



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANOUS CIVIL APPLICATION NO. 113 OF 2004**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE MINISTER FOR LANDS AND SETTLEMENT.....RESPONDENT**

**AND**

**KILONZO MWANA MULYUNGI.....INTERESTED PARTY**

**SYUNGO MUTUNGA.....EX PARTE APPLICANT**

**RULING**

**The Application**

Judgment was entered herein on 29<sup>th</sup> April 2013 in favour of the *ex parte* Applicant, quashing a decision of the Minister of Lands to grant the parcel of land in dispute herein to the Interested Party. The Interested Party has now filed an application by way of a Notice of Motion dated 8<sup>th</sup> December 2015, seeking the following substantive orders:

1. THAT that this Court be pleased to grant leave to the firm of P.M. Mutuku & Company Advocates to act for the interested party instead of Musyoka & Wambua Company Advocates.
2. THAT the execution by way of Notice to Show Cause be stayed.

The grounds for the application are that the Applicant is desirous to appoint another Advocate. Further, that the Notice to Show Cause was issued irregularly, as the decree was drawn when the *ex parte* applicant had already died. The Interested Party stated in a supporting affidavit sworn on 8th December 2015 that the *ex parte* Applicant died sometimes in February 2011, and that no steps were taken to substitute the said Applicant.

P.M. Mutuku & Company Advocates for the Interested Party filed submissions dated 10th May 2016, wherein it was urged that it is in light of the appointment of the counsel who was seized of this matter as a Judge of the High Court of Kenya, that the interested party is now desirous of appointing the firm of P.M. Mutuku & Company Advocates to represent him.

Further, that no substitution was done of the deceased *ex parte* Applicant, who was the party to this suit, and the matter thus proceeded on the mistaken presumption that one Kathuru Mutunga Kakuli had proper capacity and conduct to proceed with the matter. Subsequently, the decree and a notice to show

cause was issued. However that it is a matter of practice and the law, that if a party to a suit passes on, steps ought to be taken to replace that deceased party, and the subsequent proceedings after the death of the *ex parte* Applicant were therefore irregular.

In addition, that the powers granted to the donee by virtue of the Power of Attorney terminated upon the demise of the *ex parte* Applicant on 06/02/2011. Reliance was placed on the decision in **CCB vs MIB & Another (2014) e KLR** for the position that the power attorney issued to Kathuru Mutunga Kakuli by the *ex parte* Applicant had been revoked.

### **The Response**

The *ex parte* Applicant opposed the Interested Party's application in Grounds of Opposition dated 20th January 2016, and in a replying affidavit sworn on the same date by Kathuru Mutunga Kakuli. The *ex parte* Applicant stated that these proceedings were commenced on 27th July 2004 on behalf of the *ex parte* Applicant by Kathuru Mutunga Kakuli, who had a Power of Attorney from the *ex parte* Applicant dated 16/02/2004 duly registered with the Registrar of power of attorneys as I P/A 39784/1 on 19/2/2004, and duly filed with the court. A copy of the said power of attorney was attached.

Further, that the *ex parte* Applicant died on 6/2/2011 while the cause was pending in court, and Kathuru Mutunga Kakuli was lawfully appointed the administrator of the estate of the deceased *ex parte* Applicant in Probate and Administration Cause No. 5 of 2011 before the Principal Magistrate's court at Mwingi. A copy of the grant of letters of administration intestate issued on 13th June 2011 to the said Kathuru Mutunga Kakuli, with respect to the estate of the *ex parte* Applicant by the said Court was attached. It showed that the deceased died on 6<sup>th</sup> February 2011.

Therefore, that the said Kathuru Mutunga Kakuli prosecuted this cause at its inception until its disposal as donee of power of attorney, and subsequently as the administrator and legal representative of the deceased *ex parte* Applicant, and that there is nothing irregular in the proceedings. Further, that the application herein is belated and the delay is inordinate.

These averments were reiterated in submissions dated 5th May 2016 filed in Court by Kalili & Company Advocates, the learned counsel for the *ex parte* Applicant.

### **The Issues and Determination**

I have read and carefully considered the pleadings and submissions filed. I note that no objection was raised as to the change of the Interested Party's Advocate, which prayer arises from the fact that the previous counsel for the Interested Party was appointed as a High Court judge, and cannot continue with the conduct of this matter. Since the prayers for change of Advocate are not contested, the same are hereby granted.

The outstanding issue for determination is whether the proceedings herein were irregular for reason of non-substitution of the *ex parte* Applicant.

After judgment was delivered herein, the *ex parte* Applicant was awarded Party and Party Costs as against the Interested Party which were taxed at Kshs 130,753/= in a ruling delivered on 15<sup>th</sup> July 2014. Notice to show cause why execution should not issue was issued against the Interested Party on 26<sup>th</sup> October 2015, and he was required to attend Court on 1<sup>st</sup> December 2015 to show such cause why he should not be arrested and committed to civil jail in execution of the decree, as applied by the *ex parte* Applicant.

I note that the proceedings herein are judicial review proceedings that stem from a Notice of Motion dated 25<sup>th</sup> October 2004 brought pursuant to Order LIII of the revoked Civil Procedure Rules, which were similar to the current Order 53 of the Civil Procedure Rules. The provisions of the Civil Procedure Rules in Order 24 as to substitution of parties are therefore inapplicable in this respect, as it has been held

in various judicial decisions that judicial review proceedings are *sui generis* proceedings exclusively brought under Order 53 of the Civil Procedure Rules, and that the other provisions of the Civil Procedure Act and Rules are inapplicable.

The Court of Appeal in **Commissioner of Lands v Kunste Hotel Limited KLR (E&L) 1 249** stated in this regard that a court in judicial review proceedings is exercising neither a civil or criminal jurisdiction. Also see the decision in **R vs Communication Commission of Kenya & Another, (2001) 1 E.A 199**. In **Wellamondi vs The Chairman, Electoral Commission of Kenya, (2002)1 KLR 286**, Ringera J. (as he then was) explained the legal position to be as follows:

**“I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42.”**

In addition it not evident that an *ex parte* Applicant is a/or the Plaintiff in judicial review proceedings, as such proceedings are instituted in the name of the Republic, being proceedings touching on public law and public officers. The rationale for having the Applicant being the Republic and not the person aggrieved by a decision of a public body or officer, was explained by Ringera J. (as he then was) in **Welamondi vs. The Electoral Commission of Kenya [2002] 1 KLR 286** as follows:

**“Prerogative orders are issued in the name of the crown and applications for such orders must be correctly instituted and accordingly, the orders of Certiorari, Mandamus or Prohibition are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue...”**

The reason for this position is that the purpose of judicial review orders is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. Judicial review proceeding review the lawfulness of a decision, action or failure to act by a public body exercising a public function. Therefore, the parties to a judicial review proceeding are the State, and whosoever is being called upon to answer, whereby the State calls upon one of its organs to answer to some complaint that a member of the public or some other body has made.

The cause of action in a judicial review application does not therefore abate with the death of an *ex parte* Applicant, and any affected party can also be served with notice to participate in the proceedings under Order 53 Rule 3 of the Civil Procedure Rules. Failure to substitute an *ex parte* Applicant is in my view and for these reasons not fatal to the proceedings if they are able to proceed by another party who is affected.

Lastly, even if Order 24 of the Civil Procedure Rules were applicable, Order 24 Rule 10 of the Civil Procedure Rules clearly provides that nothing in rules 3, 4 and 7 of the Rules which relate to substitution of a Plaintiff or Defendant shall apply to proceedings in execution of a decree or order.

Finally, this Court also notes that the prayer for stay is brought in a vacuum, and cannot be granted in light of the fact that it is seeking an indefinite stay in proceedings that already finalized, and on which there is no appeal or review pending.

The Interested Party’s Notice of Motion dated 8<sup>th</sup> December 2015 is therefore accordingly allowed only to the extent of the following orders:

1. The firm of P.M. Mutuku & Company Advocates be and is hereby granted leave to come on

record as the Advocates for the Interested Party in place of the firm of M/S Musyoka & Wambua Company Advocates

2. The prayer for stay of execution by way of Notice to Show Cause in the Interested Party's Notice of Motion dated 8<sup>th</sup> December 2015 is hereby denied.

3. The Interested Party shall meet the costs of the Notice of Motion dated 8<sup>th</sup> December 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 20<sup>th</sup> day of February 2017.

**P. NYAMWEYA**

**JUDGE**