



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 134 OF 2015**

JOSEPH MUTIKO OLUBERO.....1<sup>ST</sup> PLAINTIFF  
OKUBUSA NYONGESA MOSESE.....2<sup>ND</sup> PLAINTIFF  
JOSEPH JOHN MAENDE.....3<sup>RD</sup> PLAINTIFF  
LYDIA MATENDECHERE.....4<sup>TH</sup> PLAINTIFF  
MASINDE AJUMA GABRIEL.....5<sup>TH</sup> PLAINTIFF

VERSUS

KARANI BALONGO..... DEFENDANT

AND

CALEB KARANI

ERINEO PAMBA.....SUBSTITUTES

**R U L I N G**

1. This ruling is on a preliminary objection based on a notice dated 28/9/2017 and filed on the same date. The objection is as follows:

**“That the intended substitutes have no legal locus standi in the suit, grant in the estate of the deceased defendant KARANI BALONGO having not been obtained by them or any one at all contrary to Succession Act Cap 160 Laws of Kenya”.**

2. To understand why the objection was raised, some prefatory remarks are necessary: The suit herein was filed on 23/11/2015. The five (5) Plaintiffs – **JOSEPH MUTIKO OLUBERO, OKUBASU NYONGESA MOSES, JOSPHAT JOHN MAENDE, LYDIA MATENDECHERE** and **MASINDE AJUMA GABRIEL** – sued the Defendant – **KARANI BALONGO** – alleging trespass onto their parcels of land **BUKHAYO/MUNDIKA/9152, 9158, 9155, 9159, 9161, and 9171**. The Defendant was alleged to have uprooted the fences and even threatened to sell the parcels of land.

3. Before commencement of trial, the Defendant passed on. The Plaintiff’s counsel, J. V. Juma, then filed an application, a Notice of Motion, to bring as substitutes two people – **CALEB KARANI** and **ERINEO PAMBA** – to take the place of the deceased Defendant. The two people are said to be sons of the deceased Defendant. The application was brought under Order 24 Rule 1 and 4 of the Civil Procedure Rules, and Section 3 & 3A of the Civil Procedure Act (cap 21).

4. It is to that application that counsel for the Defendant, WYCLIFFE OKUTTA, raised an objection in the manner already stated. Together with the notice of preliminary objection was filed grounds of opposition wherein the same issue raised in the objection was also raised.

5. The preliminary objection was canvassed by way of written submissions. The Plaintiffs’ submissions were filed on 5/12/2017. The Plaintiffs submitted, *inter alia*, that counsel for the Defendant has no locus standi in the matter as he is not acting for the proposed substitutes. Counsel was, it was submitted, acting for the deceased Defendant. He cannot therefore be entertained to raise a preliminary objection.

6. It was submitted also that the application objected to is brought under Order 24 Rule 4 of Civil Procedure Rules. According to Plaintiffs' counsel, one need not have a grant of letters of administration to be substituted as a defendant in place of a deceased relative. According to counsel, order 24 rule 5 supports this position. It was further submitted that counsel for Defendant should have waited to be appointed to act for the proposed substitutes in order to raise the objection he is now raising.

7. The Defendant's counsel submissions were filed on 7/12/2017. He submitted that as counsel for the deceased Defendant, he was served with the application. He was, he submitted, the one intended to submit. The court was asked to dismiss the application.

8. I have considered the application, the response made, and the rival submissions. The submission by counsel for the Plaintiff that counsel for the Defendant cannot raise an objection seems to me mischievous and/or dishonest. When the application was filed, counsel for the Defendant was served. One is bound to ask: Why is a party served? And an obvious answer to that question is that a party is served to respond. And a preliminary objection is one form of response. If counsel for the Plaintiff thought that counsel for the Defendant should not respond, he should only have served the proposed substitutes. It is again emphasised that parties are served to respond. And the problem in any given matter is not making a response but failing to make one if served. The Defendant's counsel was within his remit to respond.

9. The other submission by the Plaintiffs' counsel is that under Order 24 rule 4 one need not take out letters of administration to take the place of a deceased defendant. Order 24 rule 4 provides as follows:

**4(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.**

**2 Any person so made a party may make any defence appropriate to his character as legal representative of the defendant.**

**3 .....**

Counsel for Plaintiffs explained that his position as to meaning and purport of the above rule is based on rule 5, of the same order, which goes thus:

**5: Where a question arises as to whether any person is or is not a legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the court.**

10. In this matter, the question referred to in rule 5 (ante) has arisen. To Plaintiffs' counsel, one need not obtain the requisite grant in succession proceedings in order to become a legal representative under Order 24 rule 4. To him, that provision enables a person to be appointed a legal representative without recourse to the applicable succession law. To counsel for the Defendant however, one must have the necessary grant arising from succession proceedings in order to become a legal representative.

11. I need to pose a question here: Who is a legal representative? In Steven H. Gifis **"Dictionary of Legal Terms"** 4<sup>th</sup> Edition, (2008) page 378, a legal representative, also called a personal representative, is defined as **"a person who manages the affairs of another, either under a power of attorney or due to incapacity of the principal either through death, incompetency or infancy; for example the executor under the will of a decedent or the committee of an incompetent"**. In our context here, we are talking of a person managing the affairs of another because of incapacity arising through death.

12. In Blacks Law Dictionary, 9<sup>th</sup> Edition, page 1416, a legal or personal representative is defined thus:

**"a person who manages the legal affairs of another because of incapacity or death, such as an executor of an estate. Technically an executor is a personal representative named in a will, while an administrator is a personal representative not named in a will – Also termed independent personal representative; Legal representative"**.

Here, a legal representative where death is, as in this case, the issue can only fall into either of two categories viz: an executor where there is a will or an administrator where there is no will.

13. The matter at hand is one that involves the death of the Defendant. Order 24 rule 4 talks of appointing **"the legal representative"**, not a legal representative. The language is clear. The order presupposes the existence of a legal representative appointed under the applicable law. It does not itself appoint a person who is not already a legal representative to act in that capacity in a given suit, including this one here. It is important to note that such a person has to be an executor or an administrator. One needs to ask whether one can become an executor or administrator without recourse to succession law. And the answer to that would be an obvious **NO**.

14. But the Civil Procedure Act (cap 21) makes it even clearer, at Section 2, which is the interpretation Section. This is what it says:

**"Legal representative" means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued"**.

I pose another question here: Can the two substitutes proposed by the Plaintiffs' counsel be deemed in law to represent the estate of the deceased Defendant? The answer to this question is obviously **NO**. And the import of this is that the two proposed substitutes are not legal representatives within the meaning envisaged by the Civil Procedure Act (cap 21) itself.

15. I now need to make some general observations. Counsel for the Defendant cannot be wished away in the matter. He was acting for the Defendant and there is obviously the issue of accrued but unpaid costs. He has a legitimate interest to know who is coming to take the place of his deceased client. And this is so because were he to stop or continue acting in the matter, these are the people he would raise such issues with.

16. I would wish to point out also that the general accepted procedure where issues of the death of parties arise in a pending case is that recourse is always had to the applicable provisions of Succession Law. It is clear that a person professing to be a legal representative in a situation where death has occurred should have the necessary legal instrument showing him as such. You cannot therefore pick a person from anywhere, bring him to a pending case, and call him a legal representative.

17. My position, in light of the foregoing, is that the preliminary objection raised by counsel for the Defendant is meritorious and the application dated 18/9/2017 and filed on 19/9/2017 is therefore hereby dismissed with costs.

**Dated, signed and delivered at Busia this 31<sup>st</sup> day of October, 2018.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Plaintiff: Absent

2<sup>nd</sup> Plaintiff: Absent

3<sup>rd</sup> Plaintiff: Absent

4<sup>th</sup> Plaintiff: Absent

5<sup>th</sup> Plaintiff: Absent

Defendant: Absent

1<sup>st</sup> Substitute: Absent

2<sup>nd</sup> Substitute: Absent

Counsel of Plaintiffs: Present

Counsel of Defendant: Absent