



**Kotut v Kosgei & 2 others; Kibet & 2 others (Applicant) (Suing as the
Legal Representative of Andrea Kibet Kotut) (Environment & Land
Case 317 of 2014) [2023] KEELC 16884 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16884 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 317 OF 2014**

**EO OBAGA, J
APRIL 20, 2023**

BETWEEN

ANDREA KIBET KOTUT PLAINTIFF

AND

ZACHARIAH KIMUTAI KOSGEI 1ST DEFENDANT

NATHAN TIROP KOECH 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

AND

HELENA JEPTARUS KIBET APPLICANT

JOSPHAT KIMELI KOTUT APPLICANT

AMBROSE KIPCHIRCHIR KOTUT APPLICANT

SUING AS THE LEGAL REPRESENTATIVE OF ANDREA KIBET KOTUT

RULING

1. This is a ruling in respect of a notice of motion dated December 30, 2022 in which the applicants seek the following orders:-
 1. Spent
 2. Spent.
 3. The ruling delivered by this honourable court on November 10, 2022 be reviewed and the application dated January 27, 2022 be allowed.
 4. Costs be in the cause.



2. The applicants had sought to have the suit herein revived and they be substituted as legal representatives of the estate of Andrew Kotut. The application was dismissed in a ruling delivered on November 10, 2022. The applicants now want the ruling of November 10, 2022 reviewed on the ground that there was an error on the face of the record.
3. The applicants contend that the trial judge failed to notice that there was a declaratory relief in the plaint.
4. The applicants' application was opposed by the 1st and 2nd defendants/respondents through a replying affidavit sworn on January 19, 2023. The respondents contend that the applicants are out to prevent them from realizing the fruits of the judgement arising from the tribunal award and that there is no error apparent on the face of the record.
5. Parties were directed to file written submissions. The 1st and 2nd respondents filed their submissions on February 17, 2023. The applicants did not file any submissions and if any were filed, then they are not in the file as at the time of writing this ruling on April 5, 2023.
6. I have considered the submission by the 1st and 2nd respondents. I have also considered the applicants' application as well as the opposition to the same by the 1st and 2nd respondents. The issues which emerge for determination are firstly, whether the application for review is properly before the court. Secondly, whether the applicants have shown that there are grounds to warrant review of the orders of November 10, 2022.
7. On the first issue, it is important to look at order 45 rule 1(1) (a) which states as follows: -
 - “ 1.
 - (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or...”
8. In the instant case, the applicants filed a notice of appeal against the ruling of November 10, 2022. The notice was filed pursuant to the provisions of the [Court of Appeal Rules](#). The notice of appeal was filed on November 11, 2022.
9. Order 42 rule 6(4) of the [Civil Procedure Rules](#) provides as follows: -

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.”
10. The law is clear that one cannot pursue an appeal and a review at the same time. Though the applicants state in their affidavit that they have opted to pursue a review rather than the appeal, there is no evidence that the notice of appeal which was filed has been withdrawn. This being the case, the application herein is against the law and therefore untenable.
11. However, notwithstanding the above finding, I will nevertheless address the application on its merits. The applicants contend that I failed to notice that there was a prayer for a declaration in that plaint. It is important to state from the beginning that the applicants' application was not dismissed for failure by the court to notice that there was a declaratory relief in the plaint. The application was dismissed as the applicants failed to demonstrate that there was sufficient cause why they did not substitute the deceased plaintiff.



12. An erroneous finding of a court is not a good ground for review but can be a good ground of appeal. If the applicants are contending that the court proceeded on an erroneous view of what the reliefs in the plaint were, that is not a ground for review but one for appeal. I therefore find no merit in this application which is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 20TH DAY OF APRIL, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Kayali for Mr. Kamau for Plaintiff.

Court Assistant –Laban

E. O. OBAGA

JUDGE

