



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 36 OF 2015

WILLIAM BOYON.....1ST PLAINTIFF

JOHNSTONE BOIYON.....2ND PLAINTIFF

JOEL BOIYON.....3RD PLAINTIFF

DAVID BOIYON.....4TH PLAINTIFF

VERSUS

BENJAMIN BOIYON.....1ST DEFENDANT

ANNAH CHERONO.....2ND DEFENDANT

SOPHIA CHERONO.....3RD DEFENDANT

THE DISTRICT LAND REGISTRAR KERICHO.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the Plaintiffs' Notice of Motion dated 19th October 2019 brought pursuant to Order 24 Rules 3 (10 and (4) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders:

- a) That Emily Chelangat Ngeny and Evaline Chepngetich Kilel , the legal representative of the estate of David Boiyon, the deceased 4th Plaintiff be made a party to this case in place of the deceased 4th Plaintiff.
- b) That John Cheruiyot Kemboi, the legal representative of the estate of Benjamin Boiyon, the deceased 1st Defendant be made a party to this case in place of the deceased 1st defendant
- c) That the costs of this application be provided for.

2. The application is based on the facts stated on the face of the Notice of Motion and the supporting affidavit of William Boiyon sworn on the 19th October 2018. In the said affidavit the applicant states that the 1st plaintiff died on 1st May 2018 while the 4th defendant died on 16th March 2018. He further depones that on 18th June 2018 Emily Chelangat Ngeny and Evaline Chepngetich Kilele were appointed as the legal representatives of the estate of David Boiyon (deceased).

3. He depones that the beneficiaries of the estate of Benjamin Boiyon refused to apply for Letters of Administration in respect of the estate of the deceased necessitating the applicant to file a citation cause where they were authorized to apply for letters of administration. Pursuant to the said authority, they appointed John Cheruiyot Kemboi who accepted to be the legal representative of the deceased's estate. He therefore prays that the application be granted.

4. The application is partially opposed by the 1st, 2nd and 3rd respondents through the Replying Affidavit of David Tonui Boiyo sworn on

the 14th November 2018 in which he deposes that owing to the historical differences between the late Benjamin Boiyon and John Cheruiyot Kemboi, John will not be able to protect the interests of the estate of the late Benjamin Boiyon. Of interest is the assertion that the family of the late Benjamin Boiyon were not aware of the citation proceedings nor were they served with the order obtained in the said citation proceedings. He deposes that in order to protect the interests of his late father's estate; he is willing to take out Letters of Administration in order to be made a party to this suit in place of his late father Benjamin Boiyon.

5. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUE FOR DETERMINATION

6. Having considered the Notice of Motion, rival affidavits and submissions filed by counsel for both parties, the singular issue for determination is whether John Cheruiyot Kemboi should be enjoined in this suit in place of the late Benjamin Boiyon.

ANALYSIS AND DETERMINATION

7. In his submissions, learned Counsel for the applicant submitted that the applicants have no objection to Emily Chelangat Ngeny and Eveline Chepngetich Kilel being who have been duly appointed as the personal representatives of the estate of the 4th Plaintiff being enjoined in the case. However, the bone of contention is with regard to the personal representative of the estate of Benjamin Boiyon.

8. Counsel for the applicants has poked holes in the respondents' objection to John Cheruiyot Kemboi being enjoined in the suit as the personal representative of the estate of Benjamin Boiyon on three grounds: Firstly he has submitted that the grant obtained by David Boiyon Tonui on 30th January 2019 is not valid as it was issued after a grant had already been issued to John Cheruiyot Kemboi following the respondents failure to apply for Letters of Administration.

9. He submitted that no more than one grant can exist simultaneously in respect to the same estate. See **Re Estate of Grace Nyambura Waruingi (Deceased) Nairobi HCC Succession Cause No1671 of 1993** where Justice Achode observed as follows:

“It must be stated from the outset that there can only be one grant of representation to the estate of one individual. It is therefore untenable that there are two grants and two sets of administrators in respect of the same estate”.

10. Secondly, Counsel has submitted that the grant issued to David Tonui was issued by a court that had no jurisdiction to do so. Thirdly, he submitted that there is no application seeking to cause David Tonui Boiyon to be enjoined in the suit in place of the late Benjamin Boiyon.

11. On the other hand, counsel for the respondents has submitted that the Grant obtained by David Boiyon is valid as it was issued by a court of competent jurisdiction. He cited section 3 (2) of the Magistrates Courts Act which provides that a Magistrate's Court has countrywide jurisdiction, regardless of where the cause of action arose or where the defendant resides. He submitted that the suit property is at Getarwet which is closer to Sotik Court than Kericho Court. He further submitted that the court ought to take into account the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. He cited article 159 of the Constitution of Kenya which enjoins the courts to do justice without undue regard to procedural technicalities.

12. I agree with counsel for the applicant that the objection based on technical grounds is neither here nor there in view of the provisions of article 159 (2) (d) of the Constitution. However, the crux of the matter is whether the person appointed to substitute the late Benjamin Boiyon (1st defendant) is the true legal representative of the deceased and whether he will effectively protect the interests of the deceased's estate.

13. I am acutely aware that the parties to this suit are closely related and ideally the issue of who ought to substitute the deceased should have been settled through mediation but despite the court giving the parties time to negotiate an out of court settlement, this did not happen. As correctly pointed out by the authorities cited by counsel for the applicants, the legal position is that there cannot be two grants of letters of administration in respect of the estate of the same deceased person.

14. If the respondents' assertion that they were not aware of the citations proceedings taken out by the applicants is true, then there is certainly a problem that needs to be addressed. The applicants cannot rely on legal technicalities to impose a party who will not protect the interests of the estate of the 1st defendant.

15. It is a pity that the affidavits filed by the parties did not bring out all the issues in controversy and some of this information only came to the court's attention through counsel's submissions. This amounts to giving evidence from the bar. What this has done is turn what would ordinarily have been a straight forward application into a highly contentious one.

16. For the foregoing reasons, it is my finding that on the material placed before the court, I am unable to grant prayer 2 of the application as the person who seeks to be enjoined in the suit in place of the 1st defendant who has since died, is not the legal representative of the deceased. Prayer 2 of the application is therefore dismissed. Since the substitution with respect to the 4th Plaintiff is not opposed, prayer 1 of the Notice of Motion is allowed.

17. This does not preclude the parties from reverting to the relevant court dealing with the Succession matter to ensure that an acceptable party is appointed as the legal representative of the 1st defendant after which an application may be made to substitute the 1st defendant out of time.

18. This being a matter involving members of the same family, each party shall bear their own costs.

Dated, signed and delivered at Kericho this 8th day of November, 2019.

J. M. ONYANGO

JUDGE