



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 393 OF 2013**

**KARIMI KABUTHI.....PLAINTIFF/APPLICANT**

**VERSUS**

**MAWI KABUTHI..... DEFENDANT**

**AND**

**ESTHER KAGUU MWAI**

**MICHAEL MURIITHI MWAI.....INTENDED SUBSTITUTED DEFENDANTS**

**RULING**

1. The Applicant is seeking the following orders vide his Notice of Motion dated 13<sup>th</sup> August, 2021 and filed on 16<sup>th</sup> August, 2021: -

**a. Spent**

**b. That this Honourable Court be pleased to substitute the defendant (now deceased) herein with ESTHER KAGUU MWAI and MICHAEL MURIITHI MWAI, his legal representatives, to enable the plaintiff/applicant execute his judgment.**

**c. That the costs of the application be provided for.**

2. The application is premised on the grounds set out on the face of the application supported by the affidavit of the applicant and annexures thereto.

3. The respondent opposed the said application by way of grounds of opposition and a Replying affidavit both filed on 1<sup>st</sup> November, 2021.

4. When the application came up for hearing, the parties agreed that the same be canvassed by way of written submissions.

**APPLICANT'S CASE: -**

5. The applicant's case is that judgment in this matter was delivered in his favour on 5<sup>th</sup> March, 2014.

6. Later the Defendant who was dissatisfied with the said judgment preferred an appeal, C.A. No. 51 of 2014 Mwai Kabuthi versus Karimi Kabuthi, which was dismissed.

7. The defendant failed to execute the necessary documents to facilitate the execution which led the applicant to move the court for the Executive Officer to execute the said documents – the said application was allowed on 14<sup>th</sup> February, 2019.

8. On 4<sup>th</sup> April, 2019 his application for the OCS Kerugoya Police Station to provide security was allowed so that the exercise of subdivision could be carried out.

9. The defendant died later on 28<sup>th</sup> November, 2019 and thus he has been unable to execute the said judgment which has caused him to be rendered destitute as the defendant's family has locked him out of the suit land.

**INTENDED SUBSTITUTED DEFENDANT'S CASE: -**

10. Their case is that this matter stands abated until they get a full confirmation of letters of administration and that they had already filed Succession Cause no. 79 of 2020 which is pending determination.
11. They stated that the plaintiff obtained judgment on miscarriage of justice in that the evidence adduced during hearing were not true and they intended to file an application in the Supreme Court for re-trial of the judgment of the high court and court of appeal.
12. They further stated that the plaintiff was not born and brought up in the suit land but was born in Eldoret and has not lived on the suit land at all times.
13. He also stated that the suit land is not family nor inheritance land but was allocated to the defendant by the clan having assisted during the survey and demarcation, they thus objected to the plaintiff being given half share of the suit land as he intends to waste it by selling to third parties, but they had no objection in him being registered for life interest.
14. They prayed that the application can wait for the succession cause to be concluded.

**SUBMISSIONS: -**

15. The applicant filed his submissions on 11<sup>th</sup> December, 2021 while the Intended Defendant filed theirs on 30<sup>th</sup> November, 2021.
16. The applicant submitted that the objection that they intend to file an appeal in the Supreme Court does not lie as the time to file any appeal has lapsed and also that the Supreme Court does not have jurisdiction to determine it as provided under *Article 163 (3), (4) and (5) of the Constitution of Kenya*.
17. He also submitted that the confirmation of the grant in the succession case is not a requirement for substitution and thus their allegation does not lie.
18. He further submitted that the issue of inheritance of the land was canvassed both in the trial court and appellate court and thus this Honourable Court cannot sit on its own appeal.
19. On the part of the Intended Defendants, they submitted that the application be dismissed and or stayed as it is not brought to court in good faith but with bad intent.
20. They submitted that the application did not disclose the true facts of the matter on the ground and they wish to pursue the matter until its finality and it's only fair for the same to be dismissed awaiting the aforesaid pending issues in this matter.
21. They prayed that this court orders for trial of this case through the alternative justice system as it's a family matter and true facts were not disclosed at the hearing of the main suit and the plaintiff wanted to render the land to waste by selling.

**ANALYSIS: -**

22. I have considered the application, parties' rival affidavits, grounds of opposition, annexures thereto and the submissions.
23. The application was brought under **Order 24 Rule 4 of the Civil Procedure Rules** which provides that: -

***“(1) 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.***

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant”.*

24. On the applicability of this provision of the law upon entry of judgment, the Honourable Court in the case of **AGNES WANJIKU WANG'ONDU VS UCHUMI SUPERMARKET LTD [2008] e KLR** held that: -

*“So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. In the case of Dhulla Harichand (supra), the Court said:*

*..... In (1934) I.L.R. 13 Pat. P. 777 Khaja Mohamed Noor J. says at p. 780: “No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative”.*

In my view, therefore, it was perfectly legitimate for the Appellant to seek “substitution” in the lower court, and the lower court erred not only in dismissing the application, but also in holding that the suit had “abated”.

25. Further in the case of ***Fatuma Mohamud Mohammed Mire v Japhet Nteere Mwendwa [2021] e KLR***, the Honourable Court held that: -

*“11. My understanding of the provisions of Order 24 as read with Order 31 of the Civil Procedure Rules is that the rights accruing, or any obligations owing from the deceased can only be enjoyed or enforced by the administrator of his/ her estate. There is no particular need for substitution of the deceased as what is required is proof that one has been appointed as the legal representative of the estate.*

12. In ***Brian Muchiri Waihenya v Jubilee Hauliers Ltd & another; Geminia Insurance Co. Ltd (Interested Party) [2018] e KLR***, the Court opined as follows;

*“It is plain and clear that this court having pronounced the final judgment and a decree drawn, being asked to re-engage itself and to interrogate whether or not the applicant ought to be enjoined in the suit at the late hour which is already pending before the Court of Appeal would in my very considered view be against the law and laid down principles of functus officio.*

*However, if it was a matter of correcting a clerical error or an incidental consequence of the final decision like execution proceedings or contempt of court proceedings that would be possible under the Civil Procedure Rules. [Emphasis mine]*

13. ... This is because the ELC court still retains the mandate to grant a remedy when faced with such an application on matters that are still within its jurisdiction (i.e. contempt & execution) after the pronouncement of its judgement.”

26. **Section 38 of the Civil Procedure Act** provides that: -

*“Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree — (a) by delivery of any property specifically decreed; (b) by attachment and sale, or by sale without attachment, of any property; (c) by attachment of debts; (d) by arrest and detention in prison of any person; (e) by appointing a receiver; or (f) in such other manner as the nature of the relief granted may require: ...”*

27. From the foregoing, it is clear that a decree holder can move the court for a deceased to be substituted even after pronouncement of judgment in order to effect execution in such a manner as the nature of the decree requires.

28. In this matter, there exists judgment against the deceased defendant which entitles the applicant to half share of Mutira/Kaguyu/145.

29. In the lifetime of the deceased, the applicant had made steps to ensure execution of the resultant decree; However, the deceased died before the same could be done.

30. It is evident from the rival affidavits of the parties herein that the intended substituted defendants are opposed to the execution of the said decree.

31. The objections raised cannot be dealt with by this Honourable Court as the judgment of this Honourable Court is final and the same amounts to relitigating the suit.

32. Thus, this Honourable Court is functus officio and can only deal with correcting a clerical error or an incidental consequence of the final decision like execution proceedings or contempt of court proceedings such as the instant application.

33. The allegation made by the intended substituted defendants that they intend to prefer an appeal against the high court and court of appeal judgment is untenable as there is no evidence of any appeal filed or order from a competent court staying execution of the judgment herein or even proceedings of this matter.

34. From the evidence tendered by the Applicant vide annexure marked as KK2 in his supporting affidavit, I am satisfied that the Intended Defendants are indeed the personal representatives of the Deceased Defendant. The same is also not opposed by the Respondents.

35. Since this is a cause of action that survives the deceased defendant, I am thus of the view that there is no substantial cause why the respondents should not be joined in this matter in order to facilitate the execution of the decree herein.

**CONCLUSION: -**

36. In view of the foregoing, I find and hold that the applicant’s application dated 13<sup>th</sup> August, 2021 has merits and the same is hereby allowed. Since the parties are family members, they each shall bear their own costs.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.**

.....  
**HON. E. C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. Ms Ndungu holding brief for Ms Githaiga for the Applicant
2. Respondent – present
3. Kabuta – Court Assistant.