



**Republic v County Surveyor Vihiga Cunty; Agama (Being Administrator of the Estate of Tom Mahagwa Egosagwa) (Exparte Applicant); Ludenyo (Being Administrator to the Estate of Matia Ludenyo Luhunza - Deceased) (Interested Party) (Environment and Land Judicial Review Case E004 of 2021) [2025] KEELC 4607 (KLR) (18 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4607 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E004 OF 2021**

**A NYUKURI, J**

**JUNE 18, 2025**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**COUNTY SURVEYOR VIHIGA CUNTY ..... RESPONDENT**

**AND**

**KENNEDY AGAMA (BEING ADMINISTRATOR OF THE ESTATE OF TOM MAHAGWA EGOSAGWA) ..... EXPARTE APPLICANT**

**AND**

**BEATRICE ADISA LUDENYO (BEING ADMINISTRATOR TO THE ESTATE OF MATIA LUDENYO LUHUNZA - DECEASED) ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated 24<sup>th</sup> March 2025 filed by the Ex parte Applicant seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That upon the hearing and determination of this application, an order be issued setting aside the warrants of attachment against the applicant's movable property thereby as he is not the proper party to settle the costs awarded in the suit.



- d. That upon the hearing and determination of this application, an order be issued ordering the Taxing Master to correct the Certificate of Costs dated 8<sup>th</sup> January 2025 and issue it against the estate of the late Tom Mahagwa Egosagwa and not Kennedy Agama as a person since the later was never a party in this matter.
  - e. That upon the hearing and determination of this application, an order be issued ordering the estate of the late Tom Mahagwa Egosagwa to settle the costs awarded in this matter by way of instalments of Kshs. 15,000.00 per month until payment in full.
  - f. That the court be pleased to make such other consequential orders as are necessary for the issuance of the order.
  - g. That costs of this application be provided for.
2. The application is predicated on the sworn affidavit of Kennedy Agama dated 24<sup>th</sup> March 2025. The applicant's case is that the late Tom Mahagwa Egosagwa being the ex parte applicant, filed the suit herein and passed away before the same was determined. That thereafter, the applicant obtained grant of letters of administration for the estate of the deceased Exparte applicant. That the Judicial Review application was dismissed and that thereafter there was a deliberate and systemic alteration of facts to this matter so as to hold the applicant herein personally liable for the costs awarded, yet he was merely a personal representative of the ex parte applicant's estate.
  3. The applicant stated that there was no mention of the estate of the late ex parte applicant in respect to the interested party's bill of costs. According to the applicant, there is a clear distortion of facts and errors apparent on the face of the record because the bill of costs only identifies the Republic as the applicant, the surveyor as respondent and Beatrice Ludenyo as the interested party while Kennedy Agama is identified as the ex parte applicant. That that was malicious as there is name alteration. That the ruling of 8<sup>th</sup> January 2025 did not mention the estate of the late Tom Egosagwa and that shockingly the warrants are executed against the applicant in his personal capacity when he was only in the matter as a personal representative of the estate of the late exparte applicant. He maintained that there has never been anyone in this matter called Tom Magwa Egosagwa and hence the Certificate of Costs is erroneous.
  4. He also asserted that he was never a party in this suit and execution cannot proceed against him. That if execution proceeds, it will be to his detriment. He attached the Notice of motion herein dated 30<sup>th</sup> June 2021; death certificate; bill of costs; ruling of 8<sup>th</sup> January 2025 and warrants of attachment.
  5. The application was opposed. The decree holder, Beatrice Ludenyo filed grounds of opposition dated 1<sup>st</sup> April, 2025. She stated that the judgment debtor is legally bound to settle the decretal sum stated in the attachment warrants as he assumed responsibility of the deceased ex parte applicant in obtaining grant of letters of administration in regard to the latter.
  6. Further, that the applicant has been a party in these proceedings and cannot escape the consequences that arise upon judgment. That the bill of costs was taxed after the same had been served on counsel for the applicant and no objection was raised. She maintained that a successful litigant should not be denied enjoyment of the fruits of her judgment and that the application was malicious and a waste of court's time. That there is no appeal against taxation and that the same cannot be challenged through review.



## Analysis and determination

7. The court has carefully considered the application and the response thereto. Three issues arise for the court's determination, namely;
  - a. Whether execution herein against Kennedy Agama should be set aside on the basis that he is not a party in this matter but a mere personal representative of the estate of the late Tom Mahagwa Egosagwa.
  - b. Whether the Certificate of Costs should be corrected to be issued against the Estate of Tom Mahagwa Egosagwa and not Kennedy Agama.
  - c. Whether the estate of the late Tom Mahagwa Egosagwa should be allowed to settle the taxed costs by monthly instalments of Kshs. 15, 000/=
8. The applicant in the instant application, approached this court on the basis of the provisions of Order 22 Rule 51 of the Civil Procedure Rules. The said procedure provides as follows;

Objection to attachment [Order 22, rule 51]

  1. Any person claiming to be entitled to or to have a legal or equitable interest in the whole or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to all the parties and to the decree-holder of his objection to the attachment of such property.
  2. Such notice shall be accompanied by an application supported by affidavit and shall set out in brief the nature of the claim which such objector or person makes to the whole or portion of the property attached.
  3. Such notice of objection and application shall be served within seven days from the date of filing on all the parties
9. Therefore, any person claiming to be entitled to or having a legal or equitable interest in property that has been attached in execution, may object to the attachment. In the instant matter, the applicant claims that he is not a party to this matter and that attachment cannot issue against him.
10. The applicant herein confirms that he is the personal representative of the estate of the late Tom Mahagwa Egosagwa and that he freely chose to represent the ex parte applicant's estate in this matter upon the deceased's demise.
11. A personal representative of the estate of a deceased person is defined in section 2 of the Law of succession Act to mean the executor or administrator, as the case may be, of a deceased person.
12. Section 2 of the Civil Procedure Act defines legal representative to mean 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.
13. A personal representative, like the applicant herein, does not only have powers to file and prosecute suits on behalf of the estate of a deceased person; they also have duties. Sections 82 and 83 of the Law of Succession Act provide for powers and duties of a personal representative respectively as follows;

Section 82 provides for powers of personal representatives as follows;

Powers of personal representatives



Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

- a. To enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;
- b. To sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

- i. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- (ii) no immovable property shall be sold before confirmation of the grant;
- (c) to assent, at any time after confirmation of the grant, to the vesting of a specific legacy in the legatee thereof;
- d. To appropriate, at any time after confirmation of the grant, any of the assets vested in them in the actual condition or state of investment thereof at the time of appropriation in or towards satisfaction of any legacy bequeathed by the deceased or any other interest or share in his estate, whether or not the subject of a continuing trust, as to them may seem just and reasonable to them according to the respective rights of the persons interested in the estate of the deceased, and for that purpose to ascertain and fix (with the assistance of a duly qualified valuer, where necessary) the value of the respective assets and liabilities of such estate, and to make any transfer which may be requisite for giving effect to such appropriation:

Provided that, except so far as otherwise expressly provided by any will—

- i. No appropriation shall be made so as to affect adversely any specific legacy;
- ii. No appropriation shall be made for the benefit of a person absolutely and beneficially entitled in possession without his consent, nor for the purpose of a continuing trust without the consent of either the trustees thereof (not being the personal representatives themselves) or the person for the time being entitled to the income thereof, unless the person whose consent is so required is a minor or of unsound mind, in which case consent on his behalf by his parent or guardian (if any) or by the manager of his estate (if any) or by the court shall be required.

Section 83 provides for duties of personal representatives as follows;

### 83. Duties of personal representatives

Personal representatives shall have the following duties—

- a. To provide and pay, out of the estate of the deceased, the expenses of a reasonable funeral for him;
- b. To get in all free property of the deceased, including debts owing to him and moneys payable to his personal representatives by reason of his death;
- (c) To pay, out of the estate of the deceased, all expenses of obtaining their grant of representation, and all other reasonable expenses of administration (including estate duty, if any);



- (d) To ascertain and pay, out of the estate of the deceased, all his debts;
- (e) Within six months from the date of the grant, to produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- (f) Subject to section 55, to distribute or to retain on trust (as the case may require) all assets remaining after payment of expenses and debts as provided by the preceding paragraphs of this section and the income therefrom, according to the respective beneficial interests therein under the will or on intestacy, as the case may be;
- (g) Within six months from the date of confirmation of the grant, or such longer period as the court may allow, to complete the administration of the estate in respect of all matters other than continuing trusts, and to produce to the court a full and accurate account of the completed administration.
- (h) To produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account;
- i. To complete the administration of the estate in respect of all matters other than continuing trusts and if required by the court, either of its own motion or on the application of any interested party in the estate, to produce to the court a full and accurate account of the completed administration.

14. Therefore, apart from the power of filing and prosecuting suits on behalf of the estate, a personal representative of a deceased person is obligated in law to inter alia pay debts due to the estate. One of such debts include costs in respect of a suit filed by or against a deceased person's estate.

15. It is therefore mischievous and illogical, for the applicant to argue that while he represents the deceased's estate he is not be obligated to pay costs awarded against the deceased's estate in this matter. When he took over this matter, he stood in the place of the deceased. He was well aware that he was bound by section 83 of the *law of succession Act* to do that which the deceased would have done in regard to this suit and cannot be heard to say on one hand, that he should not be responsible for settlement of costs and on the other hand seek to settle the costs by monthly instalments. He is the representative of the estate of the deceased and cannot run away from obligations placed on him under the law. The applicant's arguments that there is malice, error, alteration and distortion of facts because of the citation of the parties in this matter in the certificate of cost, where the applicant is stated to be the Republic, the respondent is the surveyor and Beatrice Adisa the interested party; are baseless and made in utter disregard of the basic fact that a judicial review application is ordinarily made in the name of the Republic, although it is normally filed by the ex parte applicant. Besides, a Judicial review application being a prayer for constitutional supervision of the power of public authorities or any other person exercising quasi-judicial authority, the respondent in judicial review application would ordinarily be an officer of government, or person exercising quasi-judicial powers. The person that will be affected by the decision of court in a judicial review application is normally referred to as the interested party.



(See *Republic v County Assembly of Nakuru & 2 Others ex parte Samuel Waituku Njane & 21 Others* High Court at Nakuru Judicial Review application No. 19 of 2016 and *Republic v Kenya Revenue Authority Ex parte Stanley Mombo Amuti* (2018) e KLR)

16. Therefore, in stating those parties as such, no malice was exhibited by the taxing officer. Just because the ex parte applicant failed to correctly cite the parties in his substantive application dated 5<sup>th</sup> November 2021, it does not mean that the court should perpetuate such a basic error by a party. The court can and should state the parties correctly as was done in this case.
17. The applicant raised the issue of the correct name of the deceased ex parte applicant, yet those names as stated in the judicial review application slightly differ in spellings in regard to other documents on record. Even the applicant now refers to himself as Kennedy Agama when in his application seeking to be substituted in the place of Tom Mahagwa Egosagwa, he referred to himself as Kennedy Agama Egosangwa. The misspellings and omission of names of parties in my view are inconsequential and do not change the substance of the certificate of costs and the fact that in the court's judgment of 23<sup>rd</sup> May 2023, the ex parte applicant's motion dated 5<sup>th</sup> November 2021 was dismissed with costs to the respondent and the interested party. The certificate of costs in favour of the interested party has not been appealed against, varied or set aside, and the contents therein are plain and clear. The mere fact that the name of the late Tom Mahagwa Egosagwa was misspelt, cannot be basis of setting aside of the attachment. Therefore, I find and hold that there is no justification for setting aside the attachment herein.
18. In the premises, and for the above reasons, I find and hold that the applicant is party to this suit and orders issued against the estate of the deceased including the certificate of costs are to be complied by him as there is no basis for rectifying the certificate of costs for the same to be in regard to the estate of the deceased and exclude the applicant.
19. Regarding the prayer for settlement of costs by monthly instalments of Kshs. 15, 000/=, the applicant did not give any justification or basis for that proposition. In any event, costs herein were assessed in the sum of Kshs. 268,658/= and allowing payment of Kshs 15, 000/= per month will result is payment a payment for a period of 18 months which is unjustified and which will not be in tandem with the right to access to expeditious justice.
20. The upshot is that the application herein dated 24<sup>th</sup> March 2025 lacks merit and the same is hereby dismissed with costs to the Interested party.
21. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA IN OPEN COURT/VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM THIS 18<sup>TH</sup> DAY OF JUNE, 2025**

**A. NYUKURI**

**JUDGE**

In the presence of;

Ms. Oduor holding brief for Mr. Wangira for the Ex parte applicant

Ms. Beatrice Ludenyo the respondent in person

Court Assistant: M. Nguyai

