REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

E.L.C CASE NO. 2 OF 2018

ELIJAH CHEPKWONY CHIRCHIR.....PLAINTIFF/APPLICANT

VERSUS

JOEL KIPNGENO ROP.....DEFENDANT/RESPONDENT

RULING

Introduction

1. On 14th March 2019, this honourable court delivered a ruling in which it struck out the plaintiff's suit for lack of *locus standi*. This was pursuant to a Preliminary objection raised by the defendant in which he raised the ground that the Plaintiff had no capacity to act for the estate of Kipchirchir Arap Maina –Deceased as he had not obtained the necessary Limited Grant as the grant that the Plaintiff had been used to file suit was limited to the purposes of "securing and preserving the assets of the deceased until further representation were granted by the court" In the said ruling the court made a finding that the said grant could not be used for purposes of filing suit as the correct grant would be one issued under section 54 of the Law of Succession Act as read with rule 14 of the 5th Schedule to the Law of Succession Act.

2. Following the said ruling the Plaintiff brought an application dated 26th March 2019 under section 80 of the Civil Procedure Act and Order 45 Rules 1,2, and 3 of the Civil Procedure Rules for review of the court's order dated 14th March 2019 which is the subject of this ruling. The main ground on which the application is based is that the Limited Grant that was issued to the Plaintiff in Kericho HC Succession Cause No. 54 of 2017 (sic) erroneously indicated that it was limited for purposes of "securing and protecting the assets of the deceased." The application is anchored on the plaintiff's supporting affidavit sworn on the 26th March 2019 in which he depones that the Limited Grant Ad Litem which was issued by the court had a clerical mistake occasioned by the registry staff which misled the court to believe it was for purposes other than for filing suit as that is what he had applied for. It is therefore his contention that there is sufficient cause to review the court's ruling/order.

3. The application is strenuously resisted by the defendant through his Replying affidavit sworn on the 26th April 2019. It is the defendant's contention that the application does not meet the threshold for review as envisaged by order 45 Rules 1.2, and 3 of the Civil Procedure Rules. It is his further contention that after his suit was struck out, the plaintiff's only recourse is to either appeal or file a fresh suit. Finally, he has raised the point that the plaintiff has not annexed a copy of the order to the application as required by the rules. He blames the plaintiff for being casual and indolent in his pursuit of justice.

Issue for determination

4. Having considered the application, rival affidavits and submissions, the singular issue that this court is called upon to determine is if the Plaintiff is entitled to the order of review of the order issued on 14th March 2019.

Analysis and determination

5. The conditions for review are set out in Order 45 (1) of the Civil Procedure Rules as follows:

> "*Any person considering himself aggrieved*
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> *a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or*
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> *b) by a decree or order from which no appeal is hereby allowed*
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> *and who from the discovery of a 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".

6. The Plaintiff relies on the ground that there is sufficient cause for the court to review its orders. In his submissions, counsel for the Plaintiff has submitted that the Grant that was issued to the Plaintiff has the heading "Limited Grant Ad Litem but the body of the Grant erroneously states that it is limited for purposes of "securing and protecting the assets of the deceased" instead of stating that it is for purposes of filing suit. He argues that the mistake was made by the High Court Registry staff and that it was the court's duty to verify the certificate keenly. Counsel heaps blame on the court for his failure to extract the order and claims to have written to court for a copy of the order without annexing any such letter. Suffice is to say that counsel ought to take responsibility for his mistakes as it was his duty to ensure that the grant he used to institute his client's case was the correct one since he is the one who applied for it and knew what was appropriate for his client's case.

7. Counsel for the Defendant has submitted that the issue of locus standi goes to the root of any suit and once a party obtains the locus, he cannot revive a suit that was struck out for lack of capacity. See the case of **Monica Kimani Munyi (suing as personal representative of Albert Munyi Kabarathi) v Annette Wanjira Nthiga & 2 Others [2018] eKLR.** Counsel argues that if the Plaintiff is of the view that the court erred in its appreciation of the Grant that was exhibited by the plaintiff then he ought to file an appeal rather than an application for review. He has cited the case of **National Bank of Kenya Limited v Ndungu Njau Civil Appeal No 211 of 1996** for the proposition that an erroneous conclusion of law may be a good ground for appeal but not for review.

8. In the case of **M'Rithara M' Ikiome (Deceased) v H. Young Company Ltd & Another [2016] eKLR** the court faced with a situation where the applicant failed to attach a copy of the death certificate to show that the plaintiff had died, the court rejected the excuse that the documents had been filed by an inexperienced clerk and observed that:

"sometimes parties should be allowed to suffer the consequences of their advocates' mistakes and be left to seek remedies available under the law, especially the Advocates Act. In my opinion the omission to annex relevant documents to an application cannot be said to be discovery of a new and important matter or evidence which after exercise of due diligence could not have been within the applicant's knowledge."

9. In the instant case, I have taken the trouble to peruse the file for HC Ad Litem No. 6 of 2017 to satisfy myself on what the Plaintiff applied for and I have confirmed that in his application for Limited Grant, the applicant states that he needs the grant for purposes of filing a suit. In the circumstances, even though it was incumbent upon the plaintiff's counsel to place all the relevant material before this court I will reluctantly accept the Plaintiff's explanation that there was a mistake by the High Court Registry staff.

10. On the failure to extract the order sought to be reviewed, it is now settled law that a party seeking to review has to annex a copy of the order sought to be reviewed. This is clear from a plain reading of section 80 of the Civil Procedure Act. See the case of **Titus Mulandi Kitonga v B.O (A minor suing through his mother and next friend SnO [2016] eKLR** .

11. Furthermore, in the case of **Thomas Owen Ondieki v National Bank of Kenya Ltd [2011]eKLR Azangalala J** stated as follows:

"The application also suffers from a fatal omission. Annexed to the affidavit in support is a copy of a ruling of Gacheche J on the Respondent's application for stay of execution, a copy of a cheque for Kshs. 119,120 in the name of the parties advocates and a copy of a Notice of Appeal lodged by M/s Mainye & Co Advocates. However, the applicant seeks a review of the judgment delivered on 24th May 2004. That judgment is not annexed, nor is an extracted decree exhibited. The omission to exhibit the extracted order clearly offends the provisions of section 80 of the Civil Procedure Act."

12. The views of Pickering CJ have been followed in subsequent decisions both in the High Court and Court of Appeal. Nyarangi J as he then was in the case of **Bernard Githinji v Kirate Farmers Co-operative Ltd [HCCC No. 32 of 1974 (UR)**:

"The Applicant should have applied for a decree to be drawn up and issued. At this stage there is nothing upon which the court's judgment can be reviewed"

13. In his submissions counsel for the Applicant has once again blamed his failure to extract the order on the court by making spurious allegations that the court file was not released to the registry for almost two weeks after delivery of the ruling. He has gone as far as alleging that he wrote letters to court which were not responded to. The said letters are also not exhibited in the applicant's affidavit. In view of these submissions which I dare say are quite unfounded, he has submitted that the court should not base its decision on the applicant's failure to attach a copy of the order. He has dismissed this requirement as a non-issue and a technicality which does not go to the root of the matter and which ought to be cured by Article 159 of the Constitution.

14. With greatest respect to counsel for the applicant, he ought not to blame the registry staff and cast aspersions on the conduct of the court for his own lack of diligence. Failure to annex a copy of the order which the Applicant seeks to review is a statutory requirement and not a procedural technicality which does not go to the root of the matter.

15. Be that as it may, I have considered the authorities cited by Counsel for the Defendant against peculiar circumstances of this case where the chain of events can be traced back to the mistake made by the High Court Registry. It would not serve that interests of justice to lock out the applicant on account of this. The oxygen principles in Sections 1A and 1B of the Civil Procedure Act provide that the overriding objective of the Civil Procedure Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Furthermore, I am guided by the dictum of Apaloo JA (as he then was) in the case of **Philip Keipto Chemwolo & Another v Augustine Kibende [1986] eKLR** when he stated that:

> *"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on the merits. I think the broad equity approach is that unless there is fraud or an intention to overreach, there is no error that cannot be put right by payment of costs. The court, as it often said exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline"*

16. In view of the foregoing, I am inclined to exercise my discretion in favour of the applicant. However, I am alive to the fact that justice cuts both ways and the Respondent must be compensated for the inconvenience occasioned to him. I therefore grant the application and set aside the order striking out the Plaint's suit. The suit is hereby reinstated. The Plaintiff shall pay the Defendant's thrown away costs of Kshs. 30,000. The Defendant shall also have the costs of this application.

Dated, signed and delivered at Kericho this 1st day of July, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. W.K.Ngeno for the Plaintiff/Applicant

2. Mr. Mwita for the Defendant

3. Court Assistant – Rotich