



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 50 OF 2012

(FORMERLY HCC NO. 14 OF 2000)

AUGUSTINE KIPSANG KIPTOO.....PLAINTIFF

VERSUS

CHERUIYOT ARAP SAWE.....DEFENDANT

AND

JOSEPH KIPRONO SANG.....APPLICANT

RULING

Joseph Kiprono Sang hereinafter referred to as the applicant has come to court for orders that this court be pleased to review its ruling delivered on 22.4.2015. Moreover, that the honourable court be pleased to extend time within which the application for substitution should be made and that the applicant be substituted in the place of Augustine Kipsang Kiptoo. The application is based on grounds that Augustine Kipsang Kiptoo, the Plaintiff herein died on 13.2.2012 and that the Applicant obtained and/or collected a Special Limited Grant ad litem from the high court in respect of the Estate of Augustine Kipsang Kiptoo on 24.11.2015 though signed on 2.10.2014 and the order made on 13.8.2014. That the Applicant's application dated 5.1.2015 and filed on 12.1.2015 seeking substitution has been dismissed and that the applicant wishes to review the court's ruling as there is an error apparent on the face of the record that requires correction and/or rectification. The court order as to costs was erroneous and needs to be corrected. He claims that there is an error in the computation of time with regard to the dates as captured in the court's finding requiring correction.

He states that the court made the order for Special Limited Grant on 13.8.2014 but it was not until the 24.11.2014 when the signed Special Grant ad Litem was collected from court and that this is a court of record hence the need to review the order to set the record straight. The Applicant requires to be substituted in place of the deceased, *Augustine Kipsang Kiptoo* so as to continue with this suit. He claims that the application is timely and made in good faith and that no prejudice will be suffered by either party if the orders sought issue as even the respondent has an application seeking similar orders and in granting this application the court will have save time. That the grant of the orders sought will serve justice for all and will ensure that the estate of the deceased does not go to waste.

The application is supported by the affidavit of *Joseph Kiprono Sang* who states that the honourable court made an order for special grant *ad litem* to the applicant on 13.8.2014. It was not until 2.10.2014 when the court signed and issued a special limited grant *ad litem*. However, the applicant did not receive a copy of the said grant until 29.11.2014 when the file was made available to the registry. The explanation given by the court Registry for the delay in availing to the applicant the signed copy of the

grant aforesaid is that the file had been taken to the County Information Technology Department for purposes of preparing a status report and for returns which are ordinarily sent to Nairobi.

It is further deponed that upon the department of Information Technology completing their work with files they forwarded to another Judge for signature of the special grant *ad litem* since Justice S. Munyao had left the station for transfer and that during all this period, the extracted grant was on the court file for signature. It is alleged that from the date the court made the order for the grant *ad litem* on the 13.8.2014, Mr. Nyairo's staff used to check with the court registry on a day to day basis with the intention to collect the signed special limited grant *ad litem* and that is was until the 24.11.2014 that the grant was collected from the court after the grant was released from the registry. Efforts to get the applicant swear the supporting affidavit for purposes of substitution were futile as he was in Narok and did not have a phone and was just lucky to be contacted by a relative. On 21.12.2015, he travelled to the offices of Nyairo & Company Advocates but found them closed. He managed to execute the affidavit on 5.1.2015.

The defendant has filed ground of opposition stating that the court is *functus officio* and that the application is *res-judicata*.

I have considered the Notice of Motion dated 2.6.2015 brought under Article 159 of the Constitution and Order 49 of the Civil Procedure Rules, 2010 and do find that the main prayer sought by the applicant is for the review of the ruling delivered on 22.4.2015. The application for review is brought under the provision of ***Order 45 of the Civil Procedure Rules, 2010*** provides that any person considering himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or 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. Moreover party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

This order should be read with Section 80 of the Civil Procedure Act, Cap. 21, Laws of Kenya which provides that;

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act,

may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Though section 80 of the parent act leaves it to court to grant the order for review as it thinks fit, It is very clear from the rules that there must be discovery of a new and important matter or evidence which after 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 record or for any other sufficient reasons.

The new and important evidence that the applicant appears to rely on is that the court made the order for a special grant *ad litem* on the 13.8.2014 but the same was issued on 2.10.2014. I have looked at the

limited grant of letters of administration ad *colligenda bona defunctis* and do find that there appear to be an error on the face of it as it was made on the 13.8.2014 and issued on 2nd October, 2014, however the same indicates vice versa, that it was issued on 13.8.2014 and dated 2.10.2014. The date of the order cannot be the date of issuance as the former comes first. It is true that upto the 2.10.2014 the court had not signed the order to enable the parties collect for use and/or filing the application dated 5.1.2015. I do find that there is an error apparent on the face of record as the special grant *ad litem* was not issued on 13.8.2014 but was issued on 2.10.2014 and therefore, time stated running on 2.10.2014.

In view of the provisions of Order 50, Rule 4, unless otherwise directed by a Judge for reasons to be recorded in writing the period between 21st December in any year and 13th January in the year next following both days included, shall be excluded from any computation of time whether under the rules or order of the court. There is no provisions for time within which such application for review should be filed hence it is envisaged that such application should be filed within reasonable time.

Having found that I erred when I found that the order was issued on 15.8.2014 instead of 2.10.2014, I do find that the time stated running on the 2.10.2014 and stopped on the 21.12.2014 until the 13th January, 2015. I do hereby review my finding that there was a delay of 120 days in filing the application as indeed the delay was for 79 days. I do hold that the error contributed in the court dismissing the application. Furthermore, I am satisfied with the explanation given for the delay in filing the instant application. Ultimately, the application dated 2.6.2015 is allowed in its entirety thus I do review my ruling delivered, and order made, on 22.4.2015. Precisely, I do extend time within which the application for substitution should be made and that the applicant be substituted in the place of Augustine Kipsang Kiptoo. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 29TH DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE