



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

SUCCESSION CAUSE NO. 176 OF 1996

IN THE MATTER OF THE ESTATE OF CHEMWOK CHEMITEI (DECEASED)

AND

IN THE MATTER OF AN APPLICATION FOR SUBSTITUTION OF ADMINISTRATORS

BETWEEN

PHILIP KIMUTAI CHEMWOK.....APPLICANT

AND

MARY JERUTO CHEMWOK.....OBJECTOR

RULING

[1] By a Chamber Summons dated **24 February 2021**, the applicant, **Philip Kimutai Chemwok**, seeks orders, pursuant to **Section 71** of the **Law of Succession Act, Chapter 160** of the **Laws of Kenya**, that:

[a] Service of the application be dispensed with in the first instance;

[b] **Philip Kimutai Chemwok** be substituted in place of **Maria J. Cherop Chemwok**, one of the petitioners, now deceased;

[c] **Susan Tuwei** be substituted in place of **Taplilei Chemwok**, one of the petitioners now deceased;

[d] Costs of the application be costs in the cause.

[2] The application is premised on the grounds that **Maria J. Cherop Chemwok** and **Taplilei Chemwok** who were the petitioners/administrators herein have since died; that the case is yet to be heard and finally determined; and that the rest of the petitioners in this matter have agreed to have the two deceased administrators substituted by **Philip Kimutai Chemwok** and **Susan Tuwei**. In support of the application, the applicant relied on the affidavits sworn by himself and by **Susan Tuwei**, sworn on **24 February 2021**. A copy of the Certificate of Death for **Taplilei Chengok** was annexed, in proof of the fact of her death on **9 February 2020**.

[3] This is a longstanding matter; and a perusal of the record reveals that a Grant of Letters of Administration

Intestate was issued on **19 November 1998** to **Kimoi Taparbuch Chemwok, Juliana Chemwok, Maria J. Chemwok, and Taplilei Chemwok**. Thereafter, an Affidavit of Protest against Confirmation of Grant was filed on **1 February 2001** by **Mary Jeruto**, one of the daughters of the deceased by his third wife, **Tapkigen Chemwok**. The parties have since been unable to either agree on the mode of distribution or prosecute the Summons for Confirmation to enable the Court take a decision in the matter.

[4] It is now manifest that all the four initial administrators have since died; and that the applicant is desirous of being appointed an administrator in place of his deceased mother, **Maria J. Cherop Chemwok**. It is also proposed that **Susan Tuwei** be brought on board in place of **Taplilei Chemwok**. It was averred in the two Supporting Affidavits that the entire family is in agreement and have approved the proposed substitutions. Nevertheless, the **Law of Succession Act** does not favour the application for substitution in the sense that it does not provide for such a scenario as is presented by the instant application.

[5] What is envisaged by **Section 81** of the Act is that, in the event of the death of one or more of joint administrators, where there are several administrators, the surviving administrator or administrators would then have the mandate to continue with their duties to completion without the need to replace the deceased ones. That Section states thus:

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

[6] In this respect the position taken **Re Estate of Mwangi Mugwe alias Elieza Ngware (deceased) [2003] eKLR**, by **Hon. Khamoni, J.** which I subscribe to, is that:

“...the operative word is “substitution”. The Law of Succession Act has no provisions talking about substitution of a deceased single administrator...In the circumstances therefore, it is my considered view that the proper provisions of the law to apply is section 76(e) of the Law of Succession Act and Rule 44 of the Probate and Administration Rules whereby the Applicant would apply for revocation or annulment of a grant on the ground “that the grant has become useless and inoperative through subsequent circumstances.” The Applicant would proceed to put a prayer in the same application that a new grant be made to him and could as well add a further prayer, if need be, for confirmation of the new grant. The application, should, of course, be supported by consent from adult beneficiaries in the estate of the first deceased person, the second deceased person being the deceased administrator.”

[7] In the same line of thought, **Hon. Musyoka J.** held as follows in **Re Estate of George Ragui Karanja (Deceased) [2016] eKLR**:

The Law of Succession Act does not expressly provide for substitution of personal representatives who die in office, particularly in cases where the estate is left without one. The closest provision is section 81 of the Act, which provides for vesting of the powers and duties of personal representatives in the survivor or survivors of a dead personal representative... It would appear to me that once all the holders of a grant die, section 81 of the Act would be of no application. Indeed, the said grant becomes useless and inoperative, and liable to revocation under section 76(e) of the Law of Succession Act, to pave way for appointment of new administrators. The appointment of fresh administrators to take the place of the previous ones following their death is subject to the provisions of sections 51 through to section 66 of the Act.”

[8] And in the case of **Florence Okutu Nandwa & Another vs. John Atemba Kojwa, Kisumu Civil Appeal No. 306 of 1998**, the Court of Appeal made it clear that:

“A grant of representation is made in *personam*. It is specific to the person appointed. It is not transferable to another person. It cannot therefore be transferred from one person to another. The issue of substitution of an administrator with another person should not arise. Where the holder of a grant dies, the grant made to him becomes useless and inoperative, and the grant exists for the purpose only of being revoked. Such grant is revocable under section 76 of the Law of Succession Act. Upon its revocation, a fresh application for grant should be made in the usual way, following procedures laid down in the Law of Succession Act and the Probate and Administration (Rules)...”

[9] In the light of the foregoing, it is manifest that the application dated **24 February 2021**, though unopposed, is untenable. The same is hereby dismissed with an order that the costs thereof be costs in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 26TH DAY OF MAY 2021

OLGA SEWE

JUDGE



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