



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 85 OF 2016

BETWEEN

KARL WEHNER CLAASEN.....APPELLANT

AND

THE COMMISSIONER OF LANDS.....1<sup>ST</sup> RESPONDENT

THE REGISTRAR OF TITLES.....2<sup>ND</sup> RESPONDENT

THE COMMISSIONER OF PRISONS.....3<sup>RD</sup> RESPONDENT

THE ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT

KIPANENGE OF KALENJIN ESTATES LIMITED.....5<sup>TH</sup> RESPONDENT

*(Being an Appeal from the Ruling of the High Court of Kenya, Environment and Land Court at Kitale, (E. Obaga, J.) dated 2<sup>nd</sup> February, 2016*

in

CONSTITUTIONAL PETITION NO. 7 OF 2015

Formerly ELD. ELC. PET NO. 1 OF 2013)

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JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the Environment and Land Court (**E. Obaga, J.**) dismissing a Notice of Motion dated 23<sup>rd</sup> October, 2014 in which the appellant herein sought leave of the court to be substituted as a legal representative of the deceased petitioner in the **Constitutional Petition No. 16 of 2013**.

[2] The appellant is a son and legal representative of **Nicolaas Henrick Claassen (Petitioner)** who died on 26<sup>th</sup> May, 2014. On 9<sup>th</sup> October, 2014, a limited grant of letters of administration was issued to the appellant limited for the purposes only of substitution and prosecuting Constitutional Petition No. 16 of 2013.

[3] On 16<sup>th</sup> January, 2013, the deceased petitioner filed constitutional petition No. 1 of 2013 at the High Court at Eldoret. The petition was brought under **Article 21, 22, 23, 27, 40 and 48** of the Constitution, 2010.

In a nutshell, the petitioner averred that in 1969 his four parcels of land in Kitale known as **Kandy Farm** were unlawfully taken away by the Government for use by the Commissioner of Prisons; that in 1969 his nine parcels of land in Kitale known as **Pilkem Estate Farm** were acquired unlawfully by **Kipagenge of Kalenjin Estates Limited**; that the parcels of land in the two farms comprised of 4,638 acres; that the

two farms were appropriated in violation of **Article 40(1)** of the Constitution which protects the right of property.

The reliefs sought in the petition include a declaration that his constitutional rights were violated; a declaration that his eviction from the two farms and the appropriation of the two farms are in violation of Article 40(1) of the Constitution and compensation for the loss of the two farms comprising of 4,638 acres in the total sum of Shs. 13,914,000,000/00.

On the 2<sup>nd</sup> February, 2015, the petition was transferred to the Environment and Land Court (*ELC*) at Kitale and registered as **Constitutional Petition No. 7 of 2015**.

**[4]** The petitioner died before the petition was heard and determined. As stated above, his son, the respondent, has obtained a grant of letters of administration ad litem.

On 20<sup>th</sup> November, 2014, the respondent filed a Notice of Motion for leave to be substituted as the legal representative of the deceased in place of the deceased. The notice of motion was brought under **section 1A, 1B, 3, 3A** of the Civil Procedure Act, order 1 rule 10 of the Civil Procedure Rules and all the enabling provisions of the law.

**[5]** The application was opposed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents in this appeal on the grounds that the application was incompetent as no provision of law provided for such an application; that the alleged violation of constitutional rights was a claim of a personal nature that does not survive the deceased petitioner; and that the petition abated with the demise of the petitioner.

The 5<sup>th</sup> respondent did not oppose the application.

**[6]** Upon consideration of the grounds of opposition, the learned judge identified two main issues for determination, firstly, whether the provisions of the Civil Procedure Act are available in constitutional petitions, and, secondly, whether a constitutional petition filed by a sole petitioner survives upon the death of a petitioner. On the first issue, the court appreciated that the Constitution of Kenya (*Protection of Rights and Fundamental Freedom*) Practice and Procedure Rules, 2013 – L.N No. 117 of 2013 (*hereafter referred to as Practice and Procedure Rules*) has no provisions for substitution of a deceased petitioner. Nevertheless, the court held that there was nothing wrong in relying on the enabling provisions of the Civil Procedure Rules and the Civil Procedure Act.

**[7]** As regards the second issue, the court observed that the deceased was seeking a declaration of rights which were alleged to have been violated and stated:-

**“The deceased’s rights were yet to be determined as at the time of his demise. There is therefore nothing to be taken over by the applicant. The moment the deceased died before his rights could be ascertained he died with those unascertained rights which were personal in nature. The unascertained rights of the deceased were not a chose in action which could be assigned to someone else.”**

On the issue of abatement of the petition, the court relied on the judgment of the **Supreme Court of Uganda at Mengo – Constitutional Appeal No. 1 of 2004 – Phillip Karugaba v. The Attorney General** and said: -

**“In the absence of what happens to a petition by a person who has died before his petition is heard in Kenya, I am persuaded to go the Uganda way which holds that such a petition abates.**

...

**In so far as the petition by the deceased is concerned there can be no substitution.”**

On the basis of those findings the court dismissed the application with no order as to costs.

**[8]** Although there are numerous grounds of appeal, the appeal essentially assails the court’s findings in respect of the second issue.

The appellant’s counsel **Mathai Maina** framed two issues in the written submissions namely; whether an application for substitution was equivalent to a constitutional petition guided by Practice and Procedure Rules, 2013. On that issue, the learned counsel submitted that **order 24** of the Civil Procedure Rules provides for substitution of parties upon the demise of a party in the proceedings.

The second issue is whether the petitioner’s rights had been ascertained upon his death and whether the rights died with him. Counsel submitted, *inter alia*, that the court failed to consider that the petitioner was not only seeking a declaration of violation of **Article 40(1)** but also compensation for loss of 4,638 acres; that the claim for compensation took the complexion of a civil suit and by **section 2(1)** of the Reform Act survived for the benefit of the estate of the petitioner. On his part **Mohammed Odongo** for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted, amongst other things, that; the right to institute court proceedings under **Article 22(1)** is a chose in action which is personal and which does not survive the claimant and abates upon the demise of the claimant; however, the rights under **Article 22(2)** survive the deceased; the property rights upon court’s declaration of **Article 40(1)** are contingent or unascertained rights which crystalizes upon the court’s declaration of the existence; that petition abated with the death of the sole petitioner and that **section 2(1)** of the Law Reform Act is not applicable in a constitutional arena.

The 5<sup>th</sup> respondent’s advocate was served with a hearing notice but failed to file written submissions or attend the hearing.

[9] The appeal raises a fundamental constitutional issue in essence whether a constitutional petition seeking compensation for alleged unconstitutional deprivation of property can be continued by a legal representative of the petitioner after the death of the petitioner. The Practice and Procedure Rules relating to procedure in constitutional petitions is silent and does not expressly provide for substitution of the deceased petitioner by his legal representative or for abatement of the petition. As the Uganda case – **Phillip Karugaba v. Attorney General (supra)** shows, **Rule 15(1)** of the Constitutional Court (*Petition for Declarations under Article 137 of the Constitution*) Directions, 1996 specifically provides that:

**“a petition shall abate by the death of a sole petitioner or of the survivor of two or more petitioners.”**

**Article 137(1)** referred to in the Rule provides:

**“Any question as to the interpretation of this Constitutions shall be determined by the Court of Appeal sitting as a Constitutional Court.”**

[10] In the Uganda case which was heavily relied on by the respondents’ counsel, a petitioner had filed a constitutional petition alleging violation of her fundamental rights and freedoms by the police and others who had imprisoned and assaulted her. She sought a declaration of violation and pecuniary damages for personal injuries suffered. However, she died before prosecuting the petition. Upon her death, her advocate sought an adjournment of the petition pending the appointment of a personal representative to take over the petition. The Constitutional Court rejected the application for adjournment and confirmed abatement of the petition under **Rule 15(1)** aforesaid.

Thereafter, her advocate filed a separate constitutional petition for a declaration that Rule 15 which provides for abatement of petitions was inconsistent with **Article 26(2)** of the Uganda Constitution. That Article provides that no person shall be compulsorily deprived of property or any interest or right over property. It was averred that the rule providing for abatement deprives the estate of a deceased sole petitioner of a chose in action being property without compensation. The petition was dismissed by the Constitutional Court which decision was affirmed by the Supreme Court for the reason that the right to petition, which is a chose in action, is not property that could be inherited by the estate of a deceased petitioner.

[11] In **Elizabeth Kwini & Another v. Managing Director & Another [2014] eKLR (Elizabeth Kwini case)**, the High Court sitting at Mombasa (**Tuiyott, J.**) allowed an application by legal representatives of a deceased petitioner to be made parties in the petition. The deceased petitioner had filed a constitutional petition for a declaration that the termination of his employment be declared unconstitutional, reinstatement and in the alternative payment of full benefits.

The High Court allowed the application for substitution on the ground that the alternative prayer which sought pecuniary damages was a chose in action which survived the death of the deceased petition. The High Court distinguished the Uganda case of **Phillip Karugaba v. Attorney General (Supra)** and stated:

**“Whether or not a right of action in a constitutional petition survives the death of the petitioner depends on the nature of the petition and the relief sought.”**

[12] **Article 22(1)** of the Constitution of Kenya, 2010 provides:

**“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.”**

Clause (2) of **Article 22** provides that such court proceedings may be instituted by a person acting on behalf of another person who cannot act in their own name; by a person acting as a member of, or in the interest of a group or class of persons; a person acting in the public interest or an association acting in the interest of one or more of its members.

**Article 258(1)** provides:

**“Every person has a right to institute court proceedings claiming that this Constitution has been contravened, or is threatened with contravention.”**

Clause 258(2) is identical to Clause 22(2) as to the class of person who may institute court proceeding alleging a contravention of the Constitution.

By **section 2(1)** of the Law Reform Act (*Cap 21*)

On the death of any person,

**“All causes of action subsisting against or vested in him shall survive against, or as the case may be, for the benefit of his estate:**

**Provided that this section does not apply to causes of action for defamation or seduction or inducing one spouse to leave or remain apart from the other or to claims for damages on ground of adultery.”**

Lastly, by **section 82** of the Law of Succession Act one of the powers of the personal representative is to enforce by suit or otherwise all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate.

[13] Causes of action of a personal nature do not survive for the benefit of a deceased's estate. The legal maxim **actio personalis moritur cum persona** (*a personal action dies with the person*) applies to such causes of action. The excluded causes of action in the proviso to **section 2(1)** of the Law Reform Act are an illustration of the application of the legal maxim. Other causes of action of a personal nature within the maxim include an action for divorce and custody dispute of minor children.

A cause of action is not synonymous with a chose in action. A cause of action denotes a combination of facts which entitles a person to obtain a remedy in court from another person and includes a right of a person violated or threatened violation of such right by another person (*see definition in Black's Law Dictionary Ninth Edition*).

A chose in action has several meanings including a right to bring proceedings in court for recovery of a sum of money or pecuniary damages for infliction of a wrong or non-performance of a contract.

[14] Turning to the instant appeal, the learned judge made a finding that the unascertained right of the deceased in the petition were not a chose in action. The right to institute court proceedings is expressly given by **Article 22(1)** of the Constitution. That right to institute court proceedings is undoubtedly a chose in action. It does not matter that such right is exercised through the procedure of a petition as **Rule 10(1)** of the Practice Procedure Rules stipulates. The cause of action is also provided in **Article 22(1)** – that is, a claim that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened.

The deceased petitioner averred in the petition to facts which *ex facie* show that his right under **Article 40(1)** to his own properties stipulated in the petition had been violated. That was a cause of action vested in him which survived for the benefit of the estate by virtue of **section 2(1)** of the Law Reform Act and which could be continued by the appellant as legal representative.

[15] In addition, the principle of *locus standi* has been profoundly reformed by **Article 22** and **258** with respect to enforcement of the Bill of Rights and enforcement of contravention of the Constitution respectively. In both cases, the right to institute court proceedings is given to a person acting in his own interest and to others including a person acting in public interest. That is consistent with **Article 3(1)** which obliges every person to *inter alia* defend the Constitution. **Rule 27(3)** of the Practice Procedure Rules is also relevant. That Rule gives the court discretion to proceed with a petition in spite of the wish of the petitioner to withdraw or discontinue the proceedings. Undoubtedly by our law the right to institute court proceedings for enforcement of the Bill of Rights and the Constitution in general is solely not a personal right exercisable by a person in his own interest. It is also a collective obligation of every person to defend the Constitution. It follows that the findings that a right to institute proceedings were not a chose in action and the right to bring proceedings by means of a petition were personal to the deceased petitioner are both erroneous in law.

[16] The deceased petitioner's main claim was for compensation for the deprivation of several parcels of land in the sum of nearly Kenya Shillings 14 billion. That cause of action survived for the benefit of his estate. The learned judge erroneously relied on the Uganda statutory provisions in arriving at a decision that the petition had abated. The finding that the proceedings (*petition*) had abated is contrary to the express provisions of **section 2(1)** of the Law Reform Act and **section 82(a)** of the Law of Succession Act and the purpose of **Article 22(2)**. We are in agreement with the decision of the High Court in **Elizabeth Kwini case (supra)**, that, whether or not a right to action in a constitutional petition survives the death of the petitioner depends on the nature of the petition and the relief sought and find that in the circumstances of this case the constitutional petition seeking compensation for deprivation of property survived for the benefit of the estate upon the death of the petitioner and may be continued by the appellant as a legal representative of the deceased petitioner. There is no cross-appeal against the finding of the trial judge that in the absence of express provisions in the Practice Procedure Rules, an application for substitution may be based on the applicable Civil Procedure Rules. However, we add that **Rule 3(8)** of the Practice and Procedure Rules gives the court inherent power to make such orders as may be necessary for the ends of justice and that **Article 159(2) (d)** and **(e)** respectively obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution.

[17] For the foregoing reasons, the appeal is allowed and the ruling of the trial court dated 2<sup>nd</sup> February, 2016 is set aside. As this is an interlocutory appeal, the costs of the appeal shall be costs in the pending petition and in the discretion of the trial court.

**DATED and Delivered at Eldoret this 9<sup>th</sup> day of May, 2019.**

**E. M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original*

**DEPUTY REGISTRAR**