



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

ENVIRONMENT & LAND CASE NO.158 OF 2016

SELINA AYIEKO AWINJA.....PLAINTIFF

VERSUS

WILFRED AWINJA.....1ST DEFENDANT

CONCEPTA NAKHUMICHA.....2ND DEFENDANT

WILBERFORCE MULAMBA AWINJA.....APPLICANT

RULING

This is in respect to the Notice of Motion dated 11th May 2018 by **WILBERFORCE MULAMBA AWINJA** (the Applicant herein) in which the following orders are sought:

- 1. That this Honourable Court be pleased to substitute SELINA AYIEKO AWINJA with WILBERFORCE MULAMBA AWINJA.**
- 2. That costs of the application be in the cause.**

The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit.

The gravamen of the application is that the plaintiff in this case **SELINA AYIEKO AWINJA** passed away on 23rd June 2017 and the Applicant was issued with the grant of letters of Administration on 25th April 2018 and wishes to be substituted in place of the deceased plaintiff since the cause of action survives her.

The Respondents have filed grounds of opposition to the said application and raised the following issues:

- 1. That the application is invalid and fatal having been drawn by an advocate not properly on record.**
- 2. That the Applicant lacks capacity to prosecute / continue this case on behalf of the deceased plaintiff SELINA AYIEKO AWINJA.**

The application has been canvassed by way of written submissions filed both by **MS. NATWATI ADVOCATE** for the Applicant and **MS. LUNANI ADVOCATE** for the Respondent.

I have considered the application, the grounds of opposition and the submissions by Counsel.

There is no dispute that from the record, **MS. NATWATI** filed a Notice of change of Advocate on 4th June 2018 wherein she describes herself as having been appointed by the deceased plaintiff to act for her in place of the firm of **KRAIDO & COMPANY ADVOCATES**. **MS. LUNANI** has submitted, and rightly so, that the plaintiff having died on 23rd June 2017, it was not possible that she instructed **MS. NATWATI** to take over this case. Obviously, **MS. NATWATI** could only have been instructed by the Applicant after he obtained the Limited Grant of Letters of Administration Ad Litem dated 25th April 2008. Indeed in her submissions, **MS. NATWATI** has stated as follows:

“Your Lordship, upon being instructed by the Applicant, we could not have filed two notices of appointment thus (sic) by the plaintiff and by the Applicant since the plaintiff had since passed on and the Applicant herein is seeking to have the plaintiff's name substituted to his names since a deceased person cannot sue and or be sued in any Court of Law unless through an

Administrator”.

In my view, the description of the deceased **SELINA AYIEKO AWINJA** as the appointing party in the Notice of change of Advocates filed on 4th June 2018 is a mere typographical error that does not prejudice the Respondent and which can also be cured by the provisions of Article 159(2) (d) of the Constitution.

The Respondents also takes issue with the fact that the Applicant seeks to be substituted in an already existing suit yet the Limited Grant that he obtained only authorized him to file a new suit on behalf of the Estate of the late **SELINA AYIEKO AWINJA**. It is of course correct that the Limited Grant of Letters of Administration Ad Litem obtained by the Applicant in **BUNGOMA CHIEF MAGISTRATE’S COURT SUCCESSION CAUSE NO.123 of 2018** clothed the Applicant with the powers of **“filing suit”**.

Ideally, the Grant should have indicated that it was for purposes of prosecuting this suit which has already been filed.

Again, however, I take the view that the Grant was meant for purposes of this suit and the lapse can adequately also be cured by the provisions of Article 159 (2) (d) of the Constitution. The fact that the Applicant has obtained a limited Grant specifically for **“filing suit”** notwithstanding, and there being no evidence that the deceased plaintiff was pursuing any other suit apart from this one, is enough reason to allow the Applicant’s application to substitute the deceased. Again no prejudice is caused to the Respondents and the cause of justice will best be served by allowing return rather than dismissing the application.

I must however caution Counsel to be more vigilant in their pleadings because those that have instructed them expect their legal advisers to be on top of their act.

Ultimately therefore the Applicant’s Notice of Motion dated 11th May 2018 is allowed. The Applicant will however meet the Respondents costs of this application.

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018

Ruling dated, delivered and signed in Open Court this 4th day of October 2018 at Bungoma.

Ms. Nanzushi for Ms. Lunani for Respondent present

Mr. Milimo for Ms. Natwati for Applicant present

BOAZ N. OLAO

JUDGE

4TH OCTOBER 2018