

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Civil Suit 22 of 2005

WILSON WANZALA OSWARO Substituted by GEORGE OSWARO
& DAVID WANZALA OSWARO.....PLAINTIFF/RESPONDENT

vs

HONORAT OKOIT OSWARO.....DEFENDANT/APPLICANT

RULING

This is a ruling on the Defendant's application dated 7/06/2006. It seeks for costs of the suit in favour of the Defendant on grounds that the suit has abated. The grounds supporting the application are that the purported substitution made on 23/3/1995 was not consequential since the Applicants had no locus standi having not obtained a limited grant. It is only a legal representative of the deceased who can take over a case. The application was opposed on grounds that the substitution was done within one (1) year provided by the law. The persons who took over the suit as Plaintiffs have already testified in court. The Applicants are therefore stopped from bringing this application. The Respondents argue that it is not clear whether the application is brought in way of review or appeal.

The application does not seek to review any orders of the court. If so, it would have been brought under Order XLIV rule 1. Neither is it an appeal against the orders of substitution. It is brought under Order XXIII which deals with death of parties to a suit. Rule 3 provides that where one Plaintiff, his legal representative shall replace him as a party and the suit shall proceed. In this case, the capacity of George Oswaro and David Wanzala Oswaro as Plaintiffs to take over the suit of their deceased father is challenged. I have perused the application for substitution dated 23/01/95. The only annexure to the application is the death certificate of deceased. If there was any limited grant or letters of administration issued in the favour of the Applicants, then it was not annexed. That document gives authority to the person appointed as legal representative of deceased to take over a pending civil case. In this application, the respondent would have annexed such authority if he had any to his replying affidavit. The application for substitution was done well within time, but by people who lacked capacity. The court must have acted in an oversight to grant the orders sought. The lack of capacity is a matter of serious nature and any orders granted by the court may be challenged. The Applicant herein did not ask the court to review or set aside the orders granted. However, the court may on its own motion declare the orders made on 23/3/1995 non consequential for want of capacity. The suit herein must be taken to have abated for want of substitution within the prescribed period. Any evidence adduced by the purported Plaintiffs herein after substitution is also consequential.

I hereby declare the said suit abated and order that the Defendant be paid costs from the estate of the deceased as provided for by rule 2. The application hereby succeeds.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Busia this 2nd day of February 2010.

In the Absence of the parties.