



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 83 of 1998**

**JOHN MWANGI KINYANJUI.....PLAINTIFF**

**VERSUS**

**CARTUBOX INDUSTRIES (EA) LTD.....DEFENDANT**

**RULING**

On 1<sup>st</sup> October, 2004, the applicant's application dated 2<sup>nd</sup> December, 2003 seeking to have Jane Mwhiki Njuguna made a party to this suit as a personal representative of John Mwangi Kinyanjui came up for hearing before Kimaru J. Only the applicant's advocate was present and he sought an adjournment of the hearing of the said application. He also sought leave to file a further affidavit and both applications were granted. The further affidavit sworn by the said advocate was filed on 5<sup>th</sup> October, 2004. In the further affidavit, he stated that on 28/8/03 the High Court at Nairobi in P & A 2391 of 2003 issued a Grant of Letters Of Administration *Ad Litem* to Jane Mwhiki Njuguna and Joseph Muiruri Kinyanjui for the purpose of filing suit but he stated that the stated purpose was an error because the said limited grant was required for purposes of prosecuting this suit. When he realised that error, he applied for rectification of the grant, Mr. Kimani deposed, and the rectification was done on 23<sup>rd</sup> June, 2004.

The defendant/respondent filed a notice of preliminary objection to the said further affidavit saying it was misconceived, incompetent and bad in law and urged the court to strike it out. He stated that the said affidavit, being in relation to a limited Grant of Letters of Administration *Ad Litem*, other than that arising in the application dated 2<sup>nd</sup> December, 2003 was irrelevant. He further stated that by the said affidavit, the applicant was seeking to argue a second application and that was oppressive. He said that the Limited Grant of Letters of Administration *Ad Litem* as rectified on 23<sup>rd</sup> June, 2004 was out of time under Order XXIII Rule 3(2) of the Civil Procedure Rules and added that the suit abated on 11<sup>th</sup> March 2004.

The defendant said that it had been caused embarrassment as it could not respond to the said further affidavit jointly with the substantive application and/or with the first affidavit filed with the said application.

Mr. Kimani for the applicant opposed the said preliminary objection and said that the further affidavit in question was filed pursuant to leave granted by the court on 1/10/2004. He said that there was no attempt to bring in any new application and that the further affidavit was in support of the application dated 2<sup>nd</sup> December 2003. He added that the application was filed before expiry of one year from the date of death of the deceased and so the suit had not abated. The date of issue of the Limited Grant of Letters of Administration *Ad Litem* was within one year from the date of death of the deceased. He therefore urged

the court to overrule the preliminary objection(s).

I have considered the preliminary objection and the reply thereto. The said further affidavit was filed with leave of the court. The defendant's advocate did not attend court to oppose the application for filing of the same, although the hearing date of 1/10/2004 had been fixed by consent. I am not in any way saying that the said affidavit, having been filed with leave of the court cannot be questioned after its filing, that would be absurd, but the same having been so filed, its propriety ought to be considered during the hearing of the application dated 2<sup>nd</sup> December, 2003 and not as a preliminary issue.

Secondly, Order XXIII Rule 3(2) provides that the suit abates where within one year no application is made to cause the legal representative of a deceased plaintiff to be made a party so that he can proceed with the suit. Here, the deceased died on 11<sup>th</sup> March, 2003 and by 28<sup>th</sup> August 2003 Limited Grant of Letters of Administration *Ad Litem* had been issued, though with some error therein. The same Grant was rectified on 23<sup>rd</sup> June, 2004. I therefore do not agree that the suit herein abated on 11<sup>th</sup> March, 2004.

I overrule the preliminary objection and direct that if the defendant wishes to pursue the same, he may do so during the hearing of the application dated 2<sup>nd</sup> December, 2003.

The applicant will have the costs of the overruled preliminary objection.

DATED, SIGNED AND DELIVERED at Nakuru this 1<sup>st</sup> day of November, 2005.

**D. MUSINGA**

JUDGE

**1/11/2005**

Ruling delivered in open court in the presence of Mr. Kagucia for the applicant and Mr. Musembi holding brief for Mr. Kimani for the respondent.

**D. MUSINGA**

JUDGE

**1/11/2005**