



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**

**CIVIL APPEAL NO. 38 OF 2014**

**JOYCE KARIMI KILEMI .....PLAINTIFF**

**VERSUS**

**FRANCIS KARIUNGA KIRUBUA**

**T/A KARIUNGA KIRUBUA & CO. ADVOCATE.....1ST RESPONDENT**

**JACINTA NKATHA KARIUNGA.....2ND RESPONDENT**

**J U D G M E N T**

1. The Memorandum of Appeal in this suit states:-

**THE APPELLANT** being aggrieved by the RULING and ORDER of the Acting Senior Principal Magistrate, his Honour, Mr. D.W. MBURU dated the 17th day of October, 2014 in Civil case No. 130 of 2011 appeals to this Honourable Court against the said Ruling and Order on the following grounds:-

***I. THAT the Learned Ag. Senior Principal Magistrate erred in law in holding that Order 24 Rule 10 only applies to execution proceedings commenced by a judgment Creditor before his or her demise and not to the judgment-debtor in similar circumstances.***

***II. THAT the Learned Ag. Senior Principal Magistrate misdirected himself in law when he held that a judgment-debtor's personal representative must be enjoined to the suit to represent the Estate of the Deceased when the judgment -debtor died after execution proceedings have been taken against him.***

***III. THAT the Learned Ag. Senior Principal Magistrate erred in law in directing the Appellant to take out fresh execution proceedings now that the Application for substitution of the judgment-debtor had been granted.***

***IV. THAT the Learned Ag. Senior Principal Magistrate erred in law in ignoring that the Appellant's right to proceed with execution was an accrued right which should not have been taken away lightly.***

**REASONS WHEREFORE** the Appellant prays:

***i. THAT the Appeal be allowed.***

***ii. THAT the Order for substitution of the Defendant/Judgment-debtor by the Applicant***

***dated 17th day of October, 2014 be set aside and application dated 16th July, 2014 do stand dismissed.***

***iii. THAT the Appellant be granted the Costs of this Appeal and the Costs in the Lower Court.***

2. The Appeal was heard by way of Written Submissions.

3. The Appellant's argument is that Order 24 Rule 10 of the Civil Procedure Rules 2010 gives the Judgment Creditor the right to proceed and seize the property of a deceased Judgment Debtor where the Order of Execution had been made by the Lower Court and properly delivered to the deceased Judgment Debtor before he died.

4. The Appellant has proffered the case of *DHULIA HARICHAND VERSUS GULAMUHA DIN AND ANOTHER VOLUME XIX PART 1 1940 KLR 6* which held that execution proceedings do not abate on the death of the decree holder and the same applies to the position where a Judgment -debtor dies after execution proceedings have been taken against him, there being really no need for taking substitution proceedings in order to proceed with the execution from where it had reached on the death of the Decree Holder or Judgment-Debtor.

5. The Respondent responded that it was wrong for the Judgment-Creditor to proceed with execution without substituting the Judgment Debtor. She submitted that the rules of Natural Justice dictate that every person should be given a chance to participate fully in Judicial proceedings.

6. The Respondent proffered the Case of *Ngambu Mbau Versus Stephen Mbau and 5 Others Nyeri HCCC Petition No. 2 of 2010* in support of his assertion. That Court made an order prohibiting the Judgment Debtor and or his estate from transferring, leasing or charging the suit land and also prohibited all persons from taking any benefit from such purported transfer, lease or charge until the whole decretal amount is paid and until further orders of the Court with costs thereof being in the cause. I do opine that the Court did not definitively pronounce itself regarding the effect of Order 24 rule 10 of the Civil Procedure Rules, 2010.

7. On 25/02/2016, after the parties had filed and exchanged their Submissions, Mr. Arithi, the Respondent's Advocate told the Court that the Respondent was not opposed to the apposite execution. He said the only issue the Respondent had was to understand how Kshs. 500,000/= rose to be Kshs. 3,000,000/=. He asked the Court to give the parties 2 weeks so that they could try to agree. Mr. Aswani, the Appellant's Advocate agreed. Parties were directed to come back to Court on 17/03/2016.

8. On 17/03/2016, only Mr. Aswani, the appellants Advocate came to Court. He told the Court that he had sent his proposals to the Respondent's Advocate who had not responded. He opined that the absence of the Respondent and her Advocate was indicative of their intention to delay the determination of this suit.

9. It is clear that by accepting that execution could proceed and that the Respondent's only concern was how a sum of Kshs. 500,000/= rose to Kshs. 3,000,000/=: the Respondent has in a pellucidly veritable manner compromised her opposition to this appeal.

10. Order 24 Rule 10 states as follows:-

***“24. (10) Nothing in order 3,4 and 7 apply to proceedings in execution of a decree or Order”.***

Rule 3 deals with the death of a Plaintiff or Plaintiffs . Rule 4 deals with the death of a Defendant or several Defendants. It is clear that Order 24 Rule 10 removes the necessity of a legal representative in proceedings in execution of a decree or an order.

11. In the Circumstances, I issue the following orders:-

**1. This appeal is allowed.**

**2. The order for substitution of the Defendant/ Judgment Debtor by the Applicant dated 17th day of October, 2014 is hereby set aside and the Application dated 16 July, 2014 is dismissed.**

**3. Costs of this Appeal and costs in the Lower Court are awarded to the Appellant.**

**It is so ordered.**

**DELIVERED IN OPEN COURT AT MERU THIS 16TH DAY OF MAY, 2016 IN THE PRESENCE OF:**

CC: Daniel/Lilian

Aswani for the Appellant

Kiautha Arithi for Respondent -Absent

**P. M. NJOROGE**

**JUDGE**