



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 379 OF 2016**

**ISAIAH ONYANGO ONGUDI.....1<sup>ST</sup> APPLICANT**

**SIPRINA AOKO ONGUDI.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**JAPHETH OGOLO OYOO.....RESPONDENT**

**RULING**

**INTRODUCTION**

**1.** By a Notice of Motion brought pursuant to Order 24 Rule (3) and Order 45 Rules (1) and (2) of the Civil Procedure Rules seeking the following orders:

(a) Spent

(b) The applicants herein Isaiah Ongudi and Siprina Aoko Ongudi be substituted as the plaintiffs herein in place of John Ongudi Oyoo.

(c) The Honourable court be pleased to review the ruling delivered on the 23<sup>rd</sup> June 2017 dismissing the suit herein

(d) Corollary to the above, the applicants be at liberty to apply to this Honourable court for all necessary and/or consequential orders that this Honourable court may deem fit and just to grant for the determination of the suit herein.

(e) The costs of this application be provided for.

**2.** The application is anchored on the grounds stated on the face of the Notice of Motion and the supporting affidavit of Isaiah Onyango Ongudi sworn on the 18<sup>th</sup> day of January 2017. Primarily he deposes that he is the son of John Ongudi Oyoo (the original Plaintiff herein) who has since died. He further deposes that his late father filed suit against the respondent challenging the registration of land parcel number KABONDO/KASEWE "A"/937 in the respondent's name as he claimed that the respondent had fraudulently obtained that grant of letters of administration which he used to transfer the suit property to himself. He contends that after delivery of the judgment herein he wrote a letter to the Executive Officer, Homa Bay Court to confirm the authenticity of the grant issued to the respondent and he received a letter informing him that the name of the deceased in the grant purportedly issued to the respondent bore the name of a different deceased person from the one on the copy produced by the respondent. He therefore argues that this is new and important information which should form the basis of a review of the judgment. He therefore prays that the applicants be substituted in place of the deceased after which the judgment should be reviewed.

**3.** The application is opposed by the respondent through the Grounds of Opposition dated 6<sup>th</sup> February 2018 and the respondent's Replying Affidavit sworn on the 17<sup>th</sup> April 2018. In the Grounds of Opposition, the respondent raises the following points;

i. The instant Notice of Motion application is pre-mature, misconceived, incompetent and otherwise legally untenable.

ii. The instant suit was dismissed vide a ruling and/or order of the court rendered on the 23<sup>rd</sup> June 2017. Consequently, there is no subsisting suit upon which the applicants can be substituted and admitted as plaintiffs in any manner.

iii. The honourable court is devoid of jurisdiction to entertain the subject application including the application for review which has been mounted by and at the instance of strangers who were not parties to the proceedings.

iv. The transfer and registration of the suit property in favour of the defendant having been carried out by transmission, this court is devoid of jurisdiction to entertain the present application, including the application for review which has been mounted by strangers who were not party to the proceedings.

v. The applicants herein have neither established and/or laid out before the honourable court, any basis or reasons to warrant the Review sought. In any event the application does not meet the threshold under the provisions of order 45 Rules (1) of the Civil Procedure Rules, 2010.

vi. The grounds pertaining to the Succession cause, which have been alluded to and which anchor the application herein, are alien and incapable in the instant matter. In a nutshell the issues raised at the foot of the application fall outside the jurisdiction of this honourable court.

vii. The Notice of Motion mounted by the applicants does not disclose any reasonable cause of action

viii. The instant application has been brought to court with unreasonable delay, which delay has not been explained howsoever. Consequently, the applicants are guilty of laches.

ix. The instant application constitutes an abuse of the process of the court.

4. In the said affidavit, the 1st applicant restated the reasons laid out in the Grounds of Opposition. He therefore prays that the application be dismissed with costs.

5. The application was canvassed by way of written submissions and both parties field their submissions which I have considered.

### ISSUES FOR DETERMINATION

6. Having considered the pleadings, proceeding herein, the Notice of Motion, Grounds of Opposition and rival submissions, the following issues arise for determination:

- i. Whether the applicants can be substituted in a suit that has been concluded
- ii. Whether the applicants have met the threshold for review under the provisions of Order 45 Rule (1) of the Civil Procedure Rules.
- iii. Whether the court has jurisdiction to entertain an application concerning the validity of the impugned grant of letters of administration issued to the respondent.
- iv. Whether the applicants are entitled to the orders sought.

7. Before delving into the issues raised in the application, it is necessary to determine whether a plaintiff who dies after the suit has been determined can be substituted. The answer lies in order 24 Rule 8 of the Civil Procedure Rules which provides as follows:

8 (1) “ In other cases of assignment , creation or devolution of any interest during the pendency of the suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)”

8. Although the rule is more explicit with regard to a decree-holder who intends to execute the decree after the death of the judgment-debtor, it can be construed to mean that the court has the discretion to allow the suit to continue in respect of either the plaintiff or defendant. The point of departure is how soon after the final order is the application for substitution being made and whether or not the decree –holder has executed the judgment.

9. In the instant suit the applicants filed the application after a period of seven months following the demise of the original plaintiff. The delay was not explained by the applicants in their supporting affidavit although counsel for the applicants attempted to explain the delay in his submissions. This is unacceptable as counsel cannot give evidence from the bar. See the case of **Said Mohammed t/a Bulbul Traders & another v Emily Wavinya Mutua [2018]** where the Court of Appeal held that submissions cannot take the place of evidence as submissions are generally ‘marketing language’ for the parties. I am therefore disinclined to exercise my discretion in favour of the applicants. On that ground alone, that application would fail.

10. Be that as it may, even assuming that substitution was allowed, the applicants would have to surmount other hurdles. The conditions for review are set out in Order 45 (1) of the Civil Procedure Rules as follows:

“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

b) by a decree or order from which no appeal is hereby allowed and who from the discovery of a new and important matter or

*evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.*

11. The applicants rely on the ground that “*there is discovery of a new and important matter or evidence which was not within their knowledge and was not available to be produced at the time of the hearing.*”

Order 45 Rule 1 of the Civil Procedure Rules specifically states that there must be:

*discovery of a new and important matter which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made.*

12. In his supporting affidavit, the 1st applicant depones that on 4<sup>th</sup> July 2017 (after delivery of the ruling dismissing the plaintiff’s suit) his advocate wrote a letter to the Executive officer in the Chief magistrate’s court at Homa Bay Law Courts to confirm if the grant of letter of administration and certificate of confirmation of grant issued on 8<sup>th</sup> November 1991 emanated from the said court and a request for copies of the same. In his reply in their letter dated 5<sup>th</sup> July 2017, the Executive officer said that the name of the deceased in their records is different from the name of the deceased reflected in the copies of the letters of administration and certificate of confirmation of grant attached to the letter.

13. If the applicants doubted the authenticity of the said grant, it is not clear why they had to wait for the case to be dismissed before writing to Homa Bay Court to confirm if indeed the grant had been issued by the said court. This is a clear case of lack of diligence. The applicants’ father was ably represented by counsel who must have known the significance of producing the best evidence possible. The court cannot allow the applicants to go on a fishing expedition and introduce evidence which was available, but was not produced during the hearing.

14. At any rate, the ‘new evidence’ to be relied on must be put to serious scrutiny as to its importance which involves an inquiry in its veracity. A mere letter stating the grant did not emanate from the court without attaching the grant issued by the court under the same number which supposedly bears a different name would not suffice. As the court of Appeal observed in **Dubai Bank Kenya Limited v Kwanza Estates Limited [2015] eKLR** at page 11

***“Even if the documents presented by the Defendant’s Notice of Motion did have a bearing to the orders issued by the impugned Ruling the issue raised on the validity of those documents in my view would disqualify them to be considered for review of Court orders....”***

15. In view of the foregoing, it is my finding that the applicants have not met the threshold for review of the court’s ruling as introduction of the Executive Officer’s letter, without more would not change the outcome of the case.

16. Lastly, the issue of the court’s lack of jurisdiction still looms large. Even assuming that the applicants had produced the alleged invalid grant, this court would not be the right forum to cancel the said grant.

17. In the final analysis, the applicants’ application lacks merit, is an abuse of the court process and the same is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Kisii this 24<sup>th</sup> day of January 2020.

**J.M ONYANGO**

**JUDGE**