



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT ELDORET**

**E & L CASE NO. 210 OF 2017**

**PETER LAVATSA KWAMBOYA.....PLAINTIFF**

**VERSUS**

**NICHOLAS GITUHU KARIRA.....1<sup>ST</sup> DEFENDANT**

**JAPHETH KIPYEGO CHEPKWONY.....THIRD PARTY**

**MOSES KIBET METTO.....APPLICANT**

**RULING**

This ruling is in respect of an application dated 11<sup>th</sup> September 2020 by the applicant seeking for the following orders:

- a. Spent
- b. THAT the Honourable court be pleased to substitute the Third Party herein who is deceased with his brother MOSES KIBET METTO and leave be granted to file pleadings to that effect.
- c. THAT costs of the application be provided for.

**APPLICANT'S CASE**

Counsel submitted that the Third Party died on 30<sup>th</sup> April, 2020 and relied on a copy of death Certificate which was marked "MKM1" and that the applicant obtained letters of Administration on 21<sup>st</sup> May, 2015 which were amended and marked "MKM2".

Counsel further submitted that the third Party was the Administrator of the Estate of Elizabeth Jephchoe Sirma who is also deceased and that Moses Kibet Metto is also an administrator of the estate of Elizabeth Jephchoe Sirma.

Counsel submitted that the issue for determination is whether the applicant can be substituted with the Third Party who was the Administrator of the Estate and relied on the provisions of Order 24 Rule 4(4) of the Civil Procedure Rules provides as follows: -

4(1) Where one of the two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendants or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court on Application made in that behalf shall cause the legal representatives of the deceased Defendant to be made a party and shall proceed with the suit.

Counsel cited the case of Muriithi Ngenya —vs- Gikonyo Macharia Mwanqi & Another ELC No. 221 of 2017ekIr where Justice G. Kemei stated that: -

*"The law is very clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon Application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased part to proceed with the case".*

Section 2 of the Civil Procedure Act defines a legal representative as follows: -

"Legal representative means a person who in /aw represents the Este of the 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".

Counsel submitted that the Applicant attached a copy of current amended Letters of Administration of the Estate of Elizabeth Jepchoge Sirma which indicates that he is one of the current Administrators of the Estate.

Further in the Court of Appeal decision of **Mary Njoki Simon--and- Monicah Wanyonya (2019) eKLR Kemei J** held that: -

*"when it is necessary that the representative of the deceased person be made a party to a pending suit, and the executor or person entitled to Administration is unable or unwilling to act, Letters of Administration may be granted to the nominee of a party in such suit limited for purpose of representing the deceased in such suit or in any other cause or suit which may be commenced in the same or in any Court between the parties touching the matters at issue in the case suit and until a final decree shall be made and carried to complete execution".*

Counsel submitted that since the Third Party died on 30<sup>th</sup> April, 2020 the substitution ought to be allowed and leave be granted to amend pleadings to that effect given the one-year limitation period has not lapsed. Counsel therefore urged the court to allow the application as prayed as the applicant is the current Administrator of the Estate to enable the matter to be prosecuted to its conclusion.

## RESPONDENT'S CASE

Counsel for the respondent opposed the application and submitted that the application is not merited on the ground that the applicant's documents and in particular annexure MKM-2 reveals that the Applicant is the administrator of the estate of **ELIZABETH JEPCHOGE SIRMA** while the documents in the court record reveal that the third party -now deceased was the administrator of the estate of **PAUL KIMETO ARAP SIRMA** which in essence means that the Applicant lacks locus standi to file the instant application given that no formal application seeking leave of the court as required by Order 1 Rule 15 of the Civil Procedure Rules 2010 for the estate of ELIZABETH JEPCHOGE SIRMA to be enjoined into this matter as required by the law.

Counsel submitted that there has been inordinate and inexcusable delay by the Applicant in bringing this application at a stage when the Plaintiff has already testified notwithstanding the fact that the third party passed on way back in April 2020 and no explanation has been given for the delay.

Mr Kagunza submitted that the application is only filed with the intention of sabotaging or delaying the proceedings in this suit contrary to law since the Applicant is unnecessary party to the proceedings hereto. That the Applicant seeking to substitute the Third party is not a legal representative of the estate of PAUL KIMETO ARAP SIRMA who the third party was representing as per the court records.

Counsel relied on the case of **Isaac Waithaka vs Gicheha Nioroge & anor, Ann Nyaguthie Gicheha (proposed interested substitute of the Deceased (2019) eKLR** where it was held in the case of Re Estate of Beth Mutei Mulili (deceased) (2019)(eKLR) pg. 4 that the following elements are applicable where a party seeks to be enjoined in the proceedings as an interested party. One must move the court by way of a formal application, enjoinder is not as of right, but is at the discretion of the court hence sufficient grounds must be laid before the court.

Counsel submitted that there is no formal application which was made by the Applicant on behalf of the estate of ELIZABETH JEPCHOGE SIRMA thus the Applicants lack audience to address the court in the first instance.

Further that the application is anchored on Order 24 Rule 3 of the Civil Procedure Rules 2010 which provisions of the law do not donate any power to this honorable court to issue orders sought thus making the instant application fatally defective. The key words in Order 24 Rule 3 of the Civil Procedure Rules 2010 are that it is the legal representative of the deceased Defendant who is to be made party to the suit.

Counsel submitted that the applicant is guilty of non-disclosure of material facts that that the applicant is the administrator of the late ELIZABETH JEPCHOGE SIRMA while the documents attached indicate that the third party now deceased was the administrator of the estate of the late PAUL KIMETTO ARAP SIRMA.. Counsel cited the case of **BRINKS - MAT Ltd - Versus - ELCOMBE [1988], 3 ALLER 188** where the opinion of Ralph Gibson L. J. eruditely enunciated the principles relevant to material non-disclosure as follows:

*"In considering whether there has been relevant non-disclosure and what consequence the Court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following: (i) The duty of the applicant is to make a full and fair disclosure of the material facts. (ii) the material facts are those which it is material for the Judge to know in dealing with the application made; materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers (iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had made such inquiries. (iv) the extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including, (a) the nature of the case which the applicant is making when he makes the application, (b) the order for which application is made and the probable effect of the order on the defendant and (c) the degree of legitimate urgency and the time available for the making of inquiries. (v) if material non-disclosure is established the Court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.....See Bank Mellat v Nikipour at (91) per Donaldson L J, citing Warrington LJ in the Kensington Income tax cmrs case. (vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty of the applicant to make all proper inquiries and to give careful consideration to the case being presented (vii) Finally, it is not for every omission that the injunction will be automatically discharged. Alocus poenitentiae (chance of repentance) may sometimes be afforded. The court has discretion, notwithstanding proof of material non- disclosure which justifies or requires the immediate discharge of the ex parte order, nevertheless to continue the order, or to make a new order on terms:*

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

### **ANALYSIS AND DETERMINATION**

This is an application for substitution of a third party who is deceased with the applicant. In an application for substitution of a deceased person, the applicant must show that he/she is the legal representative of the deceased person. This boils down to the issue of locus standi.

The issue for determination is as to whether the applicant is the legal representative of the late JAPHETH KIPYEGO CHEPKWONY.

The Plaintiff herein had filed this suit through a plaint dated 26<sup>th</sup> May 2017 seeking for the following reliefs

- a) An order for permanent injunction restraining the Defendant by himself, his servants and or agents from interfering trespassing, intermeddling and/or in any other manner dealing with the Plaintiff use possession and or ownership of that Land Parcel Number Eldoret Municipality Block 14/603 measuring 0.4922 Ha or thereabout.
- b) Declaration that the Plaintiff is entitled to mesne profits and General damages for trespass from the Defendant on Land Parcel Number Eldoret Municipality Block 14/603 measuring 0.4922 Ha or thereabout.
- c) Eviction Order against the Defendant from Land Parcel Number Eldoret - Municipality Block 14/603 measuring 0.4922 Ha or thereabout.
- d) Costs of the suit plus interests.

The Defendant filed a defence and counterclaim and introduced Japheth Chepkwony as a third party who is now deceased.

The applicant has annexed a copy of the death certificate of Japheth Chepkwony the third party who was enjoined in the suit as a result of a third party notice based on the grounds that the 3<sup>rd</sup> party is the original leaseholder of the suit property ELDORET MUNICIPALITY BLOCK 14/603 as the administrator of the estate of Paulo Kimeto Arap Sirma.

Order 24 Rule 4 of the Civil Procedure Rules provides;

**(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.**

In order for an application for substitution of a deceased person to succeed, one needs to be a legal representative of the deceased. In this particular case, one needs to be an administrator of the estate of the deceased which he was an administrator of. The applicant annexed letters of administration of the estate of Elizabeth Jepchoge Sirma. The suit land is part of the estate of Paulo Kimeto Arap Sirma. The applicant has not established the relationship between the estate of Elizabeth Jepchoge Sirma and the estate of Paulo Kimeto Sirma or the suit land herein. The estate has not been enjoined in this matter and therefore the applicant lacks the locus standi to file the instant application.

In the case of Nephant Kiguta Kingori & 2 others v. Jane Gathoni Kingori & another (2015) e KLR where this court observed:-

*“...a suit for or against the estate of a deceased person can only be brought by an administrator of the estate or against an administrator of the estate. In the circumstances of this case, it is not clear in what capacity the applicants have brought the suit or the capacity in which the respondents are sued. In this regard, see the decision in the case of Robert Meleya supra.*

*Since the capacity in which the applicants have brought the suit or in which the respondents are sued is unknown and there being no evidence that the applicants and/or the respondents are administrators of the estate of the deceased, I find and hold that the suit is incompetent for lack of capacity to sue on the part of the applicants and capacity to be sued on the part of the respondents.”*

I find that the application lacks merit as the applicant is not a legal representative of the deceased's estate as envisioned in Order 24 Rule 4 of the Civil Procedure Rules and is therefore dismissed with costs to the respondent.

**DATED and DELIVERED at ELDORET this 11<sup>TH</sup> DAY OF NOVEMBER, 2020**

**M. A. ODENY**

**JUDGE**