



**Republic v County Government of Kakamega; Omoro (Exparte);
Wanzala (Applicant) (Environment and Land Judicial Review Case
E002 of 2021) [2022] KEELC 3337 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3337 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E002 OF 2021**

DO OHUNGO, J

MAY 31, 2022

BETWEEN

REPUBLIC APPLICANT

AND

COUNTY GOVERNMENT OF KAKAMEGA RESPONDENT

AND

RAMADHAN WANZALA OMORO EXPARTE

AND

ZAINABU AKUMU WANZALA APPLICANT

RULING

1. By Notice of Motion dated 8th November 2021, the applicant Zainabu Akumu Wanzala seeks the following orders:
 1. That the Applicant be granted leave to substitute the ex parte Applicant.
 2. That leave be granted for the purposes of extending time to allow for the filing of a Substantive Notice of Motion pursuant to the Orders of this Honourable Court issued on the 18th day of March 2021.
 3. That costs be provided for.
2. The application is supported by an affidavit sworn by Kundu Nigel Wesutsa, advocate on record for the applicant. He deposed that the ex parte applicant died on the 5th August 2021. That he represented the deceased in Kakamega ELC Misc Application No E6 of 2021 wherein the deceased was granted leave to commence Judicial Review proceedings against the respondent herein on 18th March 2021. That



- following the grant of leave, the deceased filed this cause but it has since emerged that a Substantive Notice of Motion was not filed as required by Order 53, Rule 3 (1) of the Civil Procedure Rules, 2010 and that the deceased passed away before the anomaly could be corrected. Mr Wesutsa further deposed that failure to comply with the law was an oversight on his part as counsel. He added that the applicant being the widow of the deceased would be a proper person to pursue the judicial review proceedings.
3. The respondent opposed the application through a replying affidavit sworn by Vivianne Mmbaka Komwonyo, County Attorney. She deposed that in view of the deceased's failure to file the substantive motion, there is nothing before court in which any application can be filed. That the issue of failure to file the substantive motion was raised the respondent's replying affidavit sworn on 19th July 2021 as well as submissions dated 4th October 2021 yet the applicant kept quiet. That Order 53 Rule 3 is couched in mandatory terms and that there is no provision for extension of time to file a substantive motion once the statement and affidavit have been filed. She added that the applicant is a stranger to the estate of the deceased and lacks locus to substitute the deceased since she does not possess letters of administration.
 4. The application was canvassed through written submissions. It was argued on behalf of the applicant that the realm of judicial review is a special jurisdiction such that where an ex parte applicant dies there is no requirement that the party seeking to take over must be his or her legal representative. That the applicant should be considered since the deceased was her husband and she therefore has an interest in the suit property which is registered in the deceased's name.
 5. The applicant further argued that emerging jurisprudence leans in favour of extending time to file a substantive Notice of Motion and that the respondent has not demonstrated in what manner it will be prejudiced if time is enlarged. That on the contrary, if the prayer sought is rejected, the applicant who stands to suffer hardship. Reliance was placed on the cases of [*Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero*](#) [2017] eKLR and [*Republic v Minister for Lands and Settlement Ex-Parte Syungo Mutunga & another*](#) [2017] eKLR.
 6. In response, it was argued on behalf of the respondent that the applicant is a stranger to these proceedings since she is not a legal representative of the ex parte applicant's estate. That consequently, the application is bad in law and a non-starter for want of locus. Further, that there is no judicial review application in this matter capable of being heard exported and that the applicant has not offered any explanation for the delay. Relying on the High Court case of [*Abdinur Hassan Adan v County Criminal Investigation Officer, Marsabit County & 2 others*](#) [2019] eKLR and the Supreme Court case of [*Kenya Revenue Authority v Krish Commodities Limited*](#) [2020] eKLR, the respondent urged the court not to allow the application.
 7. I have considered the application, the affidavits and the submissions. Two issues emerge for determination: whether the applicant should be allowed to substitute the deceased ex parte applicant and whether extension of time should be allowed.
 8. Among the material availed by the applicant is a copy of certificate of death number 0817960 which certifies that Ramadhan Wanzala Omoro, the ex parte applicant herein, passed away on 5th August 2021 at Kholera Sublocation. The applicant contends that she is the widow of the deceased and therefore a proper person to pursue the judicial review proceedings. I note however that the applicant has not sworn any affidavit to support the application. All we have is her advocate's affidavit. Considering that the basis upon which she wants to substitute the deceased is her claim that she is the widow, it was imperative that she swears an affidavit to vouch both for the relationship and her desire to substitute the deceased. I am aware that the advocate annexed a copy of a letter dated 19th August 2021 from the Assistant Chief Kholera Sublocation. However, the letter does not state that she is the widow. It only



states that the family of the deceased has appointed the applicant as “the immediate administrator” of a parcel of land known as N/Wanga/Kholera/352.

9. The applicant contends that the deceased was granted leave to commence judicial review proceedings against the respondent herein on 18th March 2021 in Kakamega ELC Misc Application No E6 of 2021 and that the deceased filed this matter pursuant to the said leave. Unfortunately, the applicant has not annexed a copy of the order granting leave and I have therefore not been able to verify the applicant’s claims. Further, it has not been explained why the ex parte applicant found it necessary to file a new matter as opposed to filing the substantive motion in Kakamega ELC Misc Application No E6 of 2021.
10. A perusal of the statutory statement and the verifying affidavit filed herein suggests that the judicial review proceedings that the deceased was granted leave to commence were with a view to enforcing a judgment said to have been issued in his favour in Kakamega ELC Appeal No. 14 of 2019. Although a copy of the said judgment has not been annexed, the “Certificate of Order against the Government” and “Certificate of Order for Costs against the Government” which are annexed to the verifying affidavit indicate that what is sought to be enforced are an order that the respondent vacates the parcel of land known as North Wanga/Kholera/353 as well as recovery of costs of KShs 42,150.
11. Both the intended recovery of vacant possession and costs are indicative that there are property interests in respect of the estate of the deceased which are to be pursued. The applicant cannot purport to deal with the property forming part of the deceased’s estate outside the provisions of the Law of Succession Act. In particular, it is important to note that Section 45 of the said statute outlaws dealing with the property of a deceased person without a grant of representation. While it is true that judicial review proceedings are neither civil nor criminal proceedings, I cannot lose sight of the ultimate intention of the proceedings herein.
12. To the extent that the applicant does not hold a grant of representation in respect of the deceased’s estate, she is a stranger in this matter. She will need to first obtain letters of administration in respect of the deceased’s estate before she can move the court. Such a future application must be filed in Kakamega ELC Misc Application No E6 of 2021 where leave was granted, and not in this file.
13. In view of the foregoing, I find no merit in Notice of Motion dated 8th November 2021. I dismiss the application. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31ST DAY OF MAY 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Ogolla holding brief for Ms Ikhumba for the ex parte applicant

Ms Aligula holding brief for Ms Munihu for the respondent

Court Assistant: E. Juma

