REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 187 OF 2011

JUDAH NDAMBUKI KITUKU.....APPELLIANT

-VERSUS-

LEONARD MUTUKU SESI.....RESPONDENT

AND

JOSEPH MUTISYA MUASYA

GEORGE KISIO KIETI.....APPLICANTS

RULING

1. By Chamber Summons dated 4th October, 2018, the applicants herein seek an order that the name of **Judah Ndambuki** (now deceased) be replaced by **Joseph Mutisya** and **George Kisio Kieti** as the new plaintiffs in this suit and that the costs of the application be in the cause.

2. According to the applicants, the appellant/plaintiff herein is dead and he was the sole administrator of the estate of the late **Elijah Kituku**. Following an application by the applicants, they were made the administrators of the estate of the said **Elijah Kituku** vide a rectified grant issued in Machakos P & A No. 23 of 1993 on 17th September, 2018.

3. It was averred that by the time of the death of the appellant herein, the judgement the subject of these proceedings had not yet been executed hence it is in the interest of justice that the application be allowed.

4. The application was however opposed by the Respondent. According to the Respondent the grant in question was obtained fraudulently and due to none disclosure of material facts. It was further averred that the property in dispute does not belong to the deceased but belongs to **Elijah Ndambuki Kituku**. According to the Respondent, since all the three administrators of the estate of **Kituku** were dead, the grant issued on 2nd September, 2005 became useless and inoperative hence was incapable of being rectified. It was reiterated that since a grant is a certificate issued to a particular person or persons, if the holder thereof dies, it becomes inoperative and hence liable to be revoked.

5. It was averred that the purported administrators being grandsons of the deceased do not qualify to be his administrators since they do not rank in priority and have never obtained consents from those who rank in priority but used suspicious letters from the chief who failed to disclose all the heirs of the deceased.

6. The Respondent asserted that since he has interest in the subject land, he should deal with genuine and properly appointed administrators and not the applicants who should administer the estate of their father and not their grandfather.

7. In their submissions the applicants cited **Order 24 Rule 3(1)** of the ***Civil Procedure Code, 2010*** as well as section 2 of the ***Civil Procedure Act*** which defines legal representative.

8. According to the applicants, in law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the ***Law of Succession Act*** and in the present application, the Applicants have obtained letters of administration to the estate of the deceased and thus are the legal representatives of the estate of the deceased as provided for by law.

9. It was submitted that the deceased plaintiff whom the Applicants are seeking to substitute was the legal administrator of the estate of **Elijah Ndambuki** and had sued the Respondent as the legal administrator of the said estate. The deceased plaintiff then passed way before execution could be effected and as such there is a need to replace him with the Applicants who have obtained a certificate of confirmation of grant showing that they are the new administrators to the estate of the late **Elijah Ndambuki** and as such have the legal capacity to substitute the deceased plaintiff in this matter as the matter revolves around property being Plot No. 13B Tala Market belonging to the deceased. According to the applicants, the respondent's assertions and claims that the grant was obtained fraudulently and non-disclosure of material facts is not a matter to be determined by this Honorable Court but rather the court which issued the said grant since what is before this court is an application for substitution not an issue of the grant. It was submitted that the respondent should have raised or ought to raise his concerns with regards to how the grant was obtained in the court which issued the said grant but not before this honorable court.

10. That notwithstanding, it was submitted that the Respondent is not a beneficiary to the estate of the deceased but purports to be one by virtue of the tenancy agreement he had entered with the deceased yet this was never disclosed to the court in issuing the new grant. To the applicants, the issue of the tenancy agreement between the Respondent and the deceased was determined by the court in that the tenancy agreement was declared null and void and the Respondent was ordered to vacate the premises of the deceased, the aforesaid plot. As such the Respondent is not a beneficiary to the estate of the deceased and does not have any *locus standi* to claim with regards to the issuance of the said grant to the Applicants.

11. According to the applicants, though the respondent has stated in his replying affidavit that the current matter is not finalized has he has filed an appeal challenging the decision, the respondent has only exhibited an un-filed application for stay of execution pending hearing of an appeal. However, since on account of his own admission period for filing the Appeal lapsed, there is no Appeal on record and even the draft notice of appeal to show that the Respondent has appealed against the Court's ruling. As such there is no Appeal and the matter stands finalized. It was disclosed that though the Respondent has filed an application asking for enlargement of time to file the intended appeal, the same has been filed in the wrong court since the said Application should have been filed in the court to which the respondent intends to appeal to and not the present court which pronounced the ruling. As such the Application is dead on arrival and the present suit stands finalized.

12. As regards the contention that this Application was flied out of time with the requisite one year having lapsed, it was submitted that this issue was not pleaded in the replying affidavit yet parties are bound by their pleadings hence it cannot be raised at this stage. In support of this position the applicants relied on the decision of Malawi Supreme Court of Appeal in **Malawi Railways Ltd vs. Nyasulu [1998] MWSC 3,** in which the learned judges quoted with approval from an article by **Sir Jack Jacob:** ***The Present Importance of Pleadings*** published in [1960] Current Legal problems, at P174, the Court of Appeal in the case of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 Others (2014) eKLR** which cited with approval the decision of the Supreme Court of Nigeria in **Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002** and the decision of the Supreme Court of Kenya in **Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR**.

13. It was nevertheless submitted that since this matter had already been concluded and was at the execution stage, it was not bound by the one-year rule and reliance was placed on O**rder 24 Rule 10** of the ***Civil Procedure Rules, 2010.***

14. It was therefore the applicants' position that having proven their case, the application by the Applicant dated 4th October, 2018 ought to be allowed with costs to them.

15. On the other hand, the Respondent, while reiterating the averments in the replying affidavit, submitted that since the issue of limitation is an issue of law touching on jurisdiction, the same ought to be addressed notwithstanding the failure to raise it.

Determination

16. I have considered the application, the affidavits both in support of and in opposition to the application as well as the grounds of opposition.

17. The matter for determination is an application seeking substitution. Order 24 rule 3 of the ***Civil Procedure Rules*** provides as follows:

> ***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.***

18. However O**rder 24 Rule 10** of the ***Civil Procedure Rules, 2010*** provides that:-

> ***Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.***

19. It is therefore clear that in execution proceedings, it is not necessary that there be substitution of a deceased party. This was the position in **Dhola vs. Gulam Mohudin (1940) 19 LRK 6** where it was held that execution proceedings may continue without the appointment of the personal representative of the deceased decree holder. Accordingly, this application was unnecessary in so far as the execution proceedings were concerned and the decree in question could still be executed notwithstanding the death of the plaintiff.

20. The application is however opposed on the ground that the grant which the applicants rely on for their substitution was fraudulently obtained and that it was obtained by non-disclosure of material facts. However, what is expected of this court in an application for substitution is a determination whether the applicants are personal representatives of the deceased person. In **Mohan Dairy vs. Ratilal Bhurabhai [1966] EA 571**, it was held that the rule does not appear to contemplate the substitution of any other person than "the legal representative".

21. The 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.***

22. According to **Byamugisha, J** in **Khalid Walusimbi vs. Jamil Kaaya and Attorney General Kampala HCCS No. 526 of 1989 [1993] I KALR 20:**

> **"In order to acquire a representative character of suing or being sued, the legal representative has to be either an administrator of the estate, executor or personal representative as defined under the Succession Act. Section 3 of the Succession Act (Cap 139) as amended by Decree 22 of 1972 defines personal representative as "the person appointed by law to administer the estate or any part thereof of a deceased person."**

23. In **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor [1993] KLR 230**, the Court of Appeal extensively addressed itself on this issue and expressed itself as hereunder:

> **"The common law is that "*action personalis moritor cum persona*", that is, a personal action dies with the person. This rule was, however, to a large extent, supplanted by the Law Reform Act, which Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the *Law of Succession Act*, Cap 160. Section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act "shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act". The Act came into force on the 1st July, 1981 and the person whose death gave rise to this suit died on 10th April 1984…To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the *Law of Succession Act*, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person". It is common ground that the deceased in this case did not die testate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says "administrator means a person to whom grant of letters of administration has been made under this Act" …It is not in doubt that the two respondents who invoked the aid of the court to agitate the cause of action which survived the deceased, were not persons to "whom a grant of letters of administration have been made under the Act" i.e. the *Law of Succession Act* and they did not even pretend to be such. The only capacity, in which they sought to enforce the deceased's chose in action, was as dependants. At common law, death by itself automatically divests the deceased of his chose in action and the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity… Our *Law of Succession Act*, Cap 160, did not provide for the vesting of an intestate's property between the date of death and the grant of letters in any entity. So the suggestion that it will be vested in the courts conforms with the common law notions of the transmission of an intestate's right or estate. It ought to be remembered that all these temporary custodians of an intestate's rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by force of the grant in the administrator…We find no warrant for Chesoni, JA's statement that in Kenya an intestate's property is transmissible by the fact of death to his personal representatives whom he equates with his next of kin. Neither do we find any authority in law for his somewhat contradictory statement that the child's property was, on his death, transmitted to and not vested in his father. This statement, with respect, shows some confusion of thought. If death by itself transmitted the estate to his father, why did it not vest it in him? If the chose in action was not vested in him and as it was not his own chose, then what standing did he have to enforce it by action? Clearly, he would not have done it under the *Law of Succession Act*, Cap 160, or even the *Indian Succession Act*…If letters of administration vest all rights of an intestate in the administrator at the moment of death, what right would the father have left to agitate his son's preserved chose-in-action if some other person than himself, were granted letters of administration? Personal representatives, as known in this branch of the law, are persons who obtain probate or letters of administration and not blood relatives however close. Had the learned Judge in this case applied the clear provisions of the Law of Succession Act, he would have been obliged to reach the conclusion that the deceased's chose in action cannot properly be vested in or be agitated in court by wives qua wives."**

24. It is therefore clear that the only person who can be substituted is the legal representative of the deceased person. The rule does not provide that the said legal representative must be a person who was properly or lawfully entitled to be appointed as such. To read such a rider into the provision would amount to amending the rule, a power solely preserved for the Rules Committee under section 81 of the ***Civil Procedure Act***.

25. Therefore, as limitation does not apply to such applications and as the applicants are clearly the legal representatives of the deceased plaintiff, there is no justification to decline to grant the instant application. The issues raised by the respondents as properly submitted by the applicants belong to the succession cause in which the grant was issued or rectified and not to this court.

26. Consequently, the Chamber Summons dated 4th October, 2018 succeeds and the applicants herein are hereby substituted in place of the deceased, **Judah Ndambuki Kituku**.

27. There will be no order as to costs of this application.

28. It is so ordered.

Read, signed and delivered in open Court at Machakos this 16th day of July, 2019.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nzavi for Mr Mutua Makau for the applicant

CA Geoffrey