



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO. 67 OF 2008

KRISHNA KUMAR SHIVLAL LAKHANI.....PLAINTIFF

VERSUS

JULIUS MUNYURI MUTURIA.....1<sup>ST</sup> DEFENDANT

CYPRIAN KUBAI.....2<sup>ND</sup> DEFENDANT

CONSOLIDATED BANK OF KENYA LTD.....INTERESTED PARTY

NILESHKUMAR KRISHNA KUMAR LAKHLANI *alias*

NILESHKUMAR KRISHNA KUMAR SHIVLAL.....1<sup>ST</sup> APPLICANT

SHARDA KRISHNA KUMAR LAKHLANI.....2<sup>ND</sup> APPLICANT

RULING

1. On 13<sup>th</sup> December 2016 judgment was entered in favour of the plaintiff against the defendants for a sum of Kshs. 2,500,000/= being the purchase price and Kshs. 500,000/= being the sum stipulated in the sale agreement as penalty for breach of contract.
2. On 21<sup>st</sup> November 2019 the court substituted the plaintiff (now deceased) with the 1<sup>st</sup> Applicant in his capacity as personal representative of the deceased. The 2<sup>nd</sup> applicant claiming capacity as a wife of the plaintiff (now deceased) filed application dated 14<sup>th</sup> June 2019 seeking to be enjoined in the suit. She averred that she feared that the 1<sup>st</sup> applicant would render her desolate and financially handicapped and that this was already evident from the 1<sup>st</sup> applicant's action of secretly filing the a Succession cause in respect of the deceased- she is the objector ion the said cause.
3. On 21<sup>st</sup> November 2019 the court granted leave to the 2<sup>nd</sup> applicant to challenge the grant in the Succession cause and graciously halted the execution process in these proceedings. On 9<sup>th</sup> July 2020 counsel for the 1<sup>st</sup> applicant returned a report that the 2<sup>nd</sup> applicant was unsuccessful in her quest. It was reported that the matter had been challenged in the Court of appeal but was dismissed. It was his submission, therefore, that the application herein is misplaced and lacks merit. The 2<sup>nd</sup> applicant was not present although was aware of the mention date.

**ANAYSIS AND DETERMINATION**

4. Substitution of a deceased plaintiff is provided for in **Order 24 Rule 3 of the Civil Procedure Rules** as follows;

**“3.(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.”**

5. Accordingly, 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. Legal representative is defined in section 2 of the Civil Procedure Act as follows: -

**“legal representative” means 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**

6. In law, representation of the estate of a deceased person is through a probate of a will or grant of letters of administration. See section 4 of the Law of Succession Act that: -

**“representation” means the probate of a will or the grant of letters of administration**

7. I am content to cite the case of **Sarah Kobilu Chebii & another v David K. Chesang [2019] eKLR** where it was held as follows;

**“12. It is clear that even though the Civil Court had under the division of the Order XX III of the Civil Procedure Rules (Order 24 of the Civil Procedure Rules, 2010), the power to substitute the Legal Representative of the deceased plaintiff or defendant such representative must be Legal Representatives within the meaning of the applicable law. In this regard section 2 of Civil Procedure Act that Legal Representatives means “a person who in law represent the Estate of a deceased person”, that is to say a Legal Representative in the technical acceptance of the term.**

**13. The applicable law contemplated by section 2 of the Civil Procedure Act is the law of Succession Act which defines a persona representation as “a person to whom a grant to representation has been made and is still subsisting.” Consequently, if a person has not been issued with a grant of representation in accordance to the Law of Succession such a person cannot lawfully be substituted in place of a deceased party to a suit for lack of capacity.**

**14. The absurdity of the holding is that the purported personal representatives cannot implement the Order of the Court by disposing off any of the assets of Estate as they would be intermeddles within the meaning of the Law of Succession.....”**

8. Needless to state that the grant of representation issued by a court gives the holder the legal capacity to stand in place of the deceased party. Accordingly, a holder of grant of probate or letters of administration is the person who, in law, represents the estate of the deceased. Such is the one who should be joined as a party in a judicial proceeding to represent the deceased plaintiff in a suit.

9. In these proceedings, I note that the applicant is claiming to be the wife of the deceased. But, she has not claimed to be the holder of a grant of probate or letters of administration in respect of the estate of the deceased plaintiff. From the information relayed to the court, the 1<sup>st</sup> applicant is the personal representative of the estate of the deceased plaintiff hence his substitution by the court. The 2<sup>nd</sup> applicant besides being a wife of the deceased is not the personal representative of the deceased, thus, she may not be joined in these proceedings as legal representative of the deceased plaintiff.

10. I should however state that I have observed in my experience in succession cases; many labour under grave misconception that a personal representative necessarily becomes the sole beneficiary of the estate of the deceased or absolute owner of estate property. Far from the truth. First and foremost: the property of the deceased vests in him as personal representative. See section 79 of the Law of Succession Act: -

#### **79. Property of deceased to vest in personal representative**

**The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.**

11. The learning in the university on *Law on Trust* is useful here. The trustee is the legal owner of trust property but the beneficial ownership vests in the beneficiaries. This is the kind of ownership that obtains in section 79 of the Law of Succession Act.

12. Second; a personal representative is only administers the estate of the deceased in accordance with the law, the grant of probate (note relation back and the will) or letters of administration. See duties and powers of personal representatives stated in sections 79-83 of the Law of Succession Act.

13. And, third; a personal representative may or may not be a beneficiary of the estate of the deceased. The beneficiaries of the estate are stated in the will or identified and ascertained by court upon confirmation of the grant of representation. The estate is then distributed to beneficiaries so identified and ascertained.

14. Be that as it may, it bears repeating that the court gave the 2<sup>nd</sup> applicant an opportunity to substantiate her allegations in the succession proceedings. She did not provide the court with the outcome of her objection on representation of the estate of the deceased- this only puts the court in extreme difficulty position in dealing with her request.

15. In the upshot, I do not find any legal basis on which to join her in these proceedings. Accordingly, her application lacks merit and is dismissed.

16. Given the nature of claims made, I make no orders as to costs.

Dated, signed and delivered at Narok through Teams Application this 23<sup>rd</sup> day of November, 2020

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**F. GIKONYO**

**JUDGE**