



In re Estate of Livingstone Arege Migiro (Deceased) (Succession Cause 9 of 2022) [2024] KEHC 1870 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1870 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
SUCCESSION CAUSE 9 OF 2022
PN GICHOHI, J
FEBRUARY 29, 2024**

**IN THE MATTER OF
SARAH MORA AREGE DECEASED
AND
NELLY MOKEIRA AREGE APPLICANT**

RULING

1. By Summons dated 9th September 2021, the Applicant (Nelly Mokeira Arege) seeks orders that:-
 2. Leave be granted to the Applicant to be substituted as the as an administrator of the estate of the deceased (Livingstone Arege Migiro) in lieu of Sarah Mora Arege now deceased .
 3. The certificate of confirmation of grant dated 22nd September 2004 be rectified and amended as per the attached affidavit on the mode of distribution and amended P & A 5 FORM.
 4. The costs of this application be in the cause.
2. The grounds on the face of the application. The Applicant states that the Grant of Letters of Administration of the estate of deceased (Livingstone Arege Migiro) was confirmed on 22nd September 2004 and administered by Sarah Mora Arege but she passed away in 2011 before the estate could be distributed.
3. She further states she is the 2nd wife of the deceased Livingstone Arege Migiro and that some of the properties comprising the estate were not included in the distribution and some beneficiaries were also not taken care of. She states that unless leave is granted, the estate will remain unadministered and stand to be wasted and/or intermeddled.
4. In support of the Application is the Affidavit sworn by Nelly Mokeira Arege on 9th September 2021 where she attached a copy of the Amended P&A 5 and copy of the title deed for LR.No. Central / Kitutu/Monyerero /1560.



5. Upon being served, Maria Rerubo Migiro swore a Replying Affidavit on her behalf and on behalf of her brothers and with their consent. That Affidavit is dated 10th February 2022. She opposed this Application for reasons that the Applicant should have no claim to the estate of the of Livingston Arege Migiro as she is not the widow of and was not a wife of the deceased as there was no formal marriage between her and the deceased even though they cohabited for some time.
6. The Application is further opposed on the grounds that some of the children listed by the Applicant herein are not entitled to a share of the estates as they were sired by the Applicant together with one Fred Motari as per annexed a copy of letter dated 18th July 1979 written David Onyancaha & Co. Advocates on instructions of the Applicant.
7. Further, it is deponed that even as at the time the deceased cohabited with the Applicant, the deceased rendered no support of the children of the Applicant. In support of that argument, she annexed a copy of a letter by one Mogeni Dauglas dated 12th February 1992.
8. In a supplementary Affidavit sworn on 14th December 2022, the Applicant maintained that she was the only surviving widow to the deceased. She further deponed that she was aware that the Petitioner (now deceased) and Livingstone Arege Migiro (deceased) were never blessed with any children in their union and therefore, the persons listed in the succession cause were strangers since no formal adoption was ever undertaken.
9. In a Further Replying Affidavit sworn on 21st December 2022, Maria Kerubo Migoro deponed that the Applicant herein had filed Probate and Administration Cause No. 17 of 2006 which was responded to by Sarah Moraa Arege and which was dismissed on 10/07/2015 making the present Application res judica. She therefore urged the Court to strike out this Application.
10. Parties filed their respective submissions as a mode of disposal of this Application and reiterate the contents of their affidavits.
11. In their submissions dated 14th December 2022, the Applicants submit that there is no dispute that the estate of the deceased has not been distributed as per the confirmed grant.
12. Further, the Applicant submit that the deceased got married and solemnised their marriage under Gusii Customary Marriage and that the two sired children together and the Applicant also brought in her own children and whom the deceased received as his and assumed their parental responsibility.
13. The Applicant therefore submits that herself and the children are entitled to the deceased's estate.
14. In their submissions dated 3rd February 2023, the Respondents submit that though the Petitioner had not fully transmitted the estate, the Law of Succession Act does not permit the Applicant to be substitute the Petitioner and proceed to distribute the estate.
15. Further, the Respondents maintain that by virtue of High Court Kisii Succession Cause No. 17 of 2006 filed by the Applicant for Grant of Letter of Administration, and which Application was dismissed by the Court on 10/07/2017, the current Application is res judicata.

Determination

16. This Court has considered the Application, the affidavits and the submissions by the parties.
17. To start with, there is no dispute by the Applicant herein that she had filed a High Court Kisii Succession Cause No. 17 of 2006 seeking Grant of Letter of Administration and that the same was



opposed by the Petition herein Sarah Moraa Arege (now deceased) and that the Court dismissed that Application.

18. The Court of Appeal has severally dealt with and settled the issue of res judicata. Indeed, in the case of *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] eKLR, the Court restated the elements that must all be present before a suit or an issue is deemed res judicata on account of a former suit as enumerated in the *Civil Procedure Act*, that is:-

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

19. A perusal of the documents annexed clearly shows that the Application herein is res judicata. Further, though there is no doubt that the Petitioner did not fully distribute the property of the deceased and per the grant that was confirmed on 22nd September, 2004, there was only one administrator being the Petitioner/ Deceased as at the time of the said confirmation.

20. Section 81 of the Act provides that powers and duties of personal representatives vest in survivor on death of one of them and 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:

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.”

21. That in effect means that there is no room for any application for purported substitution of an administrator. Indeed, the Court of Appeal in the case of *Florence Okutu Nandwa & Another vs. John Atemba Kojwa*, Kisumu Civil Appeal No. 306 of 1998, the Court of Appeal was specific 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)...”

22. In the circumstance herein, this Application is not only res judicata but also not provided for under the law. It is dismissed and each party is to bear his own costs.



DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 29TH DAY OF FEBRUARY, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Applicant

Mr. Soire for Respondent

Saewa/ Aphline- Court Assistant

