



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**  
**AT NAIROBI**

**APPEAL NO. E079 OF 2021**

**KENYA COUNCIL OF EMPLOYMENT AND MIGRATION AGENCIES..APPELLANT**

**VERSUS.**

**HON. JOHN OBIERO NYAGARAMA (DECEASED).....1ST RESPONDENT**

**ADVOCATE ON RECORD - COURT OF APPEAL**

**CIVIL APPLICATION NO.E10 OF 2020 NAKURU .....2ND RESPONDENT**

**ADVOCATE ON RECORD - JUDICIAL REVIEW**

**NO.1 (B) OF 2019 KERICHO ELRC.....3RD RESPONDENT**

**ADVOCATE ON RECORD -**

**PETITION 1 OF 2015 KERICHO ELRC.....4TH RESPONDENT**

**NAOMI NYANGARAMA.....5TH RESPONDENT**

**EMILY NYAGARAMA .....6TH RESPONDENT**

**CHAIRMAN COUNCIL OF GOVERNORS.....7TH RESPONDENT**

**LEE FUNERAL HOME NAIROBI.....8TH RESPONDENT**

**NYAMIRA COUNTY GOVERNMENT.....9TH RESPONDENT**

**NYAMIRA COUNTY ASSEMBLY.....10TH RESPONDENT**

**NYAMIRA COUNTY PUBLIC SERVICE BOARD.....11TH RESPONDENT**

**RULING**

The appellant through the chairman Evans Nyambega Akuma filed the appeal herein together with a Notice of Motion citing various provisions of the Constitution, the Employment Act, Fair Administrative Actions Act, Law Reforms Act and Rules of procedure and dated 30<sup>th</sup> July, 2021.

In discerning the matter before court, Under the Notice of Motion, the appellant is seeking for orders that;

1. Spent.
2. In interim leave is hereby granted for making all respondents on record in MCCC No.007 of 2021 as respondents on Appeal.
3. Interim leave is hereby granted that all orders arising from MCCC No. 1162 of 2020 and not in MCCC No. 007 of 2021 are hereby stayed for enforcement and execution for reasons of conflict of interest, pending hearing and determination on this

application for appeal.

4. In interim leave is hereby granted to recall all two files and their proceedings MCCC No.1162 of 2020 and not in MCCC No.007 of 2021 and in MCCC No. 007 of 2021 from Chief Magistrate Milimani Commercial Courts Nairobi for interpretation pending hearing and determination on this application for appeal.

5. An interim order for leave to serve annexed memorandum of appeal out of time is hereby granted and hereby deemed as duly served upon payment of requisite fees and sealing by Hon. Deputy Registrar of this court.

6. For such further order or other orders as this court may deem fit to make in the circumstances of this case.

7. Costs in the cause.

The application is supported by the affidavit of Evans Nyambega Akuma, the chairman of the appellant and on the grounds that the magistrate erred in law and in fact by dismissing the appellant's case without providing reasons in case with regard to the jurisdiction of Employment and Labour Relations Court and by allowing the preliminary Objections made by the 7<sup>th</sup> respondent.

Other grounds in support of the application are that the magistrate erred in failing to find that the fresh claims by the appellant against the respondents were legal and genuine.

The appellant is seeking That the orders made on 25<sup>th</sup> June, 2021 dismissing the appellant's suit with costs be set aside and find MCCC No.007 of 2021 is not adjudicated upon. Leave be granted to allow all orders in the suit and the respondents to pay costs.

The appellant's case is also that leave be granted to file further affidavit further to the one dated 23<sup>rd</sup> July, 2021 on the grounds that Chief Justice through Gazette Notice No.6024 appointed Magistrates to preside over employment and labour relations matters; the 1<sup>st</sup> respondent is deceased and leave should be granted to substitute him under the provisions of Order 24 Rule 4 through the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents as wife, daughter and son as no application for legal representative has been made or the procedures under section 54 of the Law of Succession Act; and the court be pleased to order as applied.

The appeal herein is mixed grill of sought.

The challenged ruling in this appeal is not attached by the appellant.

The court addressed the appellant through the chairman Evans Nyambega Akuma to be assisted to file an appropriate appeal or as the case may require and he declined and protested the court's intervention in this regard.

Whereas the matter herein is filed as an Appeal, the basic foundations of an appeal are not addressed. The appellant through the chairman, Evans Nyambega Akuma has outlined various orders seeking leave to move the court which orders ordinarily arise under Judicial Review proceedings.

Taking into account the referenced suits under MCCC No.007 of 2021 and MCCC No. 1162 of 2020 and which, the outcome judgement, ruling, decree or order is not attached for the court to address whether as under an appeal or judicial review application.

The grounds in support of the Notice of Motion dated 30<sup>th</sup> July, 2021 are in their nature *Grounds of Appeal* save the Memorandum of Appeal attached thereto outline separate and different grounds in counter to the record.

The appellant is seeking to substitute the 1<sup>st</sup> respondent (deceased) with the wife, daughter and son, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondent under the provisions of Order 24 of the Civil Procedure Rules save, probate and administration matters with regard to a deceased who is a party to a suit is not addressed before the court being moved in an appeal to make a substitution.

From the pleadings in MCCC No.007 of 2021 and MCCC No.1162 of 2020 and the impugned judgement and orders of the Magistrate challenged herein and the alleged demise of the 1<sup>st</sup> respondent on 18<sup>th</sup> December, 2020 such arose during the subsistence of such suit (s) and there is no evidence that application for substitution was addressed under such suit or before filing such suit.

The appellant has well referenced section 54 of the Law of Succession Act save the procedures therefrom with regard to probate and administration have not been addressed. To move the court instead and seeking leave for substitution of the 1<sup>st</sup> respondent well aware of the attendant procedures is unprocedural. This will not achieve the desired results.

To move the court at this instance seeking leave to substitute the 1<sup>st</sup> respondent under the instant appeal is abuse of court process.

The appellant's application of Rule 99 of the Court of Appeal Rules with regard to substitution of a deceased party is misguided. The court reading of this rule is that the appeal herein has been filed with the appellant well aware that the 1<sup>st</sup> respondent is deceased. The Rule cannot sanitise the appeal.

Where the appellant may wish to address pertinent issues of law with regard to the trial magistrates having jurisdiction to address employment and labour relations matters; the process of substitution of a deceased party in court proceedings; a challenge to orders issued by

a judicial officer, the mode of litigation undertaken here would not solicit the orders sought as addressed above.

No leave is required to file an appeal to add a respondent where such a respondent was a party from the decision, order or decree being appeal from. The respondents in MCCC No.007 of 2021 and MCCC No.1162 of 2020 would as of necessity be party to the appeal therefrom.

An application for stay of execution of judgement, ruling, orders or decree issued by the Magistrate presiding in MCCC No.007 of 2021 and MCCC No.1162 of 2020 must first be addressed with the trial court and upon appeal, in seeking *interim leave* therefrom, the impugned order of the trial court must be attached which is lacking here. Save for the pleading filed under the referenced suits, no order is extracted.

The interpretation of the orders in MCCC No. 1162 of 2020 and in MCCC No.007 of 2021 in context, such would a good basis for appeal. The appellant guided should have filed the Record of Appeal and attaching the orders of the trial court on the grounds of law and fact, if any for the court to address as appropriate.

Leave applied to serve the memorandum of appeal out of time is unnecessary in this case.

On the application seeking for the court to issue such orders as the court may deem fit, this limb addressed in context, the appellant and chairman Evans Nyambega Akuma directed at the commencement of the hearing save he protested, the court will direct as herein below.

Before conclusion, the appellant is seeking payment of costs. The Employment and Labour Relations Court Act, 2011 referenced by the appellant and through the chairman Evans Nyambega Akuma makes the award of costs discretionary upon considering all factors.

These ruling would have been unnecessary had the appellant chairman Evans Nyambega Akuma allowed good counsel and direction. This was rejected. He should meet the costs of the respondents. A sum of ksh.100, 000 is found appropriate in costs.

For the court to issue precise and concise orders, the mater herein lacking in clarity and specify; the appeal is hereby struck out save the appellant and through the chairman Evans Nyambega Akuma shall meet the respondents costs all assessed at ksh.100, 000.

Orders accordingly.

**DELIVERED IN OPEN COURT AT.NAIROB THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021**

**M. MBARU**

**JUDGE**