



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L APPEAL NO. 4 OF 2015

SIRO LEO.....APPELLANT/ RESPONDENT

VERSUS

JULIUS AMBAGA ASAVA & IRENE EDESA ASAVA (Suing as administrators of the estate of

JACKTONASAVA AKIBAYA.....RESPONDENTS/ APPLICANTS)

RULING

[NOTICE OF MOTION DATED 18TH MARCH, 2021]

1. The Applicants approached this court by way of a notice of motion dated 18th March, 2021 under **Order 45 Rules 1 & 2, Order 51 Rule 1 of the Civil Procedure Rules, sections 1A, 1B, 3A, 63 (e) and 80 of the Civil Procedure Act**, seeking for orders that: -

- (a) *“Spent.*
- (b) *The firm of Mukabane & Kagunza Advocates be granted leave to come on record after Judgment.*
- (c) *This Honourable Court be pleased to review and set aside judgment delivered on 26.07.2018 and all consequential orders thereof and issue further directions in this matter pending the hearing and determination of this application.*
- (d) *That costs of the application be provided for.”*

2. The application is based on the grounds that this court had in its judgment of 26.07.2018 quashed the lower court’s judgment in **Eldoret CMCC No. 6 of 2011**, and directed that the matter goes back for retrial *denovo*, and that **Mr. Andrew Kotut** be added as a party. Unfortunately, the said Mr. Kotut passed on, and his family has refused to substitute him claiming he was the one who was better placed to shed light on the dispute. They therefore seek directions in the matter since the suit has become frustrated by their inability to comply with the court order directing the addition of Mr. Kotut as a party to the suit. The application is supported by the affidavit sworn by **Julius Amboga Asava**, on the 18th March, 2021, restating the facts in the grounds. That the order that Andrew Kotut be joined as a party in the lower court case cannot be complied with as he has since passed on prompting this application. That the discovery of the death of the said Andrew Kotut, is new and important evidence that was not within the knowledge of the Applicants, and the judgement should be reviewed.

3. That in response Siro Leo, the Respondent, swore the replying affidavit on the 6th May, 2021 in which he urges the court not to grant the orders sought in the application. He depones that Mr. Andrew Kotut, who was the registered owner of the suit land in dispute, had already been joined in the lower court case. That the court order has already been complied with as the said Kotut had filed his defence. That the proper course of action is for the Applicants to take the avenue in succession proceedings to compel someone from the family of the deceased, by way of a citation, to take out letters of administration.

4. That following the directions issued on the 22nd April, 2021, the learned counsel for the Applicants and Respondent filed their written submissions both dated the 10th May, 2021. The following are the issues for the court’s directions;

- (a) *Whether the firm of Mukabane & Kagunza Advocates should be granted leave to come on record after judgment.*
- (b) *Whether the death of Andrew Kotut is a reasonable basis for reviewing of the judgement of the 26th July, 2018.*

(c) *Who should bear costs?*

5. That I have carefully considered the grounds on the application, affidavit evidence, written submissions by the learned counsel and come to the following conclusions;

(a) That on the issue of whether the firm of Mukabane & Kagunza Advocates should be granted leave to come on record after judgment, the court takes judicial notice that there appears to be no objection raised on that issue by the Respondent. That the question of an advocate coming on record after judgment is regulated by **Order 9 Rule 9 of the Civil Procedure Act**, which requires that either a consent be filed between the advocate coming on record and the one being replaced or by leave of the Court. That Rule 10 of the said Order allows that such an application for counsel to come on record after judgement to contain other prayers, as in the instant notice of motion. That there being no objection to this prayer, the same is hereby allowed and leave is granted to the firm of M/s Mukabane & Kagunza Advocates to come on record for the Applicants/Respondents after judgment.

(b) That contrary to the Applicants' contention in ground (c), paragraphs 8 and 9 of the supporting affidavit, that seemed to suggest that Andrew Kotut died before being added as a party in the lower court case and hence the need to review the judgement, the attachments to the Respondent's replying affidavit confirms that the said Andrew is the 2nd defendant in **Eldoret CMCC No. 6 of 2011**. The attachments further show that Andrew Kotut filed a statement of defence in that case dated the 26th October, 2018. That as the Applicants have not disputed the Respondent's position that the said Andrew Kotut had been joined as the 2nd defendant in the lower court case by the time of his death on the 23rd November 2019, then the court finds that the court order on his joinder in the judgement of 26th July, 2018 has already been fully complied with. That further, Andrew Kotut died more than one year after the date of the said judgement and the fact of his death cannot qualify to be a **"new and important matter"** that **"should lead the court to a different decision on the Appellants' appeal"**.

(c) That the issue arising out of the death of Andrew Kotut when the lower court retrial was pending is the question on how his defence will be prosecuted. That the substitution of parties who have passed on when a suit is pending, like in the suit in the lower court, is as generally guided by **Order 24 of the Civil Procedure Rules**. The Applicants' appear to have come to this court for directions on how the lower court case will proceed now that the 2nd defendant has passed on. The Respondent is of the view that the Applicants ought to have moved the appropriate succession court to compel someone to take letters of administration in respect of the deceased, by filing a citation. The Applicants appear to be aware of this fact when they averred that their efforts to convince the family of the deceased to cooperate has been in vain. That the court appreciates that the **Law of Succession Act Chapter 160 of Laws of Kenya** provides the various forms of limited grants, one of which, being letters of administration *ad litem*, is suitable in the proceedings pending before the lower court. That in the case of **re the estate of Helena Wangechi Njoroge (Deceased) (2015) eKLR**, it was stated as follows in respect of letters of administration '*ad litem*';

"It was limited to the purpose of filing suit to preserve the three assets of the estate. It is what is called a grant of letters of administration ad litem. The suit envisaged to be filed on the strength of a grant ad litem is not a probate or succession case, or an interlocutory application within a probate or succession cause, but rather a civil suit. Indeed, one need not obtain a grant of any sort to enable him file a succession cause. A grant of representation is only necessary where one intends to file a civil suit to protect or defence the estate against third parties."

That in this case, the orders the Applicants seeks are to the effect that directions be issued as to how the suit will progress, more so, how the defence of Mr. Andrew Kotut will be prosecuted. This is akin to seeking for a limited grant under **section 54 of the Law of Succession Act**, as read with paragraph 14 of the 5th Schedule therein.

(d) The Applicants have complained of the refusal of Andrew Kotut's family members to cooperate. However, the court takes note of the decision the case of **In re Estate of Anthony George Kimanathi (Deceased [2019] eKLR**, wherein the court had this to say: -

"9. The law on citations is set out in part VI of the Probate and Administration Rules (P&A Rules) where three types of citations are set out. The first citation is to accept or refuse a grant, while the second is to take probate on a will. The third one is intestacy and in this third category a person who is entitled to administer the estate of the deceased may be cited by the court to accept or refuse a grant of letters of administration."

That the proper procedure the Applicants needed to pursue was to move the court under the mechanisms provided under the **Law of Succession Act**, by seeking that a citation issues against the deceased's family members to take out the limited grant of letters of administration *ad litem*. That not having been done, the court finds the invitation through the current application to issue its own directions to be premature as this is not a succession court, but an Environment and Land Court.

(e) That consequently, prayer (3) for review and setting aside of the judgement delivered on the 26th July, 2018 has no merit. The Applicants having failed in this prayer should pay the Respondent half the costs of the application.

6. That flowing from the foregoing the court finds and orders as follows;

(a) That the Applicants partially succeeds in their application dated the 18th March, 2021 limited to allowing prayer (2) only. That accordingly, the firm of M/s Mukabane & Kagunza Advocates is granted leave to come on record for the Applicants/Respondents after judgement.

(b) That prayer (3) of reviewing and setting aside the judgement of the 26th July, 2018 has no merit and is rejected.

(c) The Applicants/Respondents to pay the Appellant half the costs of the application.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 27TH DAY OF OCTOBER, 2021.

S. M. KIBUNJA

ENVIRONMENT AND LAND COURT JUDGE

IN THE PRESENCE OF:

APPLICANTS/RESPONDENTS:

ABSENT RESPONDENT/APPELLANT:

ABSENT COUNSEL:

MR. MOMANYI FOR APPELLANT

MR. KAGUNZA FOR RESPONDENTS

CHRISTINE: COURT ASSISTANT