locus standi to bring the application; whether the application is misconceived and improper before the court and whether the application is an abuse of the court process.

10. On the issue of locus standi, the Respondents submit that the Applicant lacks to the legal capacity to seek substitution as an administrator. They argue that the Applicant has not obtained a grant of representation in respect of the estate of his late father, Masila Ng'oka and therefore lacks authority to act on behalf of that estate. They further contend that the Chief's letter annexed to the Supporting Affidavit does not confer any legal authority upon the Applicant to administer his father's estate or to seek substitution in these proceedings. On this basis, the Respondents assert that the Application is unsupported, lacks merit and is legally untenable.

11. With regard to whether the application is misconceived and does not lie, the Respondents argue that the Application is fundamentally defective for failure to cite any provision of the

Law of Succession Act permitting the substitution of a deceased joint administrator. They submit that it is incumbent upon the Applicant to properly invoke the Court's jurisdiction by identifying the legal basis for the relief sought, which he has failed to do. The respondent relies on Section 81 of the Law of Succession Act (Cap. 160) which provides that where one or more joint administrators die, the powers and duties of administration vest in the surviving administrator(s). They contend that this provision has been judicially interpreted to mean that no substitution is neither required or permitted where there are surviving administrators. In support of this position, they cite the case of **Christopher Mukunga Munyi v Peterson Kabuitu Mwangi [2018] eKLR**, where the Court held that surviving joint administrators are entitled to continue administering the estate without the need for replacement of a deceased administrator. Consequently, the Respondents submits that there is no legal basis for the substitution, sought, rendering the Application bad in law and defective.

12. On the question of abuse of the court process, the Respondents submit that the Application constitutes an abuse of the court process having been brought without a sound legal foundation. They urge the court to dismiss it in its entirety with costs.

13. In conclusion, the Respondents maintain that the Application is incompetent, legally unfounded, and devoid of merit, and pray that it be dismissed with costs.

Analysis and Determination

14. I have carefully considered the summons application herein, together with the submissions placed on record and the sole issue for determination is; whether this Court has jurisdiction, to substitute a deceased joint administrator with the Applicant.

15. The Applicant's case is premised on the assertion that he is the son of the deceased administrator, Masila Ng'oka and a beneficiary of the estate of Kailu Ng'oka (Deceased) and therefore seeks to step into the shoes of his deceased father as an administrator. He contends that such substitution would promote efficient administration of the estate and would not prejudice the interest of the other beneficiaries.

16. The Respondents on the other hand, oppose the application on both procedural and substantive grounds. They contend that the Applicant lacks *locus standi*, has failed to cited any provision of law that permits such substitution and that in any event, the law does not contemplate substitution of a deceased joint administrator where there are surviving administrators.

17. The starting point in determining this issue is the relevant statutory framework under the Law of Succession Act, Cap.

160 Laws of Kenya, which governs the administration of estates of deceased persons. **Section 81 of the Law of Succession Act** provides that;

“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 become vested in the survivors or survivor of them.”

18. The import of this provision is plain and unambiguous. Where a grant of representation has been issued to more than one administrator, the death of one administrator neither renders the grant defective nor creates a vacancy requiring replacement. Instead, the law expressly vests all the powers and duties of administration in the surviving administrator or administrators. This statutory position has consistently been affirmed by the court. See **Changal v Maritim & Another (2025) KEHC 8667 (KLR)**; **Christopher Mukunga Munyi v Peterson Kabuitu Mwangi [2018] eKLR**, where the courts held that where there are surviving administrators, they are legally mandated to continue administering the estate without the necessity of substituting a deceased co-administrator.

19. In the present case, it is not in dispute that the estate of Kailu Ng’oka (Deceased) had three joint administrators namely Mutuse Ng’oka, Ndeto Ng’oka, and Masila Ng’oka.

Upon the demise of Masila Ng'oka on 16th July 2024, the surviving administrators, being Mutuse Ng'oka and Ndeto Ng'oka automatically assumed full authority to continue administering the estate by operation of Section 81. In these circumstances, there is no legal vacuum and therefore no basis for the substitution as sought by the Applicant. The law does not provide for substitution of a deceased joint administrator where there are surviving administrators. The Applicant has also not pointed this court to any provision of the law that would clothe it with jurisdiction to grant the orders sought. Further, while the Applicant asserts that he is a beneficiary and son of the deceased administrator, that fact alone does not confer upon him the legal capacity to be appointed as an administrator in place of his father. In any event, as correctly submitted by the Respondents, the Applicant has not obtained a grant of representation in respect of the estate of his late father, Masila Ng'oka, which would have been a prerequisite were he to assert any legal rights flowing from that estate.

20. I am alive to the Applicant's argument that substitution would enhance efficiency in the administration of the estate and occasion no prejudice to the beneficiaries. However, considerations, of convenience and expediency cannot override clear and express statutory provisions. The court is bound to apply the law within its confines and where the law has expressly provided how such eventualities are to be

addressed, the court cannot craft remedies that are not contemplated.

21. Accordingly, and guided by the provisions of Section 81 of the Law of Succession Act this court finds that the Application dated 3rd February 2025 is misconceived, legally untenable and devoid of merit. It cannot be sustained. The same is dismissed. Each party to bear its own costs, as an order for costs would neither serve the interests of justice nor promote family harmony.

22. Orders accordingly.

Dated, signed and delivered at Machakos this 7th day of May, 2026

RHODA RUTTO
JUDGE

In the presence of;

.....Applicant

.....Respondent

Selina Court Assistant