



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 3472 OF 1994

GEOFFREY MUGUNA MBURUGU.....PLAINTIFF

VERSUS

ATTORNEY-GENERAL.....DEFENDANT

RULING

1. Seeking Substitution of Deceased Plaintiff

The applicant, who is the widow of the plaintiff named herein, took out Chamber Summons of 9th November, 2004 on the same date. The application is brought under Order XXIII, rule 3 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act (Cap.21). It carries one substantive prayer: that *Jennifer Nanjala Mburugu* be made a party and that she do proceed with the suit herein. The application is premised on the grounds: (a) that, the plaintiff died on 25th October, 2004; (b) that, the cause of action does survive the death; and (c) that, it is in the interest of justice that the widow of the deceased be made a party and proceed with the suit.

2. Supporting Affidavit Sworn by Counsel

The application is supported by the affidavit of the applicant's counsel, *Mr. Gitobu Imanyara*, dated 9th November, 2004. He avers that his firm has hitherto had the conduct of this suit on behalf of the plaintiff, and that the plaintiff died on 25th October, 2004; he annexes a copy of the funeral announcement and of the funeral programme. He avers that burial of the plaintiff did take place on 6th November, 2004, in Meru South. He depones that the family of the deceased have instructed him to seek a Court order substituting the applicant for the deceased, so that she may proceed with the suit.

3. Attorney-General's Opposition, and the Response

To this application, the Attorney-General's Office filed grounds of opposition, dated 16th November, 2004. It is asserted that the application is incurably defective; that the applicant has not taken out Letters of Administration; that the applicant has not followed the proper legal procedure; that the supporting affidavit is not sworn by the applicant personally.

On the first occasion of hearing, learned counsel *Mr. Imanyara* and *Ms. Kabage* represented the applicant, while *Ms. Mwaniki* represented the Attorney-General's Office.

Mr. Imanyara contested the grounds of opposition filed by the respondent, and contended that there was no requirement in law that letters of administration be taken out before proceedings can proceed, following the death of a party; he stated that he had received instructions to swear his affidavit; and he

proposed that as the applicant widow was present in Court, she could be cross-examined on relevant matters of fact.

4. Is there a Distinction between “Legal Representative” and “personal Representative”?

Learned counsel, *Ms. Mwaniki*, responded by presenting the respondent’s grounds of opposition. She submitted that, under Order XXIII, rule 3 the Court was required to cause the *legal representative* of the deceased to stand as a party, where the original party has died. The question as to who is a legal representative was one determined by the substantive law; and in this regard counsel cited the Court of Appeal decision in *Trouistik Union International & Another v. Mrs. Jane Mbeyu & Another*, Civil Appeal No. 145 of 1990. In that case, the appellants had complained that the respondents lacked standing to present and prosecute a suit for the benefit of the estate of the deceased. The basis of the complaint was that the respondents did not obtain letters of administration before commencing suit. The Court remarked as follows:

“The [Succession] Act came into force on 1st July, 1981. The person whose death and succession gave rise to this suit, namely John Katembe, died on that 10th of April, 1984. To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act. That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer. It says ‘personal representative means executor or administrator of a deceased person’. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the *administrator of the estate of the deceased*. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says ‘administrator means a person to whom a grant of letters of administration has been made under this Act’”

Those principles, *Ms. Mwaniki* submitted, were not embodied in the instant application which failed to state who the legal representative of the deceased was. This submission carried clear merit, considering especially that the Court of Appeal had spoken with much clarity in the *Trouistik Union* case, on the concepts of “legal representative” and “personal representative”. If those two concepts would have technical distinctions, the Court was, as I see it, stating that *they overlap, insofar as practical application was concerned*; and I must take that to be an important legal principle enunciated by the highest Court.

5. Depositions by Counsel: Is the Matter Controversial?

Learned counsel, *Ms. Mwaniki* then objected to the making of depositions by counsel, rather than by the applicant herself. She buttressed her argument with this Court’s decision (*Ringera, J* as he then was) in *Kisya Investments Ltd & Another v. Kenya Finance Corporation Ltd*, Civil Suit No. 3504 of 1993. The learned Judge thus remarked:

The first objection is well founded. The applicant’s counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge, information and belief. It is not competent for a party’s advocate to depon to evidentiary facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box. He is liable to be cross-examined on his depositions. It is impossible and unseemly for an advocate to discharge his duty to the Court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case.”

On the principles set out in the *Kisya* case, *Ms. Mwaniki* urged that the supporting affidavit of counsel for the applicant, be struck out.

Learned counsel, *Mr. Manyara* submitted that since there was no replying affidavit, it followed that the

impugned supporting affidavit should be allowed, because it was uncontested. This would not, in my view be a cogent argument; as an uncontested affidavit can still be defective and fit for striking out. However, the content of the supporting affidavit is, in my view, a straightforward matter which is unlikely to be controverted - that **Mr. Geoffrey Muguna Mburugu** (the plaintiff) died on 25th October, 2004; that he is survived by a widow, **Jennifer Nanjala Mburugu**; and that the cause of action does survive the death of the plaintiff. The last of these facts would be best known by the advocate who has been handling the main suit on behalf of the deceased; the first two are easily verified events in respect of which little or no contest is to be expected. On these grounds I consider it proper to preserve the supporting affidavit.

6. “Legal Representative” and “Personal Representative” - Again

Mr. Imanyara submitted that the instant application was only a formal one and was not concerned with substantive entitlements in the succession process.

He submitted that a legal representative is one who, in law, represents the estate, and that *a widow* was a proper representative and there was no need at this stage to apply the provisions of the Succession Act (Cap. 160). He submitted, in this regard, that the purpose of Order XXIII which deals with the substitution of deceased parties, for the purpose of prosecuting continuing causes of action, was an ordinary civil purpose, and not a succession cause, to facilitate the completion of suits. He urged that Order XXIII enabled the legal representative to “proceed” with the ongoing suit, and that this notion in the Civil Procedure Act (Cap. 21) predated the Law of Succession Act (Cap. 160).

As I noted earlier, in juristic reasoning **Mr. Imanyara** is probably right. But, in the light of the Court of Appeal decision in **Trouistik Union International & Another v. Mrs Jane Mbeyu & Another**, Civil appeal No. 145 of 1990, it may be considered that there is an *application* dimension which favours a *fusion* of the term “legal representative” with the term “personal representative.” Since the vital subject-matter following the death of a person is what is to happen to his or her estate, it must follow that the *personal representative* is the most legitimate manager of affairs at that stage, and therefore such a person ought to be in charge of all the legal instruments of decision-making, so that there is no second person described only as “legal representative”. If this principle is applied, then the two terms will come to merge in but one person, namely the *personal representative*.

7. Depositions of Counsel - Again

Starting from the position that the **Kisya** case was the decision of a single Judge of this Court, **Mr. Imanyara** proceeded to show that that case, besides, dealt with situations of substantial controversy in the evidence, so that it would have been inappropriate for an advocate to step down from the Bar and make evidentiary depositions. He submitted, quite justifiably, with respect, that there was no real dispute in the instant matter — unlike in the **Kisya** case where issues relating to special damages were in dispute. The present case was one, counsel submitted, in which the Court could even take *judicial notice* of certain factual matters.

At the last hearing, on 7th February, 2005 learned counsel, **Ms. Kabage** presented authorities on the swearing of affidavits by counsel. In **East African Foundry Works (K) Ltd v. Kenya Commercial Bank Ltd** [2002] 1 KLR 443, **Mr. Justice Ringera** had held, much like in the **Kisya** case, that an advocate should not be allowed to depose, on behalf of his client, on contentious matters in relation to which he has no personal knowledge, in a case where he is appearing as counsel. This principle is also expressed in the Court of Appeal case, **Kenya Horticultural Exporters [1977] Ltd v. Pape (t/a Osirua Estate)** [1986] KLR 705, and summarised in the head-note as follows (p.706):

“In the absence of an affidavit sworn by the respondent himself, it was doubtful whether the respondent’s advocate could by his own affidavit prove all the statements of information and belief.”

It was not clear what extra weight the new authorities conferred upon the applicant’s case. I think these authorities only reinforce the state of the law which is already quite clear, and which I have attempted to

set out earlier, in the context of other authorities.

8. Determination of the Substitution Question - Acting ex abundanti cautela

In the light of the depositions and the submissions of counsel, it appeared to me that it would not be proper, in the circumstances of this matter, to draw a sharp distinction, as had been urged for the applicants, between “legal representative” and “personal representative”; and so I directed as follows:

“Acting ex abundanti cautela, the applicant needs to take out a limited grant of Letters of Administration, just for the purpose of concluding the pending civil cause. To create an opportunity for that, I will defer my ruling, but instead give a mention date. This matter shall be listed for mention on Tuesday, 15th February, 2005 at 2.30 p.m.”

On the date of mention, *Ms. Kabage* who held brief for *Mr. Imanyara*, for the applicant, reported that the applicant had already obtained a limited grant of Letters of Administration.

This is the context in which I now consider the Chamber Summons of 9th November, 2004, and I will make the following Orders:

- 1. that, *Jennifer Nanjala Mburugu*, the widow of the plaintiff, shall henceforth be substituted as legal representative of the plaintiff for the purpose of prosecuting the suit to completion;**
- 2. that, the costs of this application shall be borne by the respondent.**

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J.B. OJWANG

JUDGE

Coram: Ojwang, J

Court clerk: Mwangi

For the Applicant: Mr. Imanyara, Ms. Kabage instructed by M/s. Gitobu Imanyara & Co. Advocates

For the Respondent: Ms. Mwaniki, instructed by the Hon. The Attorney-General