



REPUBLIC OF KENYA



**Mwanje v Imbwenya (Succession Appeal 95 of 2021)
[2023] KEHC 3879 (KLR) (28 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3879 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
SUCCESSION APPEAL 95 OF 2021**

WM MUSYOKA, J

APRIL 28, 2023

BETWEEN

WELLINGTON AMBETSA MWANJE APPELLANT

AND

KEPHA SIMON IMBWENYA RESPONDENT

*(An appeal arising from the ruling by Hon. SO Ongeru, Senior Principal
Magistrate, in Vihiga PMCS No. 109 of 2018, of 18th February 2021)*

JUDGMENT

1. The appeal herein arises from a decision of the trial court, in Vihiga SPMCS No 109 of 2018, of 18th February 2021, although the typed ruling erroneously refers to 18th February 2020. The grounds of appeal are that the conclusions by the court were not supported by the evidence on record or the established law or practice; the trial court sacrificed the established law at the altar of expediency; the court acted on the wrong principles of law; the court did not address the contents of the pleadings, written submissions and the applicable statutory provisions; the ruling did not comply with Order 21 rule 4 of the *Civil Procedure Rules*; and the trial court erred in law. I am invited to set aside the said ruling, and to substitute it with an order dismissing the application dated 2nd November 2020.
2. The impugned ruling, of 18th February 2021, turned on a chamber summons, dated 2nd November 2020, filed in court on 3rd November 2020, by the respondent. The respondent had sought, in that summons, to have an order for him to substitute the applicant in a pending summons for revocation of grant, and for leave for him to file witness statements. The applicant in the revocation application, dated 18th July 2019, who was the father of the respondent, had died, on 4th September 2019, and the respondent was seeking to take his place in that application.
3. The reply to the summons for substitution was by way of grounds of opposition, dated 3rd November 2020, by the appellant. The grounds raised 2 points: that the respondent had not demonstrated



competence to substitute his late father as applicant; and the application was not very clear on who the applicant was.

4. Directions were taken on 17th November 2020, that the application would be disposed of by way of written submissions. It transpires that only the appellant filed written submissions, dated 18th November 2020, and filed on 30th November 2020.
5. In the ruling of 18th February 2021, the trial court delivered a 3-paragraph decision, in the following terms:

“The application dated 2.11.2020 comes up in which the objector one Jeremiah Ambetsa Muranje is deceased and the applicant Kepha Simon Imbwenya seeks that he substitutes the deceased objector.

The application is opposed, but however considering that the court is required to administer justice without undue regard to procedural technicalities. It is not disputed that the objector is deceased and as court we are required to simplify procedure to allow parties ventilate their cases without undue delay.

From the foregoing the application is allowed with no orders as to costs.”

6. Directions were given on 10th March 2022, for disposal of the appeal by way of written submissions. The written submissions that I see on record were filed by the appellant, on 21st March 2022, and are dated 15th March 2022. It is argued that the application for substitution was brought after considerable delay; the applicable provisions of the Civil Procedure Rules were not complied with, and the suit by way summons for revocation of grant had abated, and was not available for the applicant to it to be substituted.
7. The trial court was seized of the revocation proceedings, and the succession cause, generally. It was the proper court to exercise discretion, on whether to allow the substitution, notwithstanding any technical weaknesses attending to it. That court exercised that discretion, essentially to do substantive justice, by eschewing technicalities of procedure. That jurisdiction is granted to the trial court by Article 159(2) of the *Constitution*, Rule 73 of the *Probate and Administration Rules*, and sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Cap 21, Laws of Kenya. Looking at the impugned ruling, as against those provisions, I see no abuse of exercise of discretion by the trial court.
8. I am told that the “suit” in the summons for revocation of grant had abated. The summons for revocation of a grant is not a suit, but an interlocutory application, filed within a succession cause. The law on abatement of suits does not apply to it, and I have not been pointed to any law which provides for abatement of such summonses.
9. Much of the arguments that the appellant is raising are of the technical kind, which were swept away by the coming into operation of Article 159 of the *Constitution*. The issues as to whether the respondent would have competence to seek revocation of the grant in the succession cause should be addressed at the hearing of the revocation application itself. It would not serve justice to have him locked out of the matter at the preliminary stages, for doing so would leave it open to him to lodge another revocation application in the cause, in his own name, which would amount to duplication, and would, in the long run, delay the finalization of the succession cause. That is what the trial court sought to avoid by taking the direction it took in the ruling of 18th February 2021.
10. It was submitted that the application was not clear on who the applicant was. From the impugned ruling, the trial court was clear on the issue that was placed before it, and had no difficulty in addressing



that issue and determining with it. It was a straightforward issue of substitution. It has not been demonstrated that the orders that the trial court granted, were not what the respondent was seeking in his application of 2nd November 2020.

11. I find no merit in the appeal herein, and I hereby dismiss it. It is so lacking in merit that costs ought to be ordered against the appellant, for needlessly dragging the respondent to the High Court, but I shall refrain from making that order, for the sake of peace within the family. Each party shall bear their own costs. It is so ordered.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
28TH DAY OF APRIL 2023**

WM MUSYOKA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

Appearances

Mr. Balusi, instructed by Balusi & Smart, Advocates for the appellant

Mr. Chitwah, instructed by Chitwah & Company, Advocates for the respondent

Mr. Erick Zalo, Court Assistant

