



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 132 OF 2015**

**IN THE MATTER OF AN APPLICATION UNDER SECTION 37 AND 38 OF THE  
LIMITATION OF ACTION ACT AND IN THE MATTER OF LAND REFERENCE NUMBER  
KYENI/KIGUMO/2349**

**EPHANTUS NYAGA NYAGA.....PLAINTIFF/APPLICANT**

**VERSUS**

**EPHRAIM N'THAMBIRI.....DEFENDANT**

**JOYCE NYAKIO.....1<sup>ST</sup> RESPONDENT**

**KEITH KAMAU N'THAMBIRI.....2<sup>ND</sup> RESPONDENT**

**VICTORIA HELEN WAMBIRO.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Order 24 Rule 4 (1) of the Civil Procedure Rules provides as follows:-**

***“Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit” emphasis added***

**Rule 5 of the same order provides as follows:-**

***“Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the Court”***

Citing the above Order and Rules, the applicant herein **EPHANTUS NYAGA NYAGA** has moved this Court by his Notice of Motion which is un-dated but filed on 10th February 2016 seeking the following orders:-

1. ***Spent***
2. ***That the Court do determine that JOYCE NYAKIO, KEITH KAMAU N'THAMBIRI and VICTORIA HELEN WAMBIRO are the legal representatives of the late EPHANTUS NDWIGA N'THAMBIRI.***
3. ***That consequently, the said JOYCE NYAKIO, KEITH KAMAU N'THAMBIRI and VICTORIA***

- HELEN WAMBIRO be made parties to this suit instead of the deceased defendant.**
4. **That the Court do issue any other or further orders/directions.**
  5. **Costs be in the cause.**

The application is based on the grounds set out therein and supported by the affidavit of the applicant **EPHANTUS NYAGA NYAGA**.

Briefly, the applicant's case is that he had sued the late **EPHRAIM N. N'THAMBIRI** on 17th May 2006 but he died on 21st October 2015 and therefore to avoid this suit abating, it is necessary that the proposed legal representatives of the deceased defendant be made parties to this suit. The said proposed legal representatives are the widow and children of the deceased. In support of the application, he has annexed a copy of the deceased's eulogy – annexure **ENN 1**.

In opposing the application, counsel for the proposed defendants has filed grounds of opposition to the effect that they are not currently the legal representatives of the Estate of the late **EPHRAIM N'THAMBIRI** as they have no letters of administration and this application is therefore pre-mature.

When counsel for the parties appeared before me on 12th May 2016 for directions on the application, it was agreed that the Court relies on the applicant's affidavit and the grounds of opposition thereto.

I have considered the application, the supporting affidavit and the grounds of opposition.

I must start by correcting what must be a typographical error in prayer No. 2 of the said application. The prayer must be to determine that **JOYCE NYAKIO, KEITH KAMAU N'THAMBIRI** and **VICTORIA NDWIGA N'THAMBIRI** are the legal representatives of the late **EPHRAIM NDWIGA N'THAMBIRI** and not **EPHANTUS NDWIGA N'THAMBIRI**.

It is clear to me that the only reason the applicant seek to make the respondents herein parties to this suit is because they are the wife and children of the deceased **EPHRAIM N. N'THAMBIRI**. They have however not taken out a grant of letters of administration in respect to the deceased's Estate and are therefore not his legal representatives. **Section 2 of the Civil Procedure Act** defines a legal representative as follows:-

***“Legal representative means a person who in law represents the Estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the Estate devolves on the death of the party so suing or sued”***

Under **Section 3 of the Law of Succession Act**, a personal representative is defined as ***“the executor or Administrator as the case may be of a deceased person”***. An Administrator in the same section is defined as ***“a person to whom a grant of letters of administration has been made under this Act”***

As was held in the case of **TROUISTIK UNION INTERNATIONAL & ANOTHER VS JANE MBEYU & ANOR. C.A CIVIL APPEAL NO. 145 of 1990** a party cannot represent the Estate of a deceased person unless he has obtained a grant of letters of Administration. See also **VIRGINIA EDITH WAMBOI OTIENO VS JOASH OUGO & OMOLLO SIRANGA C.A CIVIL APPEAL NO. 31 of 1987 (1982 – 88) 1 K.A.R.**

Without having obtained a grant of letters of Administration in respect of the Estate of the deceased **EPHRAIM N. N'THAMBIRI** none of the respondents either jointly or severally can be made parties to this suit in place of the deceased. This is because in law, they are not legal representatives of the Estate of the deceased. And until they are appointed legal representatives of the Estate of the deceased, they would have no locus to be parties in this suit.

The applicant's Notice of Motion filed herein on 10th February 2016 is therefore dismissed with costs.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**

Ruling delivered, dated and signed in open Court this 9<sup>th</sup> day of June 2016.

Mr. Kinyanjui for Mr. Gatumuta for the Applicant present

Mr. Muyodi for the Respondents present.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> JUNE, 2016**