



REPUBLIC OF KENYA



KENYA LAW
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**Lochab Transport Limited & another v Koske (Deceased); Koske (Applicant)
(Civil Appeal 51 of 2020) [2022] KEHC 11980 (KLR) (26 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11980 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 51 OF 2020
EKO OGOLA, J
JULY 26, 2022**

BETWEEN

LOCHAB TRANSPORT LIMITED 1ST APPELLANT

ROBERT KIPKOECH KIRUI 2ND APPELLANT

AND

PAUL KIMUTAI KOSKE (DECEASED) RESPONDENT

AND

EVALINE CHEPKORIR KOSKE APPLICANT

RULING

1. Before me for determination is the Applicant's Application by way of a Notice of Motion dated the 17th January, 2022 wherein she seeks *inter alia*:
 1. That the firm of D.C. Ngeno & Co. Advocates be granted leave to come on record on behalf of the Respondent in place of the firm of M/s Ogeto & Ogeto Company Advocates who were previously on record at trial.
 2. That this Honourable Court cause the legal Representatives of the deceased Respondent Paul Kimutai Koske (Deceased) namely Evaline Chepkorir Koske to be substituted and made a party in this suit as the Respondent and proceed with this suit in place of Paul Kimutai Koske (Deceased).
 3. That such other and/or further direction given by this Honourable Court to meet ends of justice.
 4. That the costs of this application be in the cause.



2. The application is premised on the grounds set out therein and is supported by affidavit of Evaline Chepkorir Koske the Applicant herein sworn on 17th January, 2022.
3. The Applicant averred that the Respondent in the instant suit, Paul Kimutai Koske (Deceased) is her husband, who died on 7th April, 2021 have sustained serious injuries as a result of a road accident which is the subject matter in this suit.
4. The Applicant contends that the firm of M/s Ogeto & Ogeto Company Advocates never briefed her husband during lifetime about the progress of the case despite knowing that he needed the matter to be expeditiously concluded so as to enable him use the decretal sum to undertake his treatment. The Applicant further contends that despite the appeal herein being filed on 17th June, 2020 no action has ever been taken by the said firm, and that the firm has never initiated proceedings to obtain the grant of letters of administration Ad Litem on her behalf despite being informed about the demise of the Respondent herein.
5. The Applicant deposed that she has since instructed the firm of D.C. Ngeno & Co. Advocates to file petition for grant *Ad Litem* which grant has since been issued.
6. The Applicant's case is that since the Respondent has died the cause of action still survives and can be finalized by the legal representative of his estate. The prayers that she be allowed to substitute the Respondent herein.
7. In an undated Replying Affidavit filed in Court on 16th May, 2022 Peter Osongo Ogeto opposed the said application. He averred that he is in conduct of the matter on behalf the Applicant. He further stated that he has been conducting the matter on behalf of the Respondent herein who is now deceased.
8. Counsel submitted that after the demise of the Respondent, the Applicant instructed him to prepare an application for substitution. He further averred that he prepared the said application and fully explained to Applicant that the Defendants herein had appealed against the decision of the trial Court and that they were now required to pursue the appeal.
9. Counsel averred that he has been pursuing the typed proceedings in the instant suit and confirmed that the same are now ready, but that Appellant's Counsel is delaying the matter and contends that allegations levelled against him by the Applicant are unfounded..
10. Counsel stated that the parties herein had deposited the decretal sum into a joint account in the names of the Advocates on record, and that it will not be desirable to change advocates at this stage because of the prevailing situation.

Determination

11. The Applicant herein seeks to substitute the Respondent as his personal representative to enable her proceed with this appeal. The Respondent passed on during the pendency of the suit.
12. Order 24 rule 3 of the [*Civil Procedure Rules*](#) provides as follows:

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- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.



- (2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

13. In the instant case, the Applicant is the widow of the deceased, who passed away on 7th April, 2021. The Applicant annexed a copy of the Certificate of death of the deceased as exhibit ECK-1. The application for substitution was filed on 31st January, 2022. The suit herein has therefore not abated. The Applicant has since applied for and obtained a limited grant of letters of administration *ad litem* limited for the purposes of continuing and or defending this instant suit on behalf of the estate and the dependants of the Respondent.
14. In view of the foregoing, it is my finding that the Applicant herein has satisfied the pre-requisite conditions for a person seeking to substitute a party to a suit and I hereby accordingly, substitute the deceased Respondent herein with the Applicant.
15. On whether the firm of D.C. Ngeno & Co. Advocates should come on record for the Applicant, it is noteworthy that every litigant enjoys the constitutional right to be represented by an advocate of their choice.
16. As observed by O’Kubasu J. A. (as he then was) in *William Audi Odode & Another v John Yier & Another* Court of Appeal Civil Application No. Nai 360 of 2004:
- “...[I] It is not the business of the courts to tell litigants which advocate should or should not act in a particular matter. Indeed, each party to a litigation has the right to choose his or her own advocate and unless it is shown to a court of law that the interests of justice would not be served if a particular advocate were allowed to act in a matter, the parties must be allowed to choose their own counsel.”
17. It was not disputed that the Respondent was represented before the lower court by the firm of M/s Ogeto & Ogeto Company Advocates. The Applicant blamed the Respondent’s previous advocate on record for the delay in prosecuting this instant appeal on the basis that no action has been taken by the said firm since this appeal was filed on 17th June 2020. The Applicant further contends that despite instructing the said firm to petition for the grant of letters of administration *Ad Litem* upon the demise of her husband no action was ever taken. The Applicant now seeks to have the firm of D.C. Ngeno & Co. Advocates come on record on her behalf. I have keenly looked at the application for the grant of letters of administration *Ad Litem* annexed by the firm of M/s Ogeto & Ogeto Company Advocates as exhibit POO1 and I note that the same has never been filed in Court.
18. With the foregoing in mind and in the circumstances of this case it is my finding that in the interest of justice the firm of D.C. Ngeno & Co. Advocates comes on record for the Applicant herein.
19. For the reasons I have set out, I hereby order as follows:-
1. That the money deposited in a joint interest earning account in the names of J.M Kimani & Co. Advocates and M/S Ogeto & Ogeto Company Advocates be released forthwith in a joint interest earning account in the names of D.C. Ngeno & Co. Advocates and J.M Kimani & Co. Advocates together with the accrued interest.



2. That the firm of Ogeto & Ogeto Company Advocates is hereby directed to sign a letter of instructions to respective Bank for the funds to be released to the firm of D.C. Ngeno & Co. Advocates who now act on behalf of the Applicant.
3. Parties to bear their own costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 26TH OF JULY 2022.

E. K. OGOLA

JUDGE

