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REPUBLIC OF KENYA




THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FIFTH SESSION – 2021

DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON THE CONSIDERATION OF THE PETITION BY MR. EPHANTUS NYAGA REGARDING AMENDMENT TO SECTIONS OF THE CIVIL PROCEDURE ACT, CHAPTER 21, AND THE LAW OF SUCCESSION ACT, CHAPTER 160

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 06 OCT 2021	
DAY: Wednesday	
TABLED BY:	CHAIR, DC - JUSTICE & LEGAL AFFAIRS - HON. MUTURU KIGAMBO, MP
CLERK-AT THE-TABLE:	Samuel Kalama

CLERK'S CHAMBERS
DIRECTORATE OF COMMITTEE SERVICES
PARLIAMENT BUILDINGS
NAIROBI

OCTOBER, 2021

Contents

LIST OF ANNEXURES	4
CHAIRPERSON'S FOREWORD	5
CHAPTER ONE	6
1.0 PREFACE	6
1.1 Mandate of the Committee	6
1.2 Committee Membership	7
Chairperson	7
Hon. Clement Muturi Kigano, M.P.	7
Hon. Robert Gichimu Githinji, M.P.	7
1.3 Committee Secretariat	8
CHAPTER TWO.....	9
2.0 CONSIDERATION OF THE PETITION BY THE COMMITTEE.....	9
2.1 Submissions by the Petitioner Mr. Ephantus Nyaga	9
2.2 Submissions by the Judiciary	10
2.3 Comments by the Office of the Attorney General and Department of Justice.....	11
2.4 Submissions on the Development of National Policy to Streamline the Legal Sector.....	15
CHAPTER THREE.....	18
3.0 COMMITTEE'S OBSERVATIONS	18
CHAPTER FOUR.....	20
4.0 COMMITTEE RECOMMENDATION.....	20

LIST OF ANNEXURES

- Annexure 1:** Minutes of Committee sittings on the consideration of the Petition
- Annexure 2:** Signed list of Members who attended the sitting that considered and adopted the report.
- Annexure 3** Submissions on the Petition

CHAIRPERSON'S FOREWORD

The petition was presented before the house on Wednesday August, August 5th, 2020. This is in accordance with the provisions of Standing Order No. 225 (2) (b). The Petition seeks to amend sections of the Civil Procedure Act and the Law of Succession Act.

The Petition was referred to the Departmental Committee on Justice and Legal Affairs for consideration and thereafter report to the House.

In considering the Petition, the Committee, during its sitting, held on Wednesday 7th July, 2021 met with the petitioners Mr. Ephantus Nyaga, Mr. Francis Nyaga Njeru and Mr. Isaiah Njiru Njeru The meeting was aimed at inquiring into the issues raised in the Petition. The Committee wrote to the Attorney General and Chief Registrar of the Judiciary for comments on the Petition.

May I take this opportunity to express gratitude to Committee Members for their resilience and devotion to duty which made the consideration of the Bill successful. May I also appreciate the Speaker and Clerk of National Assembly for always providing guidance and direction to Committees in the discharge of their mandate. Finally, I commend the secretariat for exemplary performance in providing technical and logistical support to the Committee.

On behalf of the Committee, and pursuant to Standing Order, 227 it is my duty to table on the Floor of the House the Report of the Committee on the petition.

Hon. Muturi Kigano, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

CHAPTER ONE

1.0 PREFACE

1.1 Mandate of the Committee

1. The Departmental Committee on Justice and Legal Affairs derives its mandate from Standing Order No. 216(5) which provides for the functions of Departmental Committees as follows-
 - a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
 - b) Study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
 - c) Study and review all legislation referred to it;
 - d) Study, assess and analyse the relative success of the ministries and departments as measured by the results obtained as compared with their stated objectives;
 - e) Investigate and enquire into all matters relating to the assigned ministries and departments as they may deem necessary, and as may be referred to them by the House;
 - f) Vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)
 - g) Examine treaties, agreements and conventions;
 - h) Make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
 - i) Consider reports of Commissions and Independent Offices submitted to the House pursuant to provisions of Article 254 of the Constitution; and
 - j) Examine any questions raised by Members on a matter within its mandate.
2. The Second Schedule of the Standing Orders on Departmental Committees further outlines the subjects of the Committee as follows-
 - a. Constitutional affairs;
 - b. The administration of law and Justice
 - c. The Judiciary;
 - d. Public prosecutions;
 - e. Elections;
 - f. Ethics, integrity and anti-corruption; and
 - g. Human rights.

1.2 Committee Membership

3. The Committee was constituted on Thursday, 14th December, 2017 and comprises the following Honourable Members-

Chairperson

Hon. Clement Muturi Kigano, M.P.
Kangema Constituency

Jubilee Party

Vice Chairperson

Hon. Francis Tom Kajwang', M.P.
Ruaraka Constituency

Orange Democratic Movement (ODM)

Hon. Emmanuel Wangwe, M.P.
Navakholo Constituency

Jubilee Party

Hon. John Olago Aluoch, M.P.
Kisumu West Constituency

FORD-Kenya

Hon. Roselinda SoipanTuya, M.P.
Narok County

Jubilee Party

Hon. W. Kamoti Mwamkale, M.P.
Rabai Constituency

Orange Democratic Movement (ODM)

Hon. Jennifer Shamalla, M.P.
Nominated MP

Jubilee Party

Hon. John MuneneWambugu, M.P.
Kirinyaga Central

Jubilee Party

Hon. Anthony Githiaka Kiai, M.P.
Mukurueni Constituency

Jubilee Party

Hon. John Kiarie Waweru, M.P.
Dagoretti South Constituency

Jubilee Party

Hon. Robert Gichimu Githinji, M.P.
Gichugu Constituency

Jubilee Party

Hon. Junet Sheikh Nuh Mohamed, M.P.
Suna East Constituency

Orange Democratic Movement (ODM)

Hon. George Peter Kaluma, M.P.
Homa Bay Town Constituency

Orange Democratic Movement (ODM)

Hon. Josephine Naisula Lesuuda, M.P.
Samburu West Constituency

KANU-Kenya

Hon. Zuleikha Hassan, M.P.
Kwale County

Orange Democratic Movement (ODM)

Hon. Adan Haji Yussuf, M.P.
Mandera West Constituency

Economic Freedom Party (EFP)

Hon. George Gitonga Murugara, M.P.
Tharaka Constituency

Democratic Party (DP)

Hon. Japheth Mutai, M.P.
Bureti Constituency

Jubilee Party

Hon. Anthony Oluoch, M.P.
Mathare Constituency

Orange Democratic Movement (ODM)

1.3 Committee Secretariat

4. The Committee secretariat comprises the following staff-

Mr. Abenayo Wasike
**Principal Clerk Assistant
Lead Clerk**

Mr. Denis Abisai
Deputy Director, Legal Services

Ms. Halima Hussein
Clerk Assistant II

Dr. Donald Manyala
Research Officer II

Mr. Omar Abdirahim
Fiscal Analyst II

Ms. Roselyne Ndegi
Serjeant-at-Arms I

Mr. Joseph Okongo
Media Liaison Officer

CHAPTER TWO

2.0 CONSIDERATION OF THE PETITION BY THE COMMITTEE

5. The Committee commenced its consideration of the Petition by meeting with the Petitioners on 7th July, 2021. During the meeting, written and oral evidence was adduced as noted hereunder:-

2.1 Submissions by the Petitioner Mr. Ephantus Nyaga

6. In their petition dated 31st July, 2019, Mr. Ephantus Nyaga, Mr. Francis Nyaga Njeru and Mr. Isaiah Njiru Njeru sought to draw the attention of the house to the following;
- (i). **THAT**, the petition is of national importance.
 - (ii). **THAT**, special attention is drawn to the High Court of Embu ruling in ELC Case No. 132 of 2015, in the matter of an Application under section 37 and 38 of the Limitation of Actions Act and in the matter of Land Reference Number Kyeni/Kigumo/2349.
 - (iii). **THAT**, Section 2 of the Civil Procedure Act, Cap. 21, Laws of Kenya defines a legal representative as 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 to whom the estate devolves on the death of the party so suing or sued.
 - (iv). **THAT**, under Section 3 of the Laws of Succession Act, Cap. 160, Laws of Kenya, a personal representative is defined as “the executor or the administrator as the case maybe of a deceased person.
 - (v). **THAT**, an administrator in Section 3 of the Law of Succession Act is defined as “a person to whom a grant of letters of administration has been made under this Act.”
 - (vi). **THAT**, going by the above, it therefore means that a party cannot represent the Estate of a deceased person unless he has obtained a grant of letters of Administration.
 - (vii). **THAT**, it is not in the spirit of the law to punish people to the extent of denying them their rights due to some irresponsible or cunning persons.
 - (viii). **THAT**, it is very clear that the above sections of law are very restrictive and do not allow any space of progress in cases before the court where the deceased person was a party to the case and the owner or administrator of an estate which is a subject to a suit.
 - (ix). **THAT**, the consequence of the above is that so many people are suffering as many civil cases involving deceased property drag in our court eternally after the sued or suing party fails to replace the deceased, as legal administrator /pursue legal remedy in the appointment of an administrator.

- (x). **THAT**, the petitioners are direct victims of this law in the High Court of Kenya at Embu, ELC Case No. 132 of 2015, and believes there are many more victims.
 - (xi). **THAT**, the matters raised in this petition raises weighty matters,
 - (xii). **THAT**, the mentioned sections of law are enzymes of serious conflict between relatives or parties to a suit in relation to the property.
 - (xiii). **THAT**, a guiding clause for the transfer of responsibility of all the issues touching on the deceased estate which was party to a suit or incase where the immediate family members of a deceased person are unwilling to pursue the process of getting the deceased person Estate administrator (s) needs to be enacted with a view of having enforceable regulations.
 - (xiv). **THAT**, we confirm that the issues in respect of which the petition is made are not pending before any court of law, or constitutional or legal body.
7. The petitioners pray that the National Assembly enacts or amends Sections 2 and 3 of the Civil Procedure Act so as to include any other relative(s) of the deceased who the court may appoint as an administrator / legal representative of the deceased in relation to matter(s) before the court. Such appointment should be made within six months after the demise of the person whose property is subject to a case before court or any other legal process.

2.2 Submissions by the Judiciary

8. Further to oral submissions during the committee sitting on 21st July 2021, the Chief Registrar of the Judiciary made written submissions to the committee that Section 54 of the Law of Succession Act (Cap 160) empowers courts to grant limited Letters of Administration, and paragraph 14 of the Fifth Schedule to the Act provides one of the circumstances under which such limited grant may be issued.
9. Paragraph 14 of the Fifth Schedule to the Act provides as follows:

14. Administration limited to suit

When it is necessary that the representative of the deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable and unwilling to act, Letters of Administration may be granted to the nominee of the party in such suit limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or any other court between the parties, or any other parties, touching the issues in the cause or suit, and until a final decree shall be made therein and carried into complete execution.

10. Where there is a suit whose cause of action has survived the deceased yet the executor or any person entitled to administrations unwilling to Act, the above provision grants the court discretion to issue a Limited Grant of Letters of Administration Ad Litem to the nominee.

11. Before the court grants the order, it is necessary that petitioner demonstrates that;

- a. It is necessary to appoint a representative of the deceased for purposes of the pending suit;
 - b. The executor or the person to be appointed is entitled to administer the estate but is unable or unwilling to act;
 - c. The grant of such order is only limited for purposes of representing the estate in the suit or any other cause between the parties.
12. It is for the petitioner to convince the court that the nominee is the proper person to be nominated to represent the deceased in the circumstances contemplated under paragraph 14 and entitled to a grant of Letters of Administration or the deceased's estate in terms of priority. Thereafter, the court will proceed to grant the nominee letters of administration *ad litem* for purposes of substituting the deceased in the suit.
13. The Courts have continuously employed this provision as evinced in a number of cases, such as *Joseph Mbogo Ishumael v Henry Namu, Embu High Court Miscellaneous Application Case 139 of 2014*; in *Re Estate of Paul Kamau, Job Wanderi (Deceased) Murang'a High Court P&A Cause 1062 of 2013*, and others.
14. Aside from the Fifth Schedule to the Law of Succession Act, there is section 7 of the Public Trustee Act which provides that:
- “Where the particular circumstances of any case appear to the court so to require, the court may, if thinks fit for reasons recorded in its proceedings, of its own motion or otherwise, after having heard the public trustee, grant under the Law of Succession Act (Cap. 160) Letters of Administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the public trustee “.*
15. As is evident in the attached sample ruling in *Joyce Nyambura Mbugua David Kamau Mbugua (suing as the legal representatives of the estate of Mbugua Gachiri) v Jane Wanjiru Wangai, Thika Environment & Land Case 253 of 2017*, the Courts have used the section to appoint the Public Trustee to administer the estate of the deceased persons for purposes of defending a suit against the deceased in instances where his or her relatives are unwilling to take out Letters of Administration.
16. The Judiciary is of the view that there is sufficient provision in the law to address the circumstances of the petitioner, Mr. Ephantus Nyaga, Mr. Francis Nyaga Njeru and Mr. Isaiah Njiru Njeru.

2.3 Comments by the Office of the Attorney General and Department of Justice

17. The Committee had a meeting with the representatives of the Office of the Attorney General and Department of Justice on 21st July, 2021. The Committee requested the AG's office to provide written submissions on the petition and on the development of a national policy to streamline the legal sector.

18. The Solicitor General commented that:

- (i). The office appreciates the difficulties posed to the administration of justice, and to litigants in particular, where a party to a case passes on and no person applies for letters of administration, as outlined by the petitioners.
- (ii). Respectfully urged the committee gives consideration to Sections 6 and 7 of the Public Trustee Act, and the Law of Succession Act.
- (iii). Section 6 of the Public Trustee Act provides that the Public Trustee may be requested to take action in respect of the deceased's estate by any person appearing to have a legitimate interest in the succession to, or administration of, the estate. Upon such request, the Public Trustee shall make further inquiries as to the estate of the deceased and may, upon establishing, for instance, that the deceased person died intestate or that letters of administration to the estate have not been obtained within six months from the date of the death of the deceased, apply for grant of representation.
- (iv). Section 7 of the Public Trustee Act, on the other hand, provides as follows:

“Where the particular circumstances of any case appear to the court so to require, the court may, if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise, after having heard the Public Trustee, grant under the Law of Succession Act (Cap. 160) letters of administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the Public Trustee.”
- (v). Facts similar to the present case obtained in the case of **Joyce Nyambura Mbugua David Kamau Mbugua (Suing as the legal representatives of the Estate of Mbugua Gachiri) v Jane Wanjiru Wangai [2019] eKLR**, in which the Court relied on Section 7 of the Public Trustee Act to appoint the Public Trustee to administer the deceased Defendant's estate for purposes of defending the suit.
- (vi). The Solicitor General also noted that Section 14 of the Fifth Schedule of the Law of Succession Act, provides for administration limited to suit as follows:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”
- (vii). Section 16 of the said Schedule stipulates as follows:

“Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit.”

(viii). That the reading of the foregoing provisions of the law leads to the conclusion that the law permits the substitution of a deceased party with a relative, through the issuance of a limited grant of representation. This has been done in a number of cases.

(ix). In **Gladys Njeri Muhura v Daniel Kariuki Muthiguro [2018] eKLR**, the court stated as follows in relation to Sections 14 and 16 of the aforesaid Schedule:

“I have looked at the replying affidavit of the intended substitute where he challenges the manner in which he was appointed as a legal representative of the estate, albeit temporarily for purposes of substitution in this case. He claims that the said letters were obtained without his consent and therefore they are fraudulent. There is no material evidence that has been placed before this Court to support this allegation...As long as the said representation has not been revoked, I hold and find that the intended substitute is legally and properly appointed. The purpose of the representation is carefully spelt in the letters of administration ad litem; for purposes of prosecuting the instant case. The intended substitute need not be the registered owner of the suit property nor own property himself. The law has allowed him to step into the shoes of his deceased mother, the erstwhile defendant. It therefore follows that consent is therefore not a must for the grant of administration ad litem.”

(x). In **Re Estate of the Late Ole Kukuni [2017] eKLR** the court similarly relied on the provisions of Section 14 of the Fifth Schedule of the Law of Succession Act and allowed the application to appoint the widow of the deceased as a legal representative for purpose of defending the suit. The same was the case in **the Matter of the Estate of Gilbert Kibiti Rinchuni...Deceased [2013] eKLR**, wherein the Court stated as follows:

“In this case there is no evidence that the respondent has sought and obtained letters of administration. She is wife of the deceased and most likely entitled to administration of the deceased estate and she is most likely unable and/or unwilling act. There is equally a pending suit which has not been disputed. The fifth schedule under Rule 14 clearly states letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased in a suit and until a final decree shall be made therein and carried into complete execution.... In the circumstances and in the interest of doing substantial justice and applying the provision of Section 1A and 1B of the Civil Procedure Rules, in determining all matters, the Court must bear the oxygen

principle in mind, all things which are in conflict with the oxygen principle, must give way to the oxygen principle and aim at doing substantive justice.” [Emphasis supplied]

- (xi). The office undertook a comparative analysis of the practice in other jurisdictions, namely, Australia, Canada and India. In the assessment, the relevant legal framework is broadly similar to the aforesaid framework obtaining in Kenya. In Australia, the Supreme Court General Civil Procedure Rules, 2015 provide under Rule 16.03 thereof as follows:

“(1) Where a deceased person was interested, or the estate of a deceased person is interested, in any question in a proceeding and the deceased person has no personal representative, the Court may—

- (a) proceed in the absence of a person to represent the estate of the deceased; or*
(b) by order (with the consent of the person appointed) appoint a person to represent the estate for the purpose of the proceeding.

(2) An order under paragraph (1), and any judgment or order subsequently given or made in the proceeding, shall bind the estate of the deceased person as it would had a personal representative of the deceased been a party.

(3) Before making an order under this Rule, the Court may require notice of the application for the order to be given to any person having an interest in the estate.”

- (xii). In Canada, the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 under Rule 9 and 10 thereof, for example, provide as follows:

“Proceeding Against Estate that has no Executor or Administrator

9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a litigation administrator to represent the estate for the purposes of the proceeding. R.R.O. 1990, Reg. 194, r. 9.02 (1).

(2) An order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in a personal capacity, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 9.02 (2).

10.02 Representation of a Deceased Person

Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue in the absence of a person representing the estate of the deceased person or may by order appoint a

person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02.”

- (xiii). In India, the Code of Civil Procedure, 1908 under Order XXII Rule 4A thereof, provides as follows:

“(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court—

(a) may require notice of the application for, the order to be given to such (if any) of the persons.”

- (xiv). In the AG’s view, and in light of the foregoing comparative analysis, the current legal framework may be enhanced by requiring that the decision to substitute a deceased person with a relative or such other person (including the Public Trustee), be subject to such person being given notice and an opportunity to respond to the application for substitution. This way, the court would be able to make a considered decision, after according the concerned party an opportunity to be heard on the proposed substitution. Arguably,

2.4 Submissions on the Development of National Policy to Streamline the Legal Sector

19. The Committee raised concern on the lack of a national policy to guide the legal sector in Kenya and was of the opinion that a policy framework should always precede legislation. In light of this the Committee requested the Office of the Development of National Policy to Streamline the Legal Sector to provide a written submissions and submitted as follows; THAT

- (i). The developmental process of a national policy is as important as the outcome. It is important to formulate national policies before enacting legislation, mainly due to the fact that the process of preparing the policy tends to be highly inclusive and consultative, across a larger spectrum of audience, including regional and international best practices. Indeed, Article 10 of the Constitution on national values and principles of governance requires public participation and consultations. The process is useful because it not only provides an avenue to identify all salient issues besetting society in a comprehensive and coherent

manner, but also brings the people to the center of the State's decision making processes on decisions that affect them. Civic education and sensitization is also undertaken to allow the people understand the objectives of the intended policy, appreciate their rights and how to articulate them.

- (ii). The national policy outlines the course of action to correct or resolve the issues using a holistic approach. The actions recommended by the policy may include the enactment of laws, formulation of sub -sectoral policies, administrative action, and /or development of national action plans. Therefore, the law that emanates from the policy making process tends to be highly comprehensive and exhaustive with regard to all the issues it seeks to resolve. The identified agenda issues are then placed before different stakeholders for further interrogation and consensus building.
- (iii). This elaborate and comprehensive process, undoubtedly, necessarily implies the need for time and large budget outlays.
- (iv). Over the years, various measures have been taken to improve and strengthen the legal and judicial sector in Kenya, evidenced by the number of committees and task forces appointed to evaluate the sector and provide recommendations on how best to enhance professional standards. Recommendations have involved the formulation, review and enactment of various laws. While the recommendations have gone a long way in improving standards in the sector, the focus has been narrow and there has been no holistic approach. This has led to the piecemeal and frequent review of laws on the legal sector.
- (v). The development of an overarching national policy framework is therefore essential to guide the Government and other actors to enhance the competence, professional standards and conduct, accountability and access to legal education and aid in line with international best practices.
- (vi). In 2016, the Attorney General appointed a Taskforce on Legal Sector Reforms vide Gazette Notice No. 8116 of 7th October, 2016 to evaluate, review and make recommendations on legal education and training, regulations, the practise of law and discipline in the legal profession. The Taskforce made a wide range of recommendations and reform proposals, including the development of a policy framework to guide government and stakeholders in improving standards and professionalism in the legal sector.
- (vii). In 2019, the Attorney General sought to set up a Committee to develop a National Policy to streamline the legal sector. The Committee drew members from all relevant stakeholders, including the judiciary, universities, Council of Legal Education, and the Kenya School of law.
- (viii). A draft concept paper on the development of a national policy was also prepared. The paper details various issues to be considered in the policy, including the accreditation and regulation of the legal profession, admission criteria, cross border practice, para-legal, provision of national legal aid and discipline matters.

- (ix). A work plan with the necessary budget and timelines was prepared. Nairobi, Nakuru, Kisumu, Eldoret and Mombasa counties were mapped for public participation in the first year. As noted hereinabove, meaningful public participation is critical not just to enrich the policy under development with diverse perspectives but to also avoid legal challenges for procedural unconstitutionality, given that public participation is now a constitutional requirement.

- (x). While the process of developing a national policy on the legal sector is on course, the pace of the work has been slowed down by the inadequate budgetary allocations. Public participation calls for adequate funding. For some time now, the Office of the Attorney General & Department of Justice has experienced massive budget cuts, which have negatively impacted on its programmatic work. We wish, therefore, to take the opportunity of this letter to respectfully request the Committee to support this Office in its quest for increased funding to facilitate the performance of its critical mandates and activities connected therewith, including the development of the subject national policy.

CHAPTER THREE

3.0 COMMITTEE'S OBSERVATIONS

20. The Committee observed the following in the consideration of the Petition, that-

- (i). **THAT**, Section 2 of the Civil Procedure Act, Cap. 21, Laws of Kenya defines a legal representative as 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 to whom the estate devolves on the death of the party so suing or sued.
- (ii). **THAT**, under Section 3 of the Laws of Succession Act, Cap. 160, Laws of Kenya, a personal representative is defined as “the executor or the administrator as the case maybe of a deceased person.”
- (iii). **THAT**, an administrator in Section 3 of the Law of Succession Act is defined as “a person to whom a grant of letters of administration has been made under this Act.”
- (iv). THAT the petitioners prayed that the National Assembly enacts or amends Sections 2 and 3 of the Civil Procedure Act so as to include any other relative(s) of the deceased who the court may appoint as an administrator / legal representative of the deceased in relation to matter(s) before the court.
- (v). THAT that Section 54 of the Law of Succession Act (Cap 160) empowers courts to grant limited Letters of Administration, and paragraph 14 of the Fifth Schedule to the Act provides one of the circumstances under which such limited grant may be issued.
- (vi). THAT Paragraph 14 of the Fifth Schedule to the Act provides as follows:
Administration limited to suit
When it is necessary that the representative of the deceased person be made a party to a pending suit , and the executor or person entitled to administration is unable and unwilling to act, Letters of Administration may be granted to the nominee of the party in such suit limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or any other court between the parties , or any other parties ,touching the issues in the cause or suit ,and until a final decree shall be made therein and carried into complete execution.
- (vii). THAT where there is a suit whose cause of action has survived the deceased yet the executor or any person entitled to administration is unwilling to act, the above provision grants the court discretion to issue a Limited Grant of Letters of Administration Ad Litem to the nominee.
- (viii). It is for the petitioner to convince the court that the nominee is the proper person to be nominated to represent the deceased in the circumstances contemplated

under paragraph 14 and entitled to a grant of Letters of Administration or the deceased's estate in terms of priority. Thereafter, the court will proceed to grant the nominee letters of administration *ad litem* for purposes of substituting the deceased in the suit.

- (ix). The Courts have continuously employed this provision as evinced in a number of cases, such as *Joseph Mbogo Ishumael v Henry Namu, Embu High Court Miscellaneous Application Case 139 of 2014*; in *Re Estate of Paul Kamau, Job Wanderi (Deceased) Murang'a High Court P&A Cause 1062 of 2013*, and others.
- (x). Aside from the Fifth Schedule to the Law of Succession Act, there is section 7 of the Public Trustee Act which provides that:

“Where the particular circumstances of any case appear to the court so to require, the court may, if thinks fit for reasons recorded in its proceedings, of its own motion or otherwise, after having heard the public trustee, grant under the Law of Succession Act (Cap. 160) Letters of Administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the public trustee “.
- (xi). As is evident in the attached sample ruling in *Joyce Nyambura Mbugua David Kamau Mbugua (suing as the legal representatives of the estate of Mbugua Gachiri) v Jane Wanjiru Wangai, Thika Environment & Land Case 253 of 2017*, the Courts have used the section to appoint the Public Trustee to administer the estate of the deceased persons for purposes of defending a suit against the deceased in instances where his or her relatives are unwilling to take out Letters of Administration.
- (xii). The Committee was of the view that there is sufficient provision in the law to address the circumstances of the petitioners.

CHAPTER FOUR

4.0 COMMITTEE RECOMMENDATION

22. In response to the prayers by the petitioners, the Committee recommends that the petitioners invoke the provisions of Paragraph 14 of the Fifth Schedule to the Law of Succession Act (Cap. 160) or section 7 of the Public Trustee Act (Cap. 168) to apply for other persons to be nominated to represent the deceased in the court cases relating to the petition.

Signed..........Date..........

Hon. Clement Muturi Kigano, M.P.

Chairperson, Departmental Committee on Justice and Legal Affairs

**MINUTES OF THE SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE
AND LEGAL AFFAIRS HELD ON THURSDAY 30TH SEPTEMBER 2021 AT 12:30 P.M.
IN COMMITTEE ROOM 9, PARLIAMENT BUILDINGS**

PRESENT-

1. Hon. Tom Kajwang, M.P - **Vice-Chairperson**
2. Hon. John Olago Aluoch, M.P -Virtual
3. Hon. Mwamkale Kamoti, M.P
4. Hon. Zuleikha Hassan, M.P.
5. Hon. Jennifer Shamalla, M.P.
6. Hon. Adan Haji Yussuf, M.P
7. Hon. George Gitonga Murugara, M.P
8. Hon. Peter Opondo Kaluma, M.P -Virtual
9. Hon. Anthony Oluoch, M.P - Virtual
10. Hon. Anthony Githiaka Kiai, M.P
11. Hon. John Munene Wambugu, M.P.-Virtual

ABSENT WITH APOLOGIES-

1. Hon.Muturi Kigano, M.P - **Chairperson**
2. Hon.Emmanuel Wangwe, M.P
3. Hon. Junet Sheikh Nuh Mohammed, M.P.
4. Hon. Josephine Naisula Lesuuda,M.P
5. Hon. Japheth Mutai, M.P
6. Hon. Roselinda Soipan Tuya, M.P
7. Hon. John Kiarie Waweru, M.P.
8. Hon.Robert Gichimu Githinji, M.P.

IN ATTENDANCE-

COMMITTEE SECRETARIAT-

- | | | |
|-----------------------|---|---------------------------------|
| 1. Mr. Abenayo Wasike | - | Principal Clerk Assistant |
| 2. Mr.Dennis Abisai | - | Deputy Director, Legal Services |
| 3. Dr. Donald Manyala | - | Principal Research Assistant |
| 4. Ms. Emma Essendi | - | Legal Counsel |
| 5. Ms. Halima Hussein | - | Second Clerk Assistant |
| 6. Ms. Roselyn Njuki | - | Sergeant at Arms |
| 7. Mr.Nickson Mutai | - | Audio Officer |

MIN NO./01/2021: -

PRELIMINARIES

The meeting commenced at 1:00 p.m with a word of prayer from the Vice-Chairperson and thereafter Members considered reports on Petitions as per the agenda.

MIN NO./02/2021: - ADOPTION OF REPORTS ON BILLS

1. Report on the Petition Regarding Settlement of an Award to the Family of the late Nancy Kharwali

The Committee adoption of the report was proposed by Hon.George Murugara and seconded by Hon.Anthony Kiai.The Committee recommended that;

(a) The Principal Secretary, State Department for Interior and Citizen Services settles the decretal amount in the sum of **Kshs.4,458,120.30/=** as decreed by the Court in Civil Case No.2025 of 2013 John Musotsi Wangusi versus Attorney General, within sixty (60) days from the date of Tabling this Report in the National Assembly;

(b) If the Principal Secretary, State Department for Interior and Citizen Services fails to pay the decretal sum as recommended by the Committee under paragraph (a) of these recommendations, the issue should be brought to the attention of the Committee on Implementation for necessary action.

(c)

2. Report on the Petition by Mr. Ephantus Nyaga & Others Regarding Amendment to Sections of the Civil Procedure Act, Chapter 21, and the Law of Succession act, Chapter 160

The Committee adoption of the report was proposed by Hon.Kamoti Mwamkale and seconded by Hon.Adan Haji. The Committee recommended that;

The petitioners invoke the provisions of Paragraph 14 of the Fifth Schedule to the Law of Succession Act (Cap. 160) or section 7 of the Public Trustee Act (Cap. 168) to apply for other persons to be nominated to represent the deceased in the court cases relating to the petition.

3. Report on the Petition Regarding Amendment of the Advocates Act, Chapter 16, to allow Admission of Law Practitioners from the Republics of Rwanda and Burundi to the Roll of Advocates in Kenya

The Committee adoption of the report was proposed by Hon.George Murugara and seconded by Hon.Anthony Kaii. The Committee recommended that;

The petition is merited and that Parliament amends the Advocates Act, Chapter 16, Laws of Kenya, as follows-

- (a) Section 12 of the Advocates Act is amended in paragraph (a) by inserting the words “Rwanda, Burundi” immediately after the word “Kenya”;
- (b) Section 13(1) of the Advocates Act is amended in paragraph (d) by inserting the words “the High Court of Rwanda, the High Court of Burundi” immediately after the word “Uganda”.

MIN NO./03/2021:-

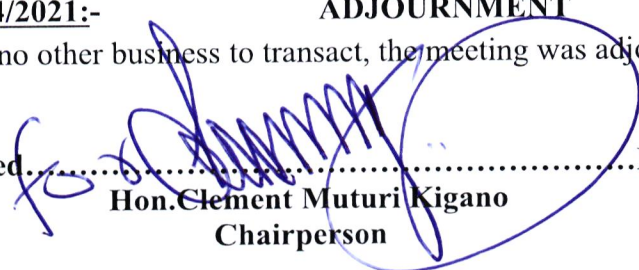
PENDING


The Secretariat tabled a report on pending business and members adopted a plan presented by the Secretariat. Members resolved to prioritise the Mediation Bill, 2020 for further engagement with Stakeholders. It was also resolved that the Committee will conduct public hearings across the Country on a Petition regarding amendments to the Elections Act on academic qualifications.

MIN NO./04/2021:-

ADJOURNMENT

There being no other business to transact, the meeting was adjourned at 2:30 pm.

Signed..........Date 6/10/21
Hon.Clement Muturi Kigano
Chairperson

 THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 06 OCT 2021	
DAY: <input type="text"/>	
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CLERK-AT THE-TABLE:	<input type="text"/>

Annex 2

Adoption List

1941

1942

KENYA NATIONAL ASSEMBLY



DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

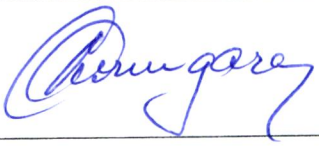
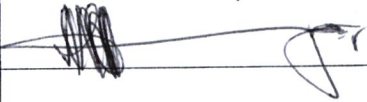


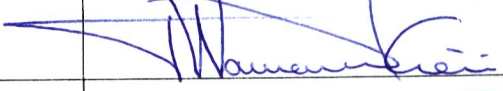



ATTENDANCE REGISTER FOR MEMBERS

DATE... 30/9/2021

VENUE... COMMITTEE ROOM 9

AGENDA... ADOPTION OF REPORT ON PETITION REGARDING
 AMENDMENT TO SECTIONS OF THE LAW OF SUCCESSION
 : ACT & THE CIVIL PROCEDURE ACT.

NO.	NAME	SIGNATURE
.	Hon. Clement Muturi Kigano, M.P. - Chairperson	
.	Hon. T.J. Kajwang - Vice Chairperson	
.	Hon. Emmanuel Wangwe	
.	Hon. Junet Sheikh Nuh Mohamed, M.P.	
.	Hon. John Olago Aluoch, MP.	
.	Hon. Roselinda Soipan Tuyu, MP.	
.	Hon. Peter Opondo Kaluma, MP.	
.	Hon. Mwamkale Kamoti, MP.	
.	Hon. Zuleikha Hassan, MP.	

10.	Hon. Josephine Naisula Lesuuda, M.P.	
11.	Hon. George Gitonga Murugara, MP.	
12.	Hon. Adan Haji Yussuf, MP.	
13.	Hon. Japheth Kiplangat Mutai, MP.	
14.	Hon. Anthony Githiaka Kiai, MP.	
15.	Hon. Jennifer Shamalla, MP.	
16.	Hon. John Kiarie Waweru, MP.	
17.	Hon. John Munene Wambugu, MP.	
18.	Hon. Anthony Oluoch, M.P.	
19.	Hon. Robert Gichimu Githinji, M.P	

COMMITTEE CLERK


.....

DIRECTOR DEPARTMENTAL COMMITTEES

.....

Annex 3

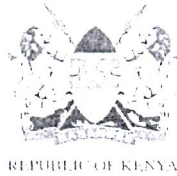
Submissions by

Judiciary

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REPUBLIC OF KENYA

When replying please quote

Ref: CRJ/23

THE JUDICIARY

4th August, 2021

Hon. Clement Muturi
Chairperson, Justice & Legal Affairs Committee
The National Assembly
Parliament Buildings
NAIROBI

Dear Sir,

**RE: COMMENTS ON PETITION ON THE LAW GOVERNING SUITS AGAINST
DECEASED PERSONS**

We acknowledge receipt of the Petition from Ephantus Nyaga Nyaga and others calling on the National Assembly to re-examine the law on suits against deceased persons.

Further to our oral submissions during the Committee Sitting on 21st July 2021, we would like to bring to the attention of the Committee the provisions of **Section 54** of the **Law of Succession Act (Cap 160)** which empowers Courts to grant limited Letters of Administration, and **Paragraph 14** of the **Fifth Schedule** to the Act which provides one of the circumstances under which such limited grant may be issued. Paragraph 14 provides that:

14. Administration limited to suit

When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.

Where there is a suit in which a cause of action has survived the deceased yet the executor or any person entitled to administration is unwilling to act, this provision grants the court discretion to issue a Limited Grant of Letters of Administration *Ad Litem* to a nominee of a party to the suit to represent the deceased in the suit.

The Petitioner in the instant case can therefore identify a person in the deceased's family, nominate that person to be appointed administrator for purposes of that suit and the court will on this basis issue Letters of Administration *Ad Litem* to the nominee. Before the court grants the order, it is necessary that the Petitioner demonstrates that:

- a. It is necessary to appoint a representative of the deceased for purposes of the pending suit;

- b. The executor or the person to be appointed is entitled to administer the estate but is unable or unwilling to act;
- c. The grant of such order is only limited for purposes of representing the estate in the suit or any other cause between the parties.

It is for the petitioner to convince the court that the nominee is the proper person to be nominated to represent the deceased in the circumstances contemplated under Paragraph 14 and entitled to a grant of Letters of Administration of the deceased's estate in terms of priority. Thereafter, the court will proceed to grant the nominee Letters of Administration *Ad Litem* for purposes of substituting the deceased in the suit.

Our Courts have continuously employed this provision as evinced in a number of cases, such as *Joseph Mbogo Ishumael v Henry Namu, Embu High Court Miscellaneous Application Case 139 of 2014*; *In Re Estate of Paul Kamau Job Wanderi (Deceased) Muranga High Court P&A Cause 1062 of 2013*, and others. Copies of the rulings in these cases are attached for ease of reference.

Aside from the Fifth Schedule to the Law of Succession Act, there is Section 7 of the Public Trustee Act which provides that:

"Where the particular circumstances of any case appear to the court so to require, the court may, if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise, after having heard the Public Trustee, grant under the Law of Succession Act (Cap. 160) letters of administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the Public Trustee."

As is evident in the attached sample ruling in *Joyce Nyambura Mbugua David Kamau Mbugua (Suing as the legal representatives of the Estate of Mbugua Gachiri) v Jane Wanjiru Wangai, Thika Environment & Land Case 253 of 2017*, our Courts have also used this section to appoint the Public Trustee to administer the estate of deceased persons for purposes of defending a suit against the deceased in instances where his/her relatives are unwilling to take out Letters of Administration.

Against this backdrop, we are of the view that there is sufficient provision in the law to address the circumstances of the petitioner, Mr. Ephantus Nyaga Nyaga.

We are grateful nonetheless for the opportunity to comment on his Petition.

Yours Sincerely,



ANNE A. AMADI, CBS
CHIEF REGISTRAR OF THE JUDICIARY

Encl.

Copy to: Hon. Lady Justice Lydia Achode
Principal Judge, High Court of Kenya

aaa/ko



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT EMBU

MISCELLANEOUS APPLICATION CASE NO. 139 OF 2014

JOSEPH MBOGO ISHUMAEL.....APPLICANT/PLAINTIFF

VERSUS

HENRY NAMU.....RESPONDENT/DEFENDANT

RULING

INTRODUCTION

By his chamber summons dated 13th October 2014, the plaintiff/applicant has applied to this court to appoint Henry Namu as the person to represent the estate of the deceased Mugo Munyambu. In support of the chamber summons, the plaintiff has sworn an affidavit dated 4th August, 2014. He has also in support of the application set out the grounds which are clear from the chamber summons.

The proposed nominee to represent the estate of the deceased namely Henry Namu was served with today's (8th December, 2014) notice of hearing through his wife with whom they are living together. The affidavit of service was filed in this court on 4th December, 2014. Because the service had been effected upon his wife, the hearing of the application proceeded in his absence.

The Plaintiff's Factual Basis

In support of his application to nominate Henry Namu as the representative of his late father's estate, the plaintiff has sworn an affidavit in which he has stated that the deceased (Mugo Munyambu) died on 28th March, 2013. It is also his evidence that the deceased held the suit lands reference nos. Nthawa/Gitiburi/3065 and Nthawa/Gitiburi/3073 in trust in his capacity as chairman of the plaintiff's clan. According to the plaintiff, he is entitled to a share of the said suit land.

Furthermore, the plaintiff has stated that since the death of the deceased, none of the family members has gone forward to apply for letters of administration of the estate. He further says that his family will continue to suffer loss as they cannot utilize the suit parcels of land number Nthawa/Gitiburi/3065 and Nthawa/Gitiburi/3073.

The plaintiff has finally stated that his suit has high chances of success since the defendant's advocates have partially admitted part of the claim in respect of the two parcels of the suit land. He further asks this court to allow his application that Henry Namu be nominated as the legal representative of the estate of the deceased in terms of

Schedule 5 Rule 14 of the **Succession Act Cap 160 Laws of Kenya**. This will enable him to prosecute the pending suit. According to him, Henry Namu is the proper nominee because he is the eldest son of the deceased. Additionally, he says that Henry Namu was the one who was issued with a burial permit for his late father, Mugo Munyambu.

The Applicable Law:

The law that applies in this regard is set out in the **5th Schedule, Rule 14 of the Law of Succession Act Cap 160, Laws of Kenya**. The provisions of that Schedule and the Rule State as follows:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased therein, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

Issues for Determination:

It is my considered view that the issues for determination in this application are as follows:

1. Whether or not the plaintiff has met the evidentiary threshold for the appointment of Henry Namu as the the nominee representative of the estate of the deceased.
2. Who should bear the costs of this application.

Evaluation of the Facts and the Law:

Before an applicant is granted an order of the court appointing a nominee to represent the estate of the deceased, the following requirements must be met:

1. It must be shown that it is necessary to appoint a representative for purposes of a pending suit.
2. It must also be shown that the executor or the person to be appointed is entitled to administer the estate but is unable or unwilling to act.
3. The grant of such order is only limited for purposes of representing the estate in the suit or any other cause between the parties.

The affidavit evidence of the plaintiff has shown that neither Henry Namu, nor any member of the family has gone forward to apply for letters of administration of the estate of the deceased Mugo Munyambu. There is credible evidence that Henry Namu is the one who was granted a burial permit to bury his late father. There is further evidence the advocates of the late Mugo Munyambu refused to accept service of this application on the grounds that their client Mugo Munyambu was late and that they have not found any substitute from the members of the deceased family. There is also evidence that the plaintiff cannot proceed with this suit in the absence of a nominee in terms of Rule 14 of the 5th Schedule of the Succession Act.

It is clear from *Order 24 Rule 4 (1), (2) (5) of the Civil Procedure Rules, 2010* that there is to be a legal representative of the deceased who is entitled to be a proper party, where the deceased has died. In this case, there is no legal representative of the deceased in terms of *section 2 of the Civil Procedure Act* because no one has taken out letters of administration of the estate of the deceased.

In the circumstances, the application of the plaintiff is granted in terms of prayer 1 of his chamber summons. It therefore follows that Henry Namu will represent the estate of the deceased in this suit until same is heard and finalized.

Verdict and Disposal Order:

In the light of what I have mentioned above, it is ordered that:

1. Henry Name is the nominee of the estate of the deceased for purposes of prosecuting this suit until same is heard and finalized.
2. Costs of this application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this...8thday of ...December....2014

In the presence of

The plaintiff applicant and in the absence of the defendant/respondent

Court clerk Mr Muriithi

Right of Appeal under Order 43 explained to the parties.

J.M. BWONWONGA

JUDGE



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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

P&A CAUSE NO. 1062 OF 2013

(IN THE MATTER OF THE ESTATE OF PAUL KAMAU JOB WANDERI (DECEASED))

RULING

The applicant, Jane Wanjiku Njoroge, lodged in court a summons in general form, seeking to have one Dominic Irungu Kamau, nominated as the legal representative of Paul Kamau Wanderi (deceased) for purposes of substitution of the deceased as a party in **Nyeri High Court Civil Appeal No. 165 of 2002**; prior to his demise the deceased was the respondent while the applicant was and still remains the appellant in this appeal. The summons was made under **Rule 14** of the **Fifth Schedule** and **Rule 73** of the **Probate and Administration Rules**.

In the affidavit sworn by the applicant in support of her summons, the applicant says that the respondent died on 2nd February, 2010 and since then none of his survivors has taken letters to administer his estate. It is for this reason that the applicant has opted to nominate the deceased's eldest son, Dominic Irungu Kamau, as the deceased's representative so that he can assume the place of the deceased in the appeal case.

In response to the summons, the proposed nominee has opposed the application. He states in his affidavit filed in response to the applicant's summons that while it is true that he is the deceased's eldest son, he has never been involved in the proceedings out of which the appeal in the High Court at Nyeri arose.

The parties' counsel opted to have the application determined by way of written submissions and to this end, they filed and exchanged their respective submissions which I have duly considered.

The applicant has invoked **rule 14** of the **Fifth Schedule** which reads:-

14. Administration limited to suit

"When it is necessary that the representative of a deceased person be made to a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, an until a final decree shall be made therein, and carried into complete execution."

The applicant is of the view that Dominic Irungu Kamau, who is the eldest son of the deceased, is the proper person to be nominated to represent the deceased in the circumstances contemplated under the foregoing rule.

On his part Dominic Irungu Kamau has admitted that indeed he is the oldest son of the deceased but that he has never been involved in the proceedings out of which the appeal in which he is sought to be joined arose. He says that he has been advised by his advocates which advice he verily believes to be true that the applicant's summons is an abuse of the court process because under **Order 24 rule 4 of the Civil Procedure Rules**, the appeal in issue has abated. For these reasons, Dominic Irungu Kamau has asked the court to dismiss the summons herein.

Counsel for the parties filed and exchanged written submissions on the positions they have adopted in respect of the applicant's summons; I have duly considered these submissions.

I agree with counsel for the applicant that the **Law of Succession Act, (Cap. 160)** is self-contained and reference to the **Civil Procedure Act** can only be made in limited circumstances; these circumstances are expressly stated in **Rule 63 (1) of the Probate and Administration Rules**. This rule provides:-

63. (1) Save as in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (Practice and Procedure) Rules, shall apply so far as relevant to proceedings under these Rules.

Although some of these Rules have since been renumbered in the Civil Procedure Rules, 2010 the rule in respect of abatement of suits as provided under **Order 24 Rule 4 (3)** has never been part of those rules which may be invoked in the proceedings instituted under the Probate and Administration Rules. Since the Probate and Administration Rules expressly state specific provisions of the Civil Procedure Rules which may apply to proceedings made under those Rules, it is assumed that the rules in the Civil Procedure Rules which have not been expressly provided for do not apply. For this reason, **Order 24 Rule 4 of the Civil Procure Rules** which Dominic Irungu Kamau has cited in opposition to the applicant's summons does not apply.

In any event, the Law of Succession Act itself provides for the circumstances under which suits or proceedings would ordinarily abate where such proceedings are covered by the Civil Procedure Rules; **Rule 14 of the 4th Schedule** to the Act, which has been quoted earlier in this ruling appears to be clear that whenever it is necessary that a representative of a deceased person should be made a party to a pending suit and such potential representative is reluctant to act and take out letters of administration in respect of the deceased's estate, he may be nominated for the purpose of representing the deceased in the pending suit; in my view the term "suit" in the context of this rule would include the appeal proceedings that are now pending in the High Court. The rule itself does not limit the representation to a suit alone, it says that representation may be extended to "*any other cause or suit which may be commenced in any other court...until the final decree shall be made therein, and carried into complete execution.*" The rule does not state when such application for nomination of a representative of the deceased may be made

and thus it would appear that it may be made at any time during the pendency of the proceedings.

In the premises I am inclined to allow the applicant's summons dated 3rd October, 2013. The grant of letters of administration intestate in respect of the estate Paul Kamau Job Wanderi is hereby made to Dominic Irungu Kamau, limited for purposes of substitution in **Nyeri High Court (Probate & Administration) Appeal No. 165 of 2002**. The costs of the application shall be in the cause.

Dated and signed at Nyeri this 17th day of November 2014

Ngaah Jairus

JUDGE

Read and delivered in open court this 13th day of February, 2015

H.P. Waweru

JUDGE



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REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.253 OF 2017

JOYCE NYAMBURA MBUGUA

DAVID KAMAU MBUGUA (Suing as the legal

representatives of the Estate of MBUGUA GACHIRI.....PLAINTIFFS/APPLICANTS

VERSUS

JANE WANJIRU WANGAI.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the *Notice of Motion* application dated *15th March 2018*, brought by the Applicant herein under, *Sections 1A* and *3A* of the *Civil Procedure Code Cap 21 Laws of Kenya* and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers:-

- 1) That the Court be pleased to enlarge the time within which to substitute the Defendant with a legal representative.*
- 2) The Court be pleased to issue an order that the Public Trustee to come on record and act as the legal representative of the Respondent*
- 3) Costs of the Application be in cause.*

This Application is premised on the grounds stated on the face of the application and on the *Supporting Affidavit* of *David Kamau Mbugua*. These grounds are:-

- a) The Respondent is deceased.*
- b) Applicant has made several attempts to have the Respondent's daughter named Mary Wanjiru take out letters of Administration come on record and defend the suit to no avail.*
- c) Public trustee is empowered under the Public Trustee Act to administer the estate of a deceased person where no person has availed themselves to do so and where there is a property belonging to them is in dispute.*
- d) The granting of the orders will serve to meet the ends of justice as the court will be able to determine the facts of ELC Cause 253 of 2017*

formerly Nairobi 496 of 2010, on merit and without any party being prejudiced.

The Applicant in his *Supporting affidavit* averred that the court reinstated the suit and the Applicant was to pursue substitution of the Defendant/Respondent and that pleas to have the Defendant's daughter take up the matter have not borne any fruits. He averred that the Public trustee is empowered to safeguard all property on behalf of the deceased persons and can be compelled by the court to come on record and defend the suit on behalf of the deceased's estate.

The Application was dispensed with via written submissions and the Applicant through the *Law Firm of Nyawira Milimu & Omotto Advocates* filed their submissions on **5th November 2018**. It was submitted that the Defendant having passed on and none of her family members having taken out letters of administration nor shown interest in defending the suit despite being aware, then the proper party to be enjoined in the suit would be the Public trustee.

They relied on **Section 7** of the *Public Trustee Act* that provides:-

"Where the particular circumstances of any case appear to the courts or so require the court may if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise after having heard the public trustee grant under the Law of Succession Act letters of administration to the Public trustee."

The Court has carefully considered the pleadings and submissions made by the Applicant. The issues for determination are:-

i. Whether this court has powers to enlarge time and;

ii. whether the court can compel the Public Trustee to come on record for the Defendant.

i. Whether this Court has powers to enlarge time. Section 95 of the Civil Procedure Act grants the court powers to

enlarge the time for doing any act prescribed by the Statute. The court has wide and unfettered discretion and some of the factors to consider include the delay, the nature of the dispute and whether the Respondent will suffer prejudice.

From their Affidavit, the Applicant has made several attempts to get the daughter of the Defendant to defend the suit which attempts have not been fruitful. The Court finds that to enable the matter be heard on merit, then time within which the Applicant had been granted to substitute the Defendant must be enlarged. The Court finds that the Defendant will not suffer any prejudice if the time is enlarged as her estate will have the chance to have her rights protected and the matter being determined on merit will have solved all pending issues.

Order 24 Rule 4 of the *Civil Procedure Rules*, provides for the procedure to be followed in case of death of one or several Defendants. It provides that a cause of action shall not be defeated merely by the death of the Plaintiff or Defendant. A substitution must be undertaken within a year if the cause of action survives the deceased.

ii. Whether the court can compel the Public Trustee to come on record and act as the Legal Representative of the deceased.

Section 7 of the Public Trustee Act provides that:-

“Where the particular circumstances of any case appear to the courts or so require the court may if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise after having heard the Public Trustee grant under the Law of Succession Act, Letters of Administration to the Public Trustee notwithstanding that there are persons who under the Act or any other written law, would in the ordinary course be entitled to administer the estate of the deceased person”.

The upshot of the foregoing is that the Court finds that there is merit in the Application and enlarges the time within which the Applicant has to substitute the Defendant and the Public Trustee is therefore ordered to administer the Estate of the Defendant/Respondent for purposes of defending this suit.

Consequently, the *Court allows the Plaintiff’s/Applicant’s Notice of Motion dated 15th May 2018 with costs being in the cause.*

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of March 2019.

L. GACHERU

JUDGE

25/3/2019

In the presence of

Mr. Githiri holding brief for Mr. Olembo for Plaintiffs/Applicants

No appearance for Defendant/Respondent

Lucy - Court Assistant

L. GACHERU

JUDGE

25/3/2019



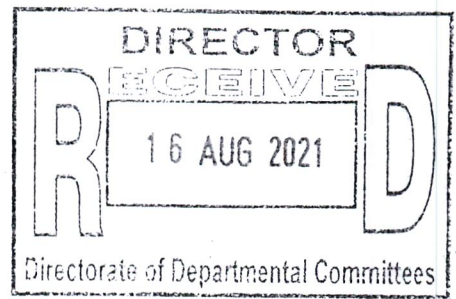
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Submissions by
The Attorney
General

2012-2013

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**OFFICE OF THE ATTORNEY-GENERAL
&
DEPARTMENT OF JUSTICE**

Our Ref: AG/CONF/6/B/18/1

10th August 2021

Mr. Michael R. Sialai, EBS
Clerk of the National Assembly
Clerk's Chambers
Parliament Buildings
NAIROBI

*Abenayo Wasike
to facilitate consideration
w/ DDC
07/8/21/16/8/21*

RE: THE HONOURABLE THE ATTORNEY GENERAL'S SUBMISSIONS ON: (A) PETITION TO THE NATIONAL ASSEMBLY TO AMEND ORDER 24 RULE 3(1), 5 & 7 OF THE CIVIL PROCEDURE RULES, 2010 AND SECTION 3 OF THE LAW OF SUCCESSION ACT, CAP 60 LAWS OF KENYA AND ON (B) THE DEVELOPMENT OF A NATIONAL POLICY TO STREAMLINE THE LEGAL SECTOR

This has reference to the above-captioned matter and to the meeting that the Justice and Legal Affairs Committee of the National Assembly had with, among others, this Office's representatives on 21st July 2021. As you would recall, this Office was requested to provide written submissions on the above-captioned petition and on the development of a national policy to streamline the legal sector. We wish to provide our written submissions as follows:

(i) Petition to the National Assembly to Amend Order 24 Rules 3(1), 5 & 7 of the Civil Procedure Rules, 2010 and Section 3 of the Law of Succession Act, Dated 6th June 2020

(a) Introduction

1. The subject petition urges Parliament to consider specified amendments to Order 24 of the Civil Procedure Rules and to Section 3 of the Law of Succession Act.
2. The petition is grounded on what the petitioners describe as "a bad and unjust experience" in Embu ELC Case No. 132 of 2015: Ephantus Nyaga Nyaga v Ephraim N'thambiri & 2 others [2016] eKLR, in which the court declined to declare as defendants, relatives of a deceased defendant. The facts of the matter were that

SHERIA HOUSE, HARAMBEE AVENUE
P.O. Box 40112-00100, NAIROBI, KENYA. TEL: +254 20 2227461/2251355/07119445555/0732529995
E-MAIL: info.statelawoffice@kenya.go.ke WEBSITE: www.attorney-general.go.ke

DEPARTMENT OF JUSTICE
CO-OPERATIVE BANK HOUSE, HAILLE SELLASIE AVENUE P.O. Box 56057-00200, Nairobi-Kenya TEL: Nairobi 2224029/ 2240337
E-MAIL: legal@justice.go.ke WEBSITE: www.justice.go.ke

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following the death of the defendant therein, the family did not petition for grant of letters of administration as required by the Law of Succession Act, with the consequence that there was no one to defend the suit. The Court held that it could not compel a deceased person's relatives to petition for grant of letters of administration.

3. Section 2 of the Civil Procedure Act defines a personal representative as:

"...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."

4. Section 3 of the Law of Succession Act defines a personal representative as:

"...the executor or administrator, as the case may be, of a deceased person."

5. An executor is defined in the said Section 3 of the Law of Succession Act as "a person to whom the execution of the last will of a deceased person is, by the testator's appointment, confided" while an administrator is defined as "a person to whom a grant of letters of administration has been made under this Act."

6. According to the petitioners, the foregoing provisions of the law have resulted in civil cases involving deceased persons dragging in court for failure to appoint administrator (s) to replace the deceased. The petitioners therefore invite the National Assembly to enact or amend the foregoing provisions of the law to include any other relative (s) of the deceased who the court may appoint as administrators/legal representatives in relation to matters in court.

(b) Our Comments

7. We appreciate the difficulties posed to the administration of justice, and to litigants in particular, where a party to a case passes on and no person applies for letters of administration, as outlined by the petitioners.

8. Even as Parliament considers the petition and the prayer therein, we respectfully urge that consideration be had to Sections 6 and 7 of the Public Trustee Act, and the Law of Succession Act.

9. Section 6 of the Public Trustee Act provides that the Public Trustee may be requested to take action in respect of the deceased's estate by any person appearing to have a legitimate interest in the succession to, or administration of, the estate. Upon such request, the Public Trustee shall make further inquiries as to the estate of the deceased and may, upon establishing, for instance, that the deceased person died intestate or that letters of administration to the estate have not been obtained within

six months from the date of the death of the deceased, apply for grant of representation.

10. Section 7 of the Public Trustee Act, on the other hand, provides as follows:

"Where the particular circumstances of any case appear to the court so to require, the court may, if it thinks fit for reasons recorded in its proceedings, of its own motion or otherwise, after having heard the Public Trustee, grant under the Law of Succession Act (Cap. 160) letters of administration to the Public Trustee notwithstanding that there are persons who, under that Act or any other written law, would in the ordinary course be legally entitled to administer the estate of the deceased person concerned in preference to the Public Trustee."

11. Facts similar to the present case obtained in the case of Joyce Nyambura Mbugua David Kamau Mbugua (Suing as the legal representatives of the Estate of Mbugua Gachiri) v Jane Wanjiru Wangai [2019] eKLR, in which the Court relied on Section 7 of the Public Trustee Act to appoint the Public Trustee to administer the deceased Defendant's estate for purposes of defending the suit.

12. We also note that Section 14 of the Fifth Schedule of the Law of Succession Act, provides for administration limited to suit as follows:

"When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution."

13. Section 16 of the said Schedule stipulates as follows:

"Where it appears to the court to be necessary or convenient to appoint some person to administer an estate or any part thereof other than the person who would in ordinary circumstances be entitled to a grant of representation, the court may, in its discretion and having regard to all the circumstances of the case, appoint such other person to be administrator and grant letters of administration, whether limited or otherwise, as it shall think fit."

14. Our reading of the foregoing provisions of the law leads to the conclusion that the law permits the substitution of a deceased party with a relative, through the issuance of a limited grant of representation. This has been done in a number of cases.
15. In *Gladys Njeri Muhura v Daniel Kariuki Muthiguro* [2018] eKLR, the court stated as follows in relation to Sections 14 and 16 of the aforesaid Schedule:

"I have looked at the replying affidavit of the intended substitute where he challenges the manner in which he was appointed as a legal representative of the estate, albeit temporarily for purposes of substitution in this case. He claims that the said letters were obtained without his consent and therefore they are fraudulent. There is no material evidence that has been placed before this Court to support this allegation...As long as the said representation has not been revoked, I hold and find that the intended substitute is legally and properly appointed. The purpose of the representation is carefully spelt in the letters of administration ad litem; for purposes of prosecuting the instant case. The intended substitute need not be the registered owner of the suit property nor own property himself. The law has allowed him to step into the shoes of his deceased mother, the erstwhile defendant. It therefore follows that consent is therefore not a must for the grant of administration ad litem."

16. In *Re Estate of the Late Ole Kukuni* [2017] eKLR the court similarly relied on the provisions of Section 14 of the Fifth Schedule of the Law of Succession Act and allowed the application to appoint the widow of the deceased as a legal representative for purpose of defending the suit. The same was the case in the *Matter of the Estate of Gilbert Kibiti Rinchuni...Deceased* [2013] eKLR, wherein the Court stated as follows:

"In this case there is no evidence that the respondent has sought and obtained letters of administration. She is wife of the deceased and most likely entitled to administration of the deceased estate and she is most likely unable and/or unwilling act. There is equally a pending suit which has not been disputed. The fifth schedule under Rule 14 clearly states letters of administration may be granted to the nominee of a party in the suit, limited for the purpose of representing the deceased in a suit and until a final decree shall be made therein and carried into complete execution.... In the circumstances and in the interest of doing substantial justice and applying the provision of Section 1A and 1B of the Civil Procedure Rules, in determining all matters, the Court must bear the oxygen principle in mind, all things which are in conflict with the oxygen principle, must give way to the oxygen principle and aim at doing substantive justice." [Emphasis supplied]

17. We have also undertaken a comparative analysis of the practice in other jurisdictions, namely, Australia, Canada and India. In our assessment, the relevant legal framework is broadly similar to the aforesaid framework obtaining in Kenya. In Australia, the Supreme Court General Civil Procedure Rules, 2015 provide under Rule 16.03 thereof as follows:

“(1) Where a deceased person was interested, or the estate of a deceased person is interested, in any question in a proceeding and the deceased person has no personal representative, the Court may—

(a) proceed in the absence of a person to represent the estate of the deceased;
or

(b) by order (with the consent of the person appointed) appoint a person to represent the estate for the purpose of the proceeding.

(2) An order under paragraph (1), and any judgment or order subsequently given or made in the proceeding, shall bind the estate of the deceased person as it would had a personal representative of the deceased been a party.

(3) Before making an order under this Rule, the Court may require notice of the application for the order to be given to any person having an interest in the estate.”

18. In Canada, the Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194 under Rule 9 and 10 thereof, for example, provide as follows:

“Proceeding Against Estate that has no Executor or Administrator

9.02 (1) Where it is sought to commence or continue a proceeding against the estate of a deceased person who has no executor or administrator, the court on motion may appoint a litigation administrator to represent the estate for the purposes of the proceeding. R.R.O. 1990, Reg. 194, r. 9.02 (1).

(2) An order in a proceeding to which a litigation administrator is a party binds or benefits the estate of the deceased person, but has no effect on the litigation administrator in a personal capacity, unless a judge orders otherwise. R.R.O. 1990, Reg. 194, r. 9.02 (2).

10.02 Representation of a Deceased Person

Where it appears to a judge that the estate of a deceased person has an interest in a matter in question in the proceeding and there is no executor or administrator of the estate, the judge may order that the proceeding continue

in the absence of a person representing the estate of the deceased person or may by order appoint a person to represent the estate for the purposes of the proceeding, and an order in the proceeding binds the estate of the deceased person, subject to rule 10.03, as if the executor or administrator of the estate of that person had been a party to the proceeding. R.R.O. 1990, Reg. 194, r. 10.02."

19. In India, the Code of Civil Procedure, 1908 under Order XXII Rule 4A thereof, provides as follows:

"(1) If, in any suit, it shall appear to the Court that any party who has died during the pendency of the suit has no legal representative, the Court may, on the application of any party to the suit, proceed in the absence of a person representing the estate of the deceased person, or may by order appoint the Administrator-General, or an officer of the Court or such other person as it thinks fit to represent the estate of the deceased person for the purpose of the suit; and any judgment or order subsequently given or made in the suit shall bind the estate of the deceased person to the same extent as he would have been bound if a personal representative of the deceased person had been a party to the suit.

(2) Before making an order under this rule, the Court—

(a) may require notice of the application for, the order to be given to such (if any) of the persons."

20. In our view, and in light of the foregoing comparative analysis, the current legal framework may be enhanced by requiring that the decision to substitute a deceased person with a relative or such other person (including the Public Trustee), be subject to such person being given notice and an opportunity to respond to the application for substitution. This way, the court would be able to make a considered decision, after according the concerned party an opportunity to be heard on the proposed substitution. Arguably,

(ii) Submissions on the Development of a National Policy to Streamline the Legal Sector

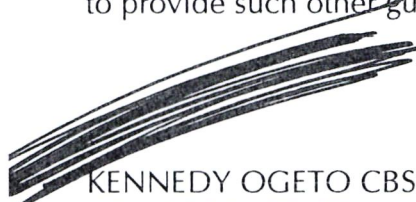
21. As you would recall, during the meeting under reference, the Committee raised concern on the lack of a national policy to guide the legal sector in Kenya. The Committee was of the opinion that a policy framework should always precede legislation. To this end, this Office was required to provide written submissions on the development of a national policy for the legal sector. We wish to submit as follows:

22. The developmental process of a national policy is as important as the outcome. It is important to formulate national policies before enacting legislation, mainly due to the fact that the process of preparing the policy tends to be highly inclusive and consultative, across a larger spectrum of audience, including regional and international best practices. Indeed, Article 10 of the Constitution on national values and principles of governance requires public participation and consultations. The process is useful because it not only provides an avenue to identify all salient issues besetting society in a comprehensive and coherent manner, but also brings the people to the center of the State's decision making processes on decisions that affect them. Civic education and sensitization is also undertaken to allow the people understand the objectives of the intended policy, appreciate their rights and how to articulate them.
23. The national policy outlines the course of action to correct or resolve the issues using a holistic approach. The actions recommended by the policy may include the enactment of laws, formulation of sub-sectoral policies, administrative action, and /or development of national action plans. Therefore, the law that emanates from the policy making process tends to be highly comprehensive and exhaustive with regard to all the issues it seeks to resolve. The identified agenda issues are then placed before different stakeholders for further interrogation and consensus building.
24. This elaborate and comprehensive process, undoubtedly, necessarily implies the need for time and large budget outlays.
25. Over the years, various measures have been taken to improve and strengthen the legal and judicial sector in Kenya, evidenced by the number of committees and task forces appointed to evaluate the sector and provide recommendations on how best to enhance professional standards. Recommendations have involved the formulation, review and enactment of various laws. While the recommendations have gone a long way in improving standards in the sector, the focus has been narrow and there has been no holistic approach. This has led to the piecemeal and frequent review of laws on the legal sector.
26. The development of an overarching national policy framework is therefore essential to guide the Government and other actors to enhance the competence, professional standards and conduct, accountability and access to legal education and aid in line with international best practices.
27. In 2016, the Attorney General appointed a Taskforce on Legal Sector Reforms vide Gazette Notice No. 8116 of 7th October, 2016 to evaluate, review and make recommendations on legal education and training, regulations, the practise of law and discipline in the legal profession. The Taskforce made a wide range of recommendations and reform proposals, including the development of a policy

framework to guide government and stakeholders in improving standards and professionalism in the legal sector.

28. In 2019, the Attorney General sought to set up a Committee to develop a National Policy to streamline the legal sector. The Committee drew members from all relevant stakeholders, including the judiciary, universities, Council of Legal Education, and the Kenya School of law.
29. A draft concept paper on the development of a national policy was also prepared. The paper details various issues to be considered in the policy, including the accreditation and regulation of the legal profession, admission criteria, cross border practice, para-legal, provision of national legal aid and discipline matters.
30. A work plan with the necessary budget and timelines was prepared. Nairobi, Nakuru, Kisumu, Eldoret and Mombasa counties were mapped for public participation in the first year. As noted hereinabove, meaningful public participation is critical not just to enrich the policy under development with diverse perspectives but to also avoid legal challenges for procedural unconstitutionality, given that public participation is now a constitutional requirement.
31. While the process of developing a national policy on the legal sector is on course, the pace of the work has been slowed down by the inadequate budgetary allocations. Public participation calls for adequate funding. For some time now, the Office of the Attorney General & Department of Justice has experienced massive budget cuts, which have negatively impacted on its programmatic work. We wish, therefore, to take the opportunity of this letter to respectfully request the Committee to support this Office in its quest for increased funding to facilitate the performance of its critical mandates and activities connected therewith, including the development of the subject national policy.

We trust that what we have stated herein will be of use to you and remain at your disposal to provide such other guidance as may be deemed expedient.



KENNEDY OGETO CBS
SOLICITOR GENERAL

Copy to: Hon. P. Kihara Kariuki, EGH
ATTORNEY GENERAL