



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**CIVIL SUIT. NO.39 OF 2010 (0S)**

**PHIATAH KITHUMBI MUUMBO.....  
PETITIONER**

**VERSUS**

**TIMOTHY MWANDI MUUMBO.....RESPONDENT**

**RULING**

The Applicant, Carolyn Kalunde Muumbo applied, under **Order 24 Rules 1,2,3(1)** and 5 of the **Civil Procedure Rules** seeking to be substituted as the Petitioner in the place of her mother Phiatah Kithumbi Muumbo who died on 17<sup>th</sup> January 2013. The Applicant annexed a copy of the certificate of death in the affidavit in support of the application. She deponed that she was authorized to take over the proceedings in the case on behalf of the estate of her deceased mother. In that regard, she annexed a copy of limited grant of letters of administration intestate which was issued to her by the High Court in **Nairobi HC P & A No.1178 of 2013 In the Matter of the Estate of Viata Kithumbi Muumbo alias Phiatah Kithumbi Muumbo (deceased)**.

The Applicant states that the deceased had filed the present suit under **Section 17** of the **Married Women Property Act 1882** (which has since been repealed and replaced by **The Matrimonial Property Act**). She deponed that her mother's claim survived her death hence the Applicant's decision to make the present application. The application is supported by the annexed affidavit of the Applicant and the grounds stated on the face of the application.

The application is opposed. The Respondent, through his advocate, filed grounds in opposition to the application. He stated that the application was fatally and incurably defective. It was bad in law since at the time the application was filed, the suit had already abated. He was of the view that in the premises therefore the application lacked merit and was filed in abuse of the due process of the court.

During the hearing of the application, this court heard oral rival submission made by Ms. Mukururi for the Applicant and Mr. Musyoka for the Respondent. Learned Counsel essentially reiterated the contents of the application and the grounds of opposition. That the Applicant has the legal right to continue with the proceedings against the Respondent is not in doubt. In **Mary Wanjiru Gachacha –Vs- Erastus Gachacha Mbanu [2011] eKLR** Wendoh J, held that the death of a spouse who has filed a case seeking a declaration of her right in matrimonial property does not extinguish her right to that property. That right is due to her estate and can be prosecuted by her personal representative. The Learned Judge cited **paragraph 1039 of Halsbury's Laws of England** then held thus:

*“From the above, it seems that the applicant has the right to take over and continue with the plaintiff's application as the legal representative. The plaintiff (deceased) had sought to have the properties that were listed in the Originating Summons to be held jointly and in equal shares between the plaintiff and the defendant, the same having been held by the defendant as proprietor and trustee for himself and the plaintiff.”*

In the present application, the Respondent essentially opposed the application on the grounds that the suit had already abated by the time the Applicant sought to be substituted in the suit in place of her deceased mother. In that regard, the Respondent relied on **Order 24 Rule 3(2)** of the **Civil Procedure Rules** which

provides that:

***“Where within one year no application is made under sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff....”***

However, there is proviso to that rule that grants the court discretion, for good reason, to extend time.

In the present application, it was clear that it took time for the Applicant to file the present application on account of the fact that soon after the death of the Petitioner, the Respondent sought to evict the children of the Petitioner from one of the properties that is the subject of the suit. This court is of the view that in the interest of justice and for the children of the deceased petitioner to be given a chance to ventilate their case, it will allow the application made by the Applicant to substitute her mother as the Petitioner in this case notwithstanding that one year had expired at the time that she filed the present application. This court exercises its discretion to extend time to enable the Applicant be substituted in the present suit in the place of the deceased petitioner. It is so ordered.

Since the dispute involves family members, there shall be no orders as to cost. Each party shall bear their costs.

**DATED AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2016**

**L. KIMARU**

**JUDGE**