

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL CASE NO 122 OF 1986

KURIA.....APPLICANT

VERSUS

SHAH.....RESPONDENT

RULING

This is an application which has been brought seeking the review of this court's order made on 1.12.89 striking out the plaint brought by the applicant on behalf of the estate of his son on the ground that he had no grant of letter of administration intestate. The principles for the successful grant of a review are well settled and the two which are pertinent to this application are that some new and important matter or evidence which could not with diligence have been discovered, have been discovered, after the order sought to be reviewed was made, or for any other sufficient cause. The new discovery made according to the affidavit in support of the application, is that it had come to the attention of counsel for the applicant after the order of this court was made on 1.12.89, that the decision of the Court of Appeal in the case of *Hintz v Mwakima*, (1982-88) 1 KAR 482, had held that a personal representative as opposed to a legal representative, could sue in Kenya for damages for the benefit of the estate of a deceased person. Why this authority could not have been discovered after the exercise of due diligence even if this authority could be regarded as "new and important matter or evidence" is not explained. Since also the phrase "any other sufficient reason" has been held to mean any other sufficient reason analogous in this case, to the discovery of new and important matter or evidence, it means that if I reject this application on the ground that it has not been established that the discovery or the report of the *Hintz* case is not a new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of counsel for the applicant, I must also hold that there is also no other sufficient reason to grant the application. It is so ordered. But counsel for the applicant has not pressed this aspect of the application and has contented himself to showing that the decision in the *Hintz* case is no longer good law, namely that a personal representative or administrator of a deceased, from more recent decisions of the Court of Appeal, cannot sue on behalf of the estate of the deceased without first having obtained letters of administration. He cited among others the celebrated case of *Virginia Edith Wambui Otieno v Joash Ochieng Ougo and Omolo Siranga*, Court of Appeal at Nairobi Civil Appeal No 31 of 1987. In the judgment of the court in that case where the appellant claimed the right to bury her husband as his personal representative, the Court of Appeal had the following to say:

"But an administrator is not entitled to bring an action as administrator before he has taken out letters of administration. If he does the action is incompetent at the date of its inception

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She cannot legally claim the right to bury the body of her husband as his personal representative. It follows that if the appellant relies on the common law itself it will not assist her. She is not yet able to sue as personal representative until the grant of letters of administration to her".

This is great authority. I am also indebted to Mr Fraser, counsel for the respondent who also drew my attention to the ruling of Shields J in the case of *Elias Awinda Ochola v Peter K Langat* HCCC No 3081 of 1986 where the *Hintz* case and the *Otieno* case were considered and where Shields J came to the conclusion that the *Hintz* case was no longer good law having been overruled by the *Otieno* case. I

respectfully agree with Shields J.

And so had I not held that the application was incompetent because it does not satisfy the conditions laid down in 0 44 r 1(1) under which it had been brought, I would have dismissed it on the ground that the *Hintz* case upon which reliance has been placed is no longer good law. In the result the application is dismissed with costs.

Dated and Delivered at Nairobi this 8th Day of March, 1990

A.M.AKIWUMI

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JUDGE