



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELCC No. 94 OF 2019

AGNES ANDENYI IMBUCHI 1ST PLAINTIFF

KENNEDY NANG'AME 2ND PLAINTIFF

VERSUS

Sued as administrators of the estate of RICHARD M. IMBUCHI

ROSE IKAMBI AMBULA 1ST DEFENDANT

NANCY WITAMBULA AMBULA 2ND DEFENDANT

RULING

1. By Notice of Motion dated 4th March 2021, the applicant Alexander Agengo seeks the following orders:

i) The deceased Plaintiff Agnes Andanyi Imbuchi be and is hereby substituted by Alexander Agengo

ii) Consequential leave be granted to amend the Originating Summons in accordance with the draft amended Originating Summons herein.

iii) That such leave being granted the draft amended Originating Summons filed herewith be deemed properly filed and served subject to payment of requisite court fees.

iv) That the Defendant be at liberty to file reply to the amended Originating Summons.

v) Costs be in the cause.

2. The application is supported by an affidavit sworn by Alexander Agengo, the applicant. He deposed that the first plaintiff who was his mother passed away on 31st October 2020 and that he is the administrator of her estate having obtained grant of letters of administration. He therefore urged the court to allow the application.

3. The defendants opposed the application through a replying affidavit sworn by the second defendant. She deposed that that the applicant lacks *locus standi* to be made a party to this suit in place of the deceased because the limited grant of letters of administration *ad litem* issued to him is limited to the purpose only of filing suit. That this suit a pending suit to which the grant makes no reference to and that it is more than one year since the demise of the deceased and therefore the suit has abated.

4. Parties were ordered to canvass the application through written submissions. The applicant did not file any submissions.

5. The defendants submitted that the application is fatally defective because it is unclear as to who is filing the application because the plaintiff named herein is dead and thus cannot file a suit and that the second plaintiff is not referenced as a party to the application. That the applicant cannot seek general orders for prosecuting a matter where he has a limited grant for a particular purpose of filing suit. The defendants relied on **Lydia Ntembi Kairanya & Another vs. Attorney General [2009] eKLR Civil Case No. 618 of 1997** and further argued that the application should be dismissed since the suit has abated.

6. I have considered the application, the affidavits and the submissions filed. From the material on record, there is no dispute that that the

first plaintiff passed away on 31st October 2020 and that the applicant obtained limited grant of letters of administration *ad litem* in respect of her estate.

7. **Order 24 Rules 1 to 3** of the **Civil Procedure Rules** provide that the death of a plaintiff shall not cause the suit to abate if the cause of action survives or continues and that where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff the court, on an application made, shall cause the legal representative of the deceased plaintiff to be made a party who shall then proceed with the suit. The substitution must be done within a period of one year from the death.

8. Further, term “legal representative” is defined in section 2 of the **Civil Procedure Act** as meaning:

a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.

9. There are authorities to the effect that legal representative means executor or administrator of a deceased person duly appointed under the **Law of Succession Act**, Cap 160. See, for example, **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor [1993] KLR 230**.

10. Thus, all that is required is to be the executor or administrator of the deceased’s estate. The applicant herein holds letters of administration *ad litem* in respect of the deceased’s estate which were issued to him on 18th February 2021 in **Butali SPMC Probate and Administration Cause No. 28 of 2021**.

11. The defendants have opposed the application on the ground that the letters of administration only permit filing a suit. Suffice it to state that if the applicant can file a suit on the basis of the grant that he holds, he can also continue a suit which had been commenced by the deceased. The present application is only dealing with the issue of substitution and not the validity of the grant. The defendants have not demonstrated that they will suffer any prejudice if the deceased is substituted. Further, **Article 159 (2) (d)** of the **Constitution** requires the court to deal with substantive justice and not overly focus procedural technicalities.

12. Regarding the argument by the defendants that the suit has abated, I note that the deceased passed away on 31st October 2020 while the present application was filed on 2nd July 2021, before the one-year period stipulated under **Order 24 Rule 3 (2)** had lapsed. Thus, the suit had not abated by the time the application was filed.

13. In the result, I find merit in Notice of Motion dated 4th March 2021. I make the following orders:

- a) **The deceased plaintiff Agnes Andenyi Imbuchi be and is hereby substituted by Alexander Agengo.**
- b) **Leave be and is hereby granted to amend the Originating Summons in accordance with the draft amended Originating Summons that was filed with the application.**
- c) **The amended Originating Summons be filed and served within 14 (fourteen) days from the date of delivery of this ruling.**
- d) **The defendant to file and serve, if need be, a reply to the amended Originating Summons within 14 (fourteen) days of service.**
- e) **Costs be in the cause.**

Dated, signed and delivered at Kakamega this 8th day of March 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiffs

No appearance for the defendants

Court Assistant: E. Juma