



REPUBLIC OF KENYA



KENYA LAW
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**Machika v Okal & 3 others (Civil Appeal E044 of 2021)
[2023] KEHC 18301 (KLR) (2 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 18301 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E044 OF 2021
WM MUSYOKA, J
JUNE 2, 2023**

BETWEEN

PHANICE KAYETSA MACHIKA APPELLANT

AND

NICHOLAS ORIATO OKAL 1ST RESPONDENT

CHARLES OMONDI OKAL 2ND RESPONDENT

JOSEPHINE ADHIAMBO OKAL 3RD RESPONDENT

COLLINS OGUTU OKAL 4TH RESPONDENT

*(Being an appeal from the ruling of Hon. JR__ Ndururi__, Principal Magistrate,
PM, delivered on 2nd September 2021 in Kakamega SPMCCC No. 42 of 2021)*

JUDGMENT

1. The suit before the primary court was by the appellant against the respondents, for a permanent injunction to bar them from interfering with the running of a posho mill business, and general damages for loss occasioned by the closure of the business. Upon being served, the respondents raised a preliminary objection, on grounds that the appellant had initiated the suit without a grant of representation. The preliminary objection was canvassed by way of written submissions, and in the end the court held that the property, the subject of the dispute, belonged to a dead person, and it had no jurisdiction to handle it in a civil suit, rather than in a succession cause.
2. The appellant was aggrieved, hence the appeal. The grounds of appeal are that the proceedings were purely civil in nature, and there was no element of succession; the trial court was wrong on jurisdiction; and that the appellant had a limited grant.



3. Directions were taken on February 23, 2022, for canvassing of the appeal by way of written submissions. I have seen the written submissions by the appellant, which I have read and noted the arguments made.
4. The dispute herein relates to the running of a posho mill. The deceased owned it, and used to operate it, with assistance from the appellant. When he died, the appellant sought to register a business name, to enable her continue the business. The respondents are children of the deceased, their view was that the posho mill, and the grounds it stood on were estate assets, and what the appellant was doing was to intermeddle with the estate. The trial court agreed with the respondents.
5. The issue for determination is around the survivors of the deceased continuing to run a business that the deceased had been running, and whether there is need to obtain a grant of representation to enable them to do so.
6. Business is carried out in various forms, as a sole proprietorship, a partnership or a limited liability company. As a sole proprietorship, the assets relating to the business, such as the premises and any plant or equipment, belong to the sole proprietor. Survivors of the deceased cannot access such assets, unless they obtain representation to the estate of the sole proprietor, so that the assets are vested in them by dint of section 79 of the *Law of Succession Act*, Cap 160, Laws of Kenya. If the business runs as a partnership, the assets would be owned by the partners, proportionate to the shares held by each partner in the partnership. Upon the demise of a partner, the share due to him vests in the personal representative, who would then be entitled to call for the deceased's share. Of course, upon the death of a partner, the partnership ought to be dissolved, and accounts taken of the shares, and whatever is due to the dead partner becomes payable to his personal representative. If the business runs under a limited liability company, the estate of the dead shareholder would only be entitled to the value of his shares in the company, but not to the business or assets of the company.
7. The facts in the instant case point to the deceased running a sole proprietorship, and that explains why the appellant sought to register a business name, under her own name, to enable her continue running the business that the deceased had been running. The land on which the business operated from belonged to the deceased. The plant or equipment or machinery used for the purpose of the business, that is to say the posho mill, also belonged to the deceased. The appellant only assisted him. She was not in joint business with him. Consequently, the land and the equipment could only vest in her as personal representative of the deceased. Even if she were to allege that there was a partnership, arising from working at the mill with the deceased, the fact of his death meant that the partnership ended, and ought to have been dissolved formally, by way of taking accounts, to determine what the estate was entitled to, and what the appellant was entitled to as a partner, if at all.
8. The bottom-line is that the land and equipment belonged to the deceased, and no person could access them, upon his demise, unless they first obtained representation to his estate. That way the land and equipment would be vested in them, under section 79 of the *Law of Succession Act*, and they would then have legal authority to handle it without risking running afoul of section 45 of the *Law of Succession Act*.
9. Was the appellant the personal representative of the deceased? A person does not become a personal representative of another by mere fact of their relationship, but only upon a grant of representation being made to them. A surviving spouse or surviving child does not automatically become a personal representative by the mere fact of being a surviving spouse or surviving child of the deceased. See *In re Estate of Francis Kimani Muchiri (Deceased)* [2018] eKLR (Musyoka, J). Being a personal representative has something to do with the court granting you papers to represent the deceased.



10. Does the appellant have such papers? The appellant does hold a grant of representation, taking the form of a limited grant *ad litem*, issued under section 54 and the 5th schedule, on February 5, 2021, in Kakamega CMC *ad litem* Cause No. E77 of 2021, limited to the purpose of filing suit. A limited grant *ad litem* is limited to the filing and prosecution of certain suits. It does not vest the estate in the grantee. It cannot be used in the place of a substantive grant. See [Gabriel Macharia Njoroge v Absa Bank Kenya PLC](#) [2021] eKLR (Gacheru, J). It merely empowers the grantee to either sue on behalf of the deceased or to defend a suit on behalf of the deceased. So, in this case, the fact that the limited grant *ad litem* was made to the appellant, did not constitute her the administrator of his estate, and the assets of the estate did not vest in her. Indeed, the appellant was not acting for the benefit of the estate, but for her own benefit, for she had changed the name of the business that the deceased operated, to a business name registered under her own name. The business she was running on the property of the deceased, was, therefore, not a business of the estate, which could be protected in the manner she proposed.
11. The tussle between the appellant and the respondents is over the assets that the deceased left behind. Both are entitled to the same as survivors of the deceased, according to Part V of the [Law of Succession Act](#), and in particular section 35. A contest over who should administer the estate, or take charge of assets left behind by a dead person, or who is entitled to succeed the deceased with respect to such assets, are matters for the probate court, in succession proceedings, properly initiated under the [Law of Succession Act](#); and not the civil court, in civil proceedings, initiated under the [Civil Procedure Act](#), Cap 21, Laws of Kenya. These are the jurisdiction issues that the trial court was talking about.
12. Personal representatives have no power to carry on the business of the deceased, whatever form it may take. With respect to a partnership, the personal representative can only call for share of the deceased in the partnership. For a limited liability company, the personal representative can only call for the value of the shares. See [Pauline Muthoni Kigwe & another v Joseph Wathua Kigwe & another](#) [2015] eKLR (Muigai, J), [Romana Chepkemboi Yego & another v Jane Njuguna & another](#) [2017] eKLR (Githua, J), [In re Estate of Edward Abondo Kiseru \(Deceased\)](#) [2019] eKLR (Odunga, J) and [Pacific Frontier Seas Ltd v Kyengo & another](#) (Civil Appeal 32 of 2018) [2022] KECA 396 (KLR) (M'Inoti, J Mohammed & Kantai, JJA). For sole proprietorships, there is implied power to carry on the business, but only to the extent of the proper realisation of the estate. See [Marshall v Broadhurst](#) [1831] 1 Cr & J 403. Where personal representatives carry on such a business, they become personally liable for the debts and contracts, for they would be running the business, not as personal representatives, but in their own right, for their own benefit. See [Robit C Nawaz v Nawaz Transport Company](#) [1982-88] 1 KAR 75 (Madan, Law, JJA & Hancox, AJA).
13. Overall, I agree with the trial court. The litigation, the appellant sought to engage in, was with respect to the estate of a dead person, and the orders sought, if granted, would not have been to the benefit of the estate, but her own benefit. The orders would have vested the estate in her, and made her an administrator, without following the due process. As counselled by the court, let the parties apply for full grant, and it is only after a full grant is obtained that suits for permanent injunctions can be mounted, but only against third parties, and not the survivors of the deceased.
14. There is no merit in the appeal herein. I hereby dismiss the same, with costs.

**JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS
2ND DAY OF JUNE 2023**

W MUSYOKA

JUDGE

Mr. Erick Zalo, Court Assistant.



Appearances

Mr. Manyoni, instructed by Momanyi Manyoni & Company, Advocates for the appellant.

