



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CONSTITUTIONAL PETITION NO 7 OF 2015**

**IN THE MATTER OF MARGIELYNE MULAYA (SUING FOR AND ON BEHALF  
OF THE ESTATE OF SILAS BUHILU ALASI).....PETITIONER**

**VERSUS**

**1. KEFA LUDENYO**

**2. DISHON VIDONYI .....RESPONDENTS**

**J U D G M E N T**

**The Petition**

1. The Petitioner herein, through her Counsel M/S K.N. Wesutsa & Co. Advocates filed her Petition on 17/04/2015. In the Petition, which is dated 07/04/2015, the Petitioner prays for the following declaratory orders:-

1. That the way in which the lower court has handled the efforts of the applicant to become the legal representative of the Deceased runs counter to the fair administration of justice.
2. That the High Court has the supervisory jurisdiction to determine if the lower court has considered the issue of legal representation in line with the law as provided for under Article 165(6) of the Constitution of Kenya (2010) (Constitution)
3. That the High Court has the authority to review the propriety of the lower court rulings as mandated under Article 165(7) of the Constitution
4. That the decisions of the lower declining to have the applicant be the legal representative of the deceased be quashed and set aside.
5. That the applicant be made a legal representative of the Deceased so that the lower court case can finally be set down for hearing.
6. That the Respondents be directed to meet the costs of the cause.

2. The Petition is supported by the Petitioner's affidavit sworn on 07/04/2015 in which the Petitioner states that the deceased herein was her father-in-law. The Petitioner also gives a history of Vihiga SRMCC No. 19 of 2009, which case was filed on 19/02/2009 by one Steven Mutange, a brother to the Petitioner's husband who by then held a General Power of Attorney dated 14/01/2009. She has also given details of the various applications filed by both herself and the donee of the Power of Attorney

Steven Mutange and the rulings delivered by the trial Court in all these applications. The Petitioner prays that the orders sought be granted.

### **Response to the Petition**

3. The replying affidavit is sworn by Kefa Lodenyo, the 1<sup>st</sup> Respondent herein. The same was sworn on 04/07/2015. The deponent avers that the matter in hand has been exhaustively considered by the lower Court, that the Petitioner through High Court Misc. Application No. 227 of 2014 sought orders similar to the orders sought herein, although the said application was subsequently withdrawn by the Petitioner, s counsel on the realization that the same was defective; that the whole purpose of the instant application is to sanction the Petitioner to introduce strangers into this matter before the lower court by introducing unknown persons to the suit. The deponent also avers that the Petitioner herein does not raise any substantive issue to warrant the granting of the orders sought by the Petitioner. He prays that the petition be dismissed with costs.

### **Background**

4. From the annexures to the Petition, Vihiga SRMCC No. 19 of 2009 was commenced by way of a plaint dated 19/02/2009. In the plaint Steven Mutange prayed for Judgment against the Defendants therein (the respondents herein) for:-

1. Compensation for all the damaged coffee plants
2. Costs of this suit

5. It was alleged at paragraph 4 of the plaint that “towards the end of the month of January 2009, the Defendants, without any lawful excuse, caused the destruction of coffee plants belonging to the said Silas Buhilu Alasi”. At paragraph 3 of the plaint, it was averred “that the plaintiff holds a general power of attorney as regards his father, one Silas Alasi, who is the registered proprietor of LR No. South Maragoli/Lugovo/1336, upon which he grows coffee for commercial purposes.”

6. On 22/12/2009, Steven Mutange was granted leave by the Lower Court to amend the plaint. A copy of the draft amended plaint forms part of the Petition. The proposed amendment showed that SILAS BUHILU ALASI was now the plaintiff suing through his next friend Steven Mutange. A new paragraph 3A of the plaint was introduced in which it was averred. “That the plaintiff who is the registered proprietor of LR. No. South Maragoli/Lugovo/1336, upon which he grows coffee commercially, is a person of unsound mind.” From the submissions of the Petitioner, the draft amended plaint was never filed as the deceased is said to have died on 24/01/2010 following a prolonged coma. It is also submitted that the deceased’s death on 24/01/2010 meant that the power of Attorney to Steven Mutange also lapsed; thereby bringing about the need to appoint a legal representative to pursue the case on behalf of the deceased. From the pleadings, one Dominic Mulekani applied for and obtained Limited Grant of letters of Administration Intestate and thereafter, filed an amended plaint dated 09/08/2011. A copy of the Limited Grant of Letters of Administration Ad Litem issued to Dominic Mulekani on 09/03/2010 is annexed to the Petition.

7. The record shows that the respondents raised a preliminary objection dated 30/08/2011 to the legality of the amended plaint and by the court’s ruling dated 20/12/2011 the preliminary objection was overruled. The Petitioner alleges that for reasons only known to himself, Dominic Mulekani who held the Limited Grant of letters of Administration Ad Litem declined to proceed with the deceased’s case as filed. In an attempt to proceed with the case, the Petitioner filed a Notice of Motion dated 29/01/2013 seeking permission of the Court to act as the plaintiff in place of the 1<sup>st</sup> respondent, Dominic Mulekani.

8. The said application which was opposed, was dismissed vide the trial Court’s Ruling dated 16/07/2013 on grounds that the Petitioner was a stranger to the proceedings and could not therefore be allowed to proceed with the case in the place of Dominic Mulekani who held the Grant of Letters of Administration Ad Litem.

9. The Petitioner thereafter filed a chamber summons dated 08/10/2013 seeking leave to be enjoined in the suit as a co-plaintiff in her capacity as the administrator of the estate of the late Silas Buhilu Alasi. The chamber summons was premised on grounds that Dominic Mulekani had declined to proceed with the case and further that the Petitioner was a co-Administrator of the estate of the deceased. The Chamber Summons was dismissed on grounds that it was res judicata the ruling dated 16/07/2013. The Petition herein was filed after the above stated ruling.

### **Analysis and Determination**

10. Having considered the history of this case as given above, the only question for determination is whether the petitioner is entitled to the orders sought. While the petitioner in her submissions dated 25/02/2016 urges this Court to grant the orders as prayed, the 2<sup>nd</sup> Respondent who is represented by the firm of Shitsama & Co. Advocates argues that the petition does not disclose a reasonable cause of action, is fundamentally defective, bad in law and a mere abuse of the due process of court and ought therefore to be dismissed with costs. The 2<sup>nd</sup> Respondent also contends that the numerous applications filed in Vihiga SRMCC. No. 19 of 2009 were heard and determined by a competent court and the petition, which is asking for similar orders, ought to be dismissed. That in any event, since the suit was filed without authority, it falls flat on its face.

11. The 2<sup>nd</sup> Respondent placed reliance on the case of Beth Wanjiru Kamau- Vrs – Savings & Loan (k) LTD (2006) eKLR in which HPG Waweru Judge held, inter alia, that

“It is trite law that a suit instituted by a person who has no locus to institute it is a non-suit. Such suit is null and void from the beginning. The plaintiff had no capacity or locus to file the suit on 19<sup>th</sup> September, 2005 as she did not then possess the requisite grant of representation to the deceased husband’s estate. The suit was brought for and on behalf of the estate. The subsequent obtaining of the necessary grant could not put life into a suit that was dead when instituted.”

I do entirely agree with HPG Waweru Judge that where a plaintiff has not been handed the shoes of a deceased person through the issuance of a grant of letters of Administration, whether such a letter is ad litem or full, such plaintiff cannot purport to be wearing such deceased’s shoes. Such a scenario would be equated to the king who walked in the streets with no clothes on his body and wanted his subjects to be told that his attire was the best in town. Non-existent authority cannot be feigned.

12. After carefully perusing the record, I am satisfied that the instant petition is an abuse of the court process and further that the orders sought by the Petitioner are an attempt by the Petitioner to have her previously dismissed applications heard afresh and determined in her favour. In its ruling dated 25/02/2014, the trial court made it clear that the Petitioner’s chamber Summons dated 08/10/2013 was similar in content to the Petitioner’s application dated 29/01/2013 and that concerning the latter application, “the Court heard both parties and wrote a ruling which was read on the 16<sup>th</sup> July, 2013 and dismissed the application with costs. The court agrees with the respondent’s contention that this court is functus Officio in determining the same matter which it has already determined and made a ruling over the same. On that score the court herewith dismisses the application with costs to the respondent.”

13. Although this court is aware of the duty cast upon it by the Constitution of Kenya 2010 to do substantive justice to litigants appearing before it without undue regard to technicalities, and the court also being aware of the provisions of Sections 1A and 1B of the Civil Procedure Act, Cap 21 laws of Kenya, it is alive to the provisions of Section 7 of Cap 21 which prohibit this court to deal with matters that are similar by way of the orders sought or the matters in controversy or the parties to the suit which have already been dealt with and which have been determined by a court of competent jurisdiction. There is no doubt in my mind that the Vihiga SRMC was a competent Court when it dealt with the various applications filed by or on behalf of the Petitioner by which the Petitioner sought to come into the matter.

14. There is no doubt that this litigation must come to an end. There is also no doubt that cases cannot be litigated piecemeal.

15. For the above reasons, I find no merit in the Petition dated 07/04/2015 and filed in court on 17/04/2015. The petition is hereby dismissed in its entirety with costs to the 2<sup>nd</sup> Respondent

Orders accordingly

Judgment delivered, dated and signed in open Court at Kakamega this 8<sup>th</sup> day of September 2016

**RUTH N. SITATI**

**JUDGE**

In the presence of;-

Mr. Kundu (Present).....for Petitioner

Mr. Osango (Present).....for 2<sup>nd</sup> Respondent

Mr. Lagat.....Court Assistant