



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC PETITION NO. 3 OF 2010

PONDENI FARMERS CO-OPERATIVE SOCIETY LTD.....1ST PETITIONER

NATHAN MUTALI MMAS.....2ND PETITIONER

JAMES WAMUKOTA SIFUMA.....3RD PETITIONER

VERSUS

COMMISSIONER FOR COOPERATIVE DEVELOPMENT.....1ST RESPONDENT

FRANCIS O. KISIA (IN THE CAPACITY AS LIQUIDATORS).....2ND RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

LUKA CHIRAKA CHITAL.....4TH RESPONDENT

PATRICK BOIYO (IN HIS CAPACITY AS EX-LIQUIDATOR).....5TH RESPONDENT

RULING

1. This Ruling is in respect of the application dated 17/1/2020 in which they seek the following orders:-

(1) That this court be pleased to review and/or set aside its Ruling delivered on 30/9/2019 upon terms which the honourable court may deem fit and just to grant in the circumstances.

(2) That any other order(s) which this court may deem fit to grant in the circumstances

(3) That the costs of this application be provided for.

2. The application is brought under the provisions of **Article 50, 51 and 159** of the **Constitution of Kenya, 2010**, **Sections 1A, 3A and 63(e)** of the **Civil Procedure Act, Cap 21 Laws of Kenya** and **Order 46 Rule 1, Order 51 Rule 1** of the **Civil Procedure Rules, 2010**. The applicability of the **Civil Procedure Act** and **Rules** to the petition will be dealt with later in this ruling.

3. The application is supported by the grounds stated on the face of the Notice of Motion and the supporting affidavit of Tom Wanyonyi sworn on 17/1/2020. The grounds in support of the application are as follows:

(1) That the deceased Nathan Mutali Mmas, the 2nd Petitioner had no personal interest in the affairs of the 1st Petitioner, save that he was only a Chairman in compliance with the law.

(2) That the 3rd Petitioner, James Wamukota Sifuna was in advertently omitted from the original notice of motion.

(3) That by virtue of the operations of the Co-operative Societies Act, the management of the Co- operative has to have the Chairman, Secretary and Treasurer.

(4) That the deceased who is the Second Petitioner and in the above Petition were instituting the Petition against the Respondents

in his capacity, but rather they are as officials litigating of the Society pursuant to mandate in their personal capacities.

(5) That the management of the society in their sitting of 8/12/2018, substituted the 2nd petitioner with Benjamin J.S.S Shamala, as per the sworn affidavit of the Vice Chairman, Tom Wanyonyi.

(6) That the pending petition before the court is not in any way related to the appointment of the office bearer.

(7) That the Notice of Motion for substitution of the 2nd Petitioner does not relate to his personal, rather the Notice of Motion was for purpose of complying with the provisions of Order 24 the Civil Procedure Rules, 2010 on Constitution of party upon death during the pendency of a suit.

(8) That the 2nd Petitioner was incorporated in the proceedings purely as an official of the 1st Petitioner, as provided for in the Co-operatives Societies Act.

(9) That through due diligence , the 1st Petitioner's Management Committee's minutes of 25/5/2019 wherein a resolution was passed to replace and/ or substitute the 2nd petitioner have been found.

(10) That the Notice of Motion for substitution does not relate to the personal estate of the 2nd Petitioner.

(11) That the minutes of 25/5/2019 appointed one Benjamin J.S.S. Shamala Imbogo as the Interim Chairman of the society in place of the late chairman Nathan Mutali Mmas.

4. The application is unopposed.

Determination

5. From the application, I find that the issues for determination are:-

(i) Whether the applicant has met the threshold for review of the court's Ruling dated 30/9/2019.

(ii) Who is entitled to the costs of this application?

6. **Order 45 (1) of the Civil Procedure Rules** sets out the requirements for an application for review as follows:

“Any person considering himself aggrieved

(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed, or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgment to the court which passed the decree or made the order without unreasonable delay”.

7. In summary, **Order 45** of the **Civil Procedure Rules, 2010** is very explicit that a court can only review its orders if the following grounds exist:-

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

8. In the instant application, it has been argued that the 2nd petitioner, who is now deceased had no personal interest in the affairs of the 1st petitioner and that he was only a chairman in compliance with the law; that according to the **Cooperative Societies Act**, a society has to have a chairman; that the deceased was not suing in his personal capacity, but as an official; that the motion for substitution was merely for compliance with **Order 24** of the **Civil Procedure Rules**; that after the exercise of due diligence the minutes of the management committee resolving that the deceased 2nd petitioner be substituted with one **Benjamin J.S.S. Shamala** have now been found and that the motion does not relate to the personal estate of the deceased.

9. I have given consideration to the above reasons given by the applicant for seeking an order of review.

10. The background to the instant application is that one of the petitioners, **Nathan Mutali Mmas** died. An application was made to substitute him with one **Benjamin J.S.S. Shamala Imbogo**. That application was dismissed on **30/9/2019**. It is that order of dismissal that the instant application herein seeks to have reviewed. The dismissal order in the first application was on the basis that:

- (a) None of the prayers in the petition related to the person of the deceased petitioner;*
- (b) None of the prayers address any specific interest unique or peculiar to the deceased;*
- (c) The deceased was only a member of the 1st petitioner who had been enjoined in the petition under unclear circumstances;*
- (d) No resolution of the 1st petitioner's management committee authorizing the proposed substitution was attached to the application;*
- (e) The 1st petitioner was still in existence; and*
- (f) In the circumstances there was no need to have him substituted.*

11. It is clear from grounds **(a)**, **(b)** and **(c)** herein above that the issue of capacity of the deceased, whether as an official or as an individual natural person with personal interest in the petition, and whether a grant of letters of administration was needed to enable the substitution were issues that were considered by this court in its ruling and cannot form the ground of review in the instant application as they were exhaustively addressed in the ruling dated **30/9/2019**. So, the present argument that the deceased was a chairman and did not have personal interest in the subject matter and that substitution can be effected without a Grant issued under **Cap 160** and on the basis of a resolution by the society is of no consequence.

12. To literally demonstrate this I will cite several paragraphs in the impugned ruling.

13. In **paragraph 10 and 11**, of that ruling this court observed as follows:

10. "What concerns this court is the description of the 2nd petitioner. In paragraph 2 of the petition dated 23/11/2010 that paragraph reads as follows:

"That the 2nd and 3rd petitioners are shareholders contributories and managers of the 1st petitioner at all material times."

11. "Of interest and relevance to the issue at hand is also paragraph 4 of that petition which reads as follows:

"That the objects of the 1st petitioner were the purchaser (sic) of the agricultural land and settlement of its members who were substantial squatters in Turbo estate and whose resident (sic) had been taken by Pan Africa Paper Mills Webuye."

14. Further, in **paragraph 13** of the same ruling it was stated as follows:-

13. "Lastly, I must also examine whether any of the prayers in the petition relate to the person of the deceased 2nd petitioner. None of those prayers address any specific interest unique or peculiar to the deceased and the question arises as to why there is need to have him substituted while the 1st petitioner is still in existence. I find no proper explanation for the expressed need to substitute him".

15. Further down in that ruling at **paragraph 16**, this court had this to say:-

16. "In the same breath the applicants aver that the "present cause of action is not hinged on the survival or otherwise of the deceased." Without citing any specific provisions of law, they further state that according to the governing law relating to Co-operative Societies in Kenya he should be replaced by the 2nd applicant and further, that a resolution was made by the 1st petitioner's management committee on 24/5/2019 to the effect that the 2nd petitioner do replace the deceased. I have examined the record and found that no such resolution is attached to the application on the record. That leaves the court with only the provisions of the Law of Succession Act Cap 160 to consider".

16. Finally, **paragraphs 18, 19** and **20** are also relevant. They read as follows:-

18. "Two crucial questions arise in respect of the instant application.

19. First, if the cause of action is not hinged on the survival or otherwise of the deceased, was there any need to enjoin him in the first place? The answer is clearly "No." Is there then any need for the substitution application while the 1st petitioner still exists? In my view no such need would arise in the circumstances.

20. Secondly, if it were to be assumed, which is not the case that the deceased had a unique and peculiar claim which only he could pursue as a person, does any person substituting him in the petition need to bear letters of administration issued under the Law of the Succession Act? In my view the answer is "Yes." However no grant of letters has been exhibited in the application".

17. In the light of the contents of the paragraphs replicated herein above, it is clear to see that this court conclusively dealt with those issues mentioned in **paragraph 10** of this ruling in the ruling dated **30/9/2019**.

18. The applicant's further argument is that the deceased was a chairman, and that his proposed substitute has been appointed as interim chairman and that the **Cooperative Societies Act** requires societies to have chairmen. However, no provision of the law has been cited before this court as mandatorily requiring chairmen of Societies to be made co-plaintiffs or co-petitioners or even co-defendants alongside the society in every litigation and that ground, also not being new and compelling or important matter or evidence, or matter that could not have been produced at the time when the application was being heard, can not enable a review.

19. A further argument has been raised that the application is simply meant for compliance with **Order 24** of the **Civil Procedure Rules**. **Order 24 rules 2 and 3** provide:-

“Procedure where one of several plaintiffs or defendants dies and right to sue survives [Order 24, Rule 2)

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3.]

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 subrule (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.”

20. No provision has been cited to demonstrate that they apply to the petitioners despite the existence of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure) Rules 2013** otherwise known as the *“Mutunga Rules.”*

21. However, it is noteworthy that in an earlier pre-2010 Constitution decision, **Meme -vs- Republic [2004] I EA 124**, the High Court held that at a very basic level the court is empowered to draw from the Civil Procedure Rules in its exercise of power under the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules** and by virtue of **Order 1 rule 10 (2)** of the **Civil Procedure Rules**. **Order 1 rule 10(2)** ordinarily grants the court jurisdiction to join any party to a suit at any stage of the proceedings as long as such joinder would assist the court to effectually and completely adjudicate on all the questions in the litigation before it. It is therefore in order for the applicant to rely on the **Civil Procedure Rules** where the **Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the individual) Practice and Procedure Rules** are silent on the issue of substitution.

22. Nevertheless this court finds that the provisions of **Order 24 rules 2 and 3** of the **Civil Procedure Rules** would not aid the applicant at all since they do not render it mandatory to substitute each and every plaintiff that meets their demise during pendency of the suit; they only apply in deserving cases. Besides this argument was not raised in the application dated **19/2/2018** and it is not tenable in an application for review to raise such argument based on provisions of the law that were still in place and were not addressed at the time of hearing of the first application.

23. Further, in this court's view, the applicant may be relying on **Order 24 Rule 3(1)**. That provision affects a suit where a plaintiff dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs. That is not urged to be the case in this petition. A perusal of the petition reveals that the main grievance therein was the cancellation of the 1st petitioner's certificate of registration, appointment of a receiver and an injunction which was sought to restrain the respondents from interfering with the 1st petitioner's suit land. In this court's view, the cause of action survives or continues to the surviving petitioners and making the legal representative of the deceased petitioner is not necessary in the circumstances of this instant petition.

24. Finally, it has been argued that after exercise of due diligence, the management committee minutes of **25th may 2019** resolving that the deceased 2nd petitioner be substituted with one **Benjamin J.S.S. Shamala Imbogo** have now been found. However, in this court's view the central dispute as to whether the substitution should be allowed or not was not predicated on whether there is any form of authorization thereof by the 1st petitioner's management committee or it's any other governance organ. Besides, the said minutes were not mentioned in the application dated **19/12/2018**. It is interesting to note that in supporting affidavit attached to that application, the proposed substitute, **Benjamin J.S.S. Shamala Imbogo** deponed that before his death Nathan had directed that Benjamin do replace him in the capacity of acting chairman, hence the application. It is not clear at what point the applicant found it necessary to have minutes appointing Benjamin the interim chairman. However due to the reason pointed out before in this paragraph, the purported discovery of those minutes is of no consequence to the instant review application as it does not fall under any of the grounds provided for under **Order 45 Rule 1**.

25. This court must also consider if there was inordinate delay in lodging the review application. Whereas the court delivered the impugned ruling on **30th September 2019**, the instant application for review was filed on **12/2/2020** after a period of almost four and a half months. That in this court's view is inordinate delay which the applicant has not explained in his application.

26. In the end, it is my considered opinion that the applicant has not satisfied the requirements for the grant of the orders of review and that the application dated 17/1/2020 has no merit and the same is therefore dismissed.

27. There shall be no orders as to costs. In addition this court has not found any order striking out the 3rd petitioner from the record and his name has been reinstated in the title herein above.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 4th day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.