



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**MISC. APPLICATION NO. 196 OF 2014**

**JOHN WACHIRA GICHACHE.....APPLICANT(DECEASED)**

**VERSUS**

**JOSEPH KIPLANGAT & 12 OTHERS.....RESPONDENTS**

**RULING**

The application dated 10<sup>th</sup> September 2014 by John Wachira Gichache, the applicant herein seeks the following orders:

- 1. That the applicant be granted leave to appeal out of time against the judgment in Nyahururu SPMCC No. 178 of 2009 delivered on the 4<sup>th</sup> July 2011.**
- 2. That corresponding leave to file a counter appeal out of time be granted to the Respondent.**

The application is brought under **Sections 1A, 1B, 3A and 79G of the Civil Procedure Act and Order 51 Rule 1 of the Rules**. Reasons given for the over three years delay are that the applicant was incapacitated by ill health and old age as averred in his supporting affidavit sworn on the 18<sup>th</sup> September 2014. Though served with the application the Respondents have not responded in anyway to the application.

By a consent filed and adopted by the court on the 14<sup>th</sup> July 2015, the applicant John Wachira Gichache, (now deceased) on the 8<sup>th</sup> September 2014 was substituted by one Gerald Kairuki Wachira the Legal Representative of the Estate.

I have noted that the application was filed one month before the applicant died. An order of substitution of the applicant by his legal representative, Gerald Kariuki Wachira was granted on the 8<sup>th</sup> October 2014. Since then, no action has been taken to effect the order of substitution by the legal representative and no explanation has been tendered.

**Order 24 of the Civil Procedure Rules** provides for the procedure for substitution of a party who dies, where the cause of action survives him.

Rule 1 provides that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. By analogy, the death of an appellant in an appeal, if the cause of action survives shall not cause the appeal to abate. **Order 24 Rule 3(1) and (2)** allows substitution of the deceased party by a legal representative within one year of the demise, after which period if no such application is made the suit abates against the deceased plaintiff.

An order of substitution was issued by the court within the one year period. However, no steps have been taken to the legal representative to amend the pleadings or the appeal to date. There seems to be no seriousness in pursuing the application for leave to appeal out of time, or even to effect the order of substitution granted on the 14<sup>th</sup> July 2015, I find no merit in the application. It is dismissed with no

orders as to costs.

**Dated, signed and delivered in open court this 31<sup>st</sup> day of March 2016.**

**JANET MULWA**

**JUDGE**