REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 892 OF 2015 (FORMERLY HCCC NO. 32 OF 2011)

LEONIDA DONDE AMBUNO (Deceased).....PLAINTIFF

VERSUS

JOASH AGENGO MIGUDI.....1ST DEFENDANT

FRANCIS AGENGO.....2ND DEFENDANT

OCHIENG AGENGO.....3RD DEFENDANT

RULING

The Defendants filed the subject application on 25th March 2019 seeking orders to set aside of the court orders of 21/11/2018 expunging all processes and pleadings filed by William Otieno Didi; that William Otieno Didi be recognized as the proper Plaintiff; and that the suit do proceed for hearing and determination.

The application is made on the ground that there is an error apparent on the face of the record, that the Defendants sought and obtained substitution of Leonida Donde Ambuno (hereinafter Leonida) with William Otiende Didi (hereinafter William) as a Plaintiff; and that they did not propose that the William was the legal representative of estate of the original plaintiff Leonida.

The application is also made on the ground that the Defendants have discovered new evidence which reveals that William or persons acting on his behalf had illegally caused the subdivision of the suit land at which point he becomes a direct beneficiary and proprietor thereby pitting him against the defendants.

The respondent filed their replying affidavit and stated that the suit was filed by the original Plaintiff Leonida (Deceased) on 20th January 2011 and hence the suit had abated**.** They further stated that William had not been enjoined properly as a plaintiff and prayed for dismissal of the application with costs.

The Applicants submitted that the only issue for determination was whether the application should be allowed. That there was an error on the face of the record, that is, that William was to substitute the Leonida not as her estate's personal representative but as the actual beneficiary of the illegal seizure of the suit property from the 1st Defendant.

The Applicant's also submitted that they had discovered a new and important matter or evidence; being that William caused the illegal sub-division of the suit property nearly two years after the death of the Plaintiff.

They relied upon the case of ***Khalif Sheikh Adan v The Hon. A.G*** **[2019] eKLR** where the court held that "where the sanctity of title is being challenged on the basis of new evidence which could not be produced during the hearing of the case, a court of law and equity will not ignore such evidence….."

The Respondents submitted that the legal issues for determination are whether the court should review/set aside its order of 21st November 2018 despite the suit having abated and whether the plaintiff is the proper party to the suit.

They submitted that the Applicants had failed to establish an error on the face of the record to warrant review, that they had not demonstrated that they discovered new evidence which was not within their knowledge, or that there was an error on the face of the record and that the court was right in finding that the said William was not a legal representative of the deceased plaintiff.

Finally, they submitted on the issue whether the said William was a proper Plaintiff that the law has stipulated clearly on what happens once a plaintiff dies and the cause of action survives or continues. That an application shall be made and the court shall cause the legal representative of the deceased to be made a party to proceed with the case. The said William is not clothed with the said representation

hence not a proper party/ plaintiff in this suit.

They urged the court to dismiss the application with costs.

Issues for Determination

1. Whether the application for review is merited

The basis for review is grounded in Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules.

Order 45 Rule 1 of the Civil Procedure Rules provides:

> **"(1) Any person considering himself aggrieved—**
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> **(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
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> **(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay".**

In *Timber Manufacturers and Dealers –Vs- Nairobi Golf Hotels (K) Ltd* HCCC No.5250/92 (reported in *Odunga's Digest on Civil Case Law and Procedure* Vol. IV at page 3553) Emukule J. held:

> ***"For it to be said that there is an error apparent on the face of the record, it must be obvious and self-evident and does not require an elaborate argument to be established."***

In *Nyamogo & Nyamogo Advocates v Kogo* [2001] 1 EA 173 the court held that: -

> ***"An error on the face of the record cannot be defined precisely or exhaustively… it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record could be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record."***
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> **While the Applicants claim that William was to substitute Leonida because he was the actual beneficiary of the seizure of the property and was merely using Leonida to mask his interests, the Respondent's Advocate assert that the intention was that William would be brought into the suit as the personal representative of Leonida.**
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> **The Amended Plaint described William as the personal representative of Leonida, indicating his intention to come into the suit in that capacity, regardless of the Applicants' curiosity as to how William had come to be personal representative of Leonida's estate. On the other hand, the parties' Advocates had by consent allowed the 1st Defendant's application for substitution on the ground that William had been using Leonida to engage the Applicants in a dispute yet he is the real beneficiary of the seizure of the suit property.**
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> **The conflict between the consent and clear intention of William in the amended plaint raises a complicated issue that cannot be easily resolved without raising elaborate arguments on both sides. Therefore, this cannot be an error apparent on the face of the record as it is not obvious or self-evident.**

Order 1 Rule 10 (2) of the Civil Procedure Rules provides:

> **"The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."**

As to what makes a party necessary, Delvin J in ***Pizza Harvest Limited v Felix Midigo* [2013] eKLR** cited with approval the case of ***Amon v Raphael Tuck & Sons Ltd (1956)* 1 All ER 273**:

> **"What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately …the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be**

necessary to hear them for that purpose. *The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party*."

In ***Busienei v Transnational Bank (K) Ltd*** **[2002] 1 KLR 784** the court declined to enjoin a party whose interests were in clear conflict with those of the Plaintiff on record.

In ***Nakuru Industries Limited v Barclays Bank of Kenya Limited*** **Kisumu HCCC No. 337 of 1994 [1994] LLR 8176**, Wambiliyangah J. held that where it is not clear how the causes of action arose involving the same defendant but two plaintiffs arose, each cause of action should be tried separately.

The Applicants had also submitted that there was *discovery of new and important matter or evidence.* That William was and understood himself as the Plaintiff by the virtue of their assertion that the said William had caused the illegal subdivision of the suit property making him a direct beneficiary hence pitting him against the Applicants.

This matter seems to be in conflict with the interests of the original Plaintiff and contradicts the pleadings in the plaint and amended plaint. The purported copy of the green card and official search annexed to the application further demonstrates the conflict.

Further, the Defendants seem to want the court to compel William to come in as a Plaintiff in a cause of action that is markedly different from the one that has arisen in this suit. It is the Defendants who seem to have a cause of action against William and instead of instituting a fresh suit against him, they are attempting to bring him in as a Plaintiff in this matter to address the subdivision of the suit property and not their alleged trespass as pleaded. This matter therefore should not necessitate review of the ruling of the court.

2. Whether an application for substitution can be heard in an abated suit

Leonida passed on during the subsistence of this suit, (passed on, on 20/1/2011) about 8 years 9 months ago today and so far she has not been substituted. By 20/1/2012 or thereabouts the suit had abated. Rejecting the application to have William substituted as the plaintiff, the court through its ruling of 21/11/2018 held that the suit had abated and parties were granted 3 months to take steps in substituting the plaintiff and failure to which the suit stood abated.

Further, the court held that the subsequent process and pleadings filed by William Otiende Didi be expunged from the court record hence leading to the defendants filing the instant application seeking review/ setting aside of the said orders.

The proposed Plaintiff William Otiende Didi has sworn an affidavit and stated that the suit had abated as no substitution had been done since the plaintiff passed on in the year 2011. This is a position the Defendants/ Applicants have not disputed.

Under Order 24 rule 3(2) there must be an application for revival of the suit after abatement before substitution. An order for substitution before revival of the suit is a nullity. The parties herein have not sought revival of the suit and as such the suit stands abated.

A suit can be said to have abated if: -

Order 24, Rule 1.

No abatement by plaintiff's death if right survives. 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Order 24 Rule 3 (2)

Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

In ***Titus Kiragu v Jackson Mugo Mathai*** **[2015] eKLR** it was held that: -

"It is not the act of the court declaring the suit as having abated that abates the suit but by operation of the law."

In ***KENYA FARMERS CO-OPERATIVE UNION LIMITED V CHARLES MURGOR (DECEASED) t/a KAPTABEI COFFEE ESTATE*** **[2005] eKLR**, the court held:

"The suit having abated on or about 23rd April, 1996, as seen above, the order of substitution of 5th March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity. It is not a sufficient answer that the application has come too late in the day or that these issues ought to have been raised at the time of hearing the application for substitution or at the latest at the time of hearing of the suit. Of course it would have been best had these issues been raised as early as possible. But it is really a matter that goes to the jurisdiction of the court.

Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already

abated by operation of the law" Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated, it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction."

It is more than 8 years since the Plaintiff passed on and no substitution has been done yet, it is also more than the 3 months since the court's ruling of 21/11/2018 hence clearly the suit has extinguished by way of abatement. The court is *functus officio* at this stage.

The upshot of the above is that the applicants have not advanced compelling reasons to enable this court review/set aside the court order of 21/11/2018. This application therefore lacks merit.

The suit stands abated.

DATED AND DELIVERED THIS 13TH DAY OF DECEMBER, 2019.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Orieyo for Plaintiff

No appearance for the Defendant