



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 35 OF 2013

MICHAEL WACHIRA GITABI.....APPLICANT

VERSUS

CHARITY MUTHONI GITABI.....1ST RESPONDENT

ANN MUTHONI 2ND RESPONDENT

RULING

1. On 15/10/2018, the court directed that the application for substitution be heard first.
2. The application for substitution is dated 7th August 2012 filed by Michael Wachira Gitabi seeking that the Honourable Court be pleased to;
 1. **Substitute Michael Wachira Gitabi in place of Joseph Gichagi Gitabi the appellant who has since passed on.**
 2. **Issue temporary injunction restraining the respondent either by herself, her agents or employee or any other person from burying her sister Margaret Gathoni Gitabi on land Parcel No. Inoi/Ndimi/238 and 239 until the application is heard inter-partes.**
3. The application was based on the ground that the appellant died on 15/5/2012 and the applicant was issued with limited grant in respect of the succession cause. The court gave interim orders on 09/08/2012 and ordered that the application be served before close of business on 13/08/2012 for inter-partes hearing. The order issued on 9/8/12 indicated that the applicant be substituted in place of Joseph Gichangi Gitabi the appellant.
4. The respondent filed a Preliminary Objection on 06/12/2013 claiming that the appeal is res judicata and that the applicant lack locus standi to bring the application as he was substituted through an interim ex-parte orders which was not confirmed since he failed to serve the application before close of business on 13/08/2012 and the order lapsed upon expiry of 14 days under **Order 40 Rule 4(2) of the Civil Procedure Rules**.
5. That the deceased appellant's widow Julia Wanjiru Gichagi has been issued with letters of Administration in **Succession Cause No. 37 of 2012** and has priority over all persons to administer his estate. That the applicant has not received her consent or served her with citation when he applied for the temporary grant. That the appellant died on 01/03/2012 therefore the appeal abated for want of substitution within the prescribed time.
6. The applicant submits that he substituted the deceased appellant by an order issued by Justice Korir on 9/8/2012.
7. For the respondent it was submitted that the order substituting the applicant dated 9/8/12 was issued on temporary basis and lapsed upon expiry of 14 days. That the applicant has not been substituted in place of his late brother Joseph Gichangi Gitabi and he therefore lacks locus standi in any application based on the appeal.

Substitution of Appellant

The appellant passed away on 01/03/2012 therefore the appeal would have abated one year later on 01/03/2013. However, the applicant filed the application for substitution on 07/08/2012 and was issued with interim orders and the application was to be served before 13/08/2012 which he failed to do.

Issues arising

Whether the orders for substitution lapsed.

Order 40 Rule 4(2) of the Civil Procedure Rules provides:

(2) An ex parte injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of parties or by the order of the court for a period not exceeding fourteen days.

(3) In any case where the court grants an ex parte injunction the applicant shall within three days from the date of issue of the order serve the order, the application and pleading on the party sought to be restrained. In default of service of any of the documents specified under this rule, the injunction shall automatically lapse.

8. The above provisions relates to ex-parte orders of injunction which was with regard to prayer No. 2 in the application. The order which was issued on 9/8/12 was as follows:-

“2) That Michael Wachira Gitabi be and is hereby substituted in place of Joseph Gichagi Gitabi.

3) That a temporary injunction be and is hereby granted restraining the respondent Charity Muthoni Gitabi for a period of 14 days from intring the remains of Margaret Gathoni Gitabi on land parcel No. Inoi/Ndimi/238 and Inoi/Ndimi/239.

4) That the application be served at the close of business on 13/8/2012 for interparties hearing at Embu High Court on 15/8/2012”.

9. It is clear from the order that the order that was issued on temporary basis was prayer No. 3 which clearly stated that it was a temporary injunction.

10. The order substituting the applicant was issued with finality. Substitution of a party could not have been issued on temporary basis. The prayer for substitution of the applicant did not lapse after the expiry of 14 days and has in deed not lapsed.

11. The respondent has annexed a grant in respect of the estate of the appellant which was issued to his widow Julia Wanjiru Gichangi on 11/10/2012 in succession cause No. 37/2012. This was after the order issued on 9/8/2012 substituting the applicant.

12. The counsel for the respondent has submitted that the meaning of an administrator is:-

“ A person appointed by the court to manage the assets and liabilities of an intestate deceased.”

13. The court has been referred to ‘Digest on Civil Case Law and Procedure G. V. Odunga at Page 33’ which has quoted a passage in the Court of Appeal **Civil Appeal No. 289/1998** where it was held –

“a) Where the appellant s dead the administrator should be joined as a party.

b) A court may substitute without application being made if no objection is taken.”

14. Further court was referred to page 35 of the Digest, the Court of Appeal in **Dr. Ignatius Owalla Awino –v- Penina Anyanyo Okello C.A No. 226/1996** where it was stated-

“a) A person who has not obtained letters of administration can neither administer the estate of the deceased nor defend a suit against him and a court has no jurisdiction to proceed with the suit before a person holding a valid grant is brought on record.”

15. It is not disputed that the wife of the Appellant has obtained a grant of Letters of Administration in his estate. The applicant had obtained a grant ad litem for the purpose of substituting the appellant in the appeal. The wife of the deceased appellant is the administrator who should be joined as a party. This is because under **Section 29 of the Law of Succession Act** which defines a dependant, the wife or wives of the deceased has priority. The wife of the deceased appellant has obtained a full grant of Letters of Administration. The appellant’s widow Julia Wanjiru Gichangi being the administrator of his estate is joined in this appeal to substitute the appellant. The consequence is that the applicant has no locus standi in the appeal and his name shall be struck out. Julia Wanjiru Gichangi shall be served with the order by the process server of this court. The matter shall then be mentioned within 30 days for directions on the hearing of the other grounds on the preliminary objection.

Dated at Kerugoya this 26th day of June 2019.

L. W. GITARI

JUDGE