



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KAPSABET

ELC APPEAL NUMBER 11 OF 2021

(FORMERLY ELDORET ELC APPEAL NO 1 OF 2019)

JEPKUTO BARGENTUNY.....APPELLANT

VERSUS

SAMSON MUTAI.....RESPONDENT

RULING

1.This ruling is in relation to two applications, the first application dated 9.12.2021 and filed by **Philister Chemaiyo Sosten**, a daughter of the deceased Appellant through the firm of K.K arap Sego and Co. Advocates who seeks that she substitutes the Appellant herein.

2. The Second application is dated 14.12.2021 by the Respondent Simon Mutai through the firm of Gicheru & Co. Advocates who seeks an order that this appeal be deemed to have abated by operation of law.

3. It is common ground in both applications that the Appellant Jepkuto Barngetuny (now deceased) passed on 22.09.2018.

4. A brief background of the Appeal is necessary so as to put the issues giving rise to the Applications in perspective. The Appeal was originally filed on 01.07.2011 before the High Court at Eldoret and was HC Civil Appeal number 116 of 2011.

5. The Appeal challenges a verdict by the Rift Valley Provincial Land Disputes Appeals Tribunal delivered on 6.5 2011. A record of Appeal was filed on 7.12.2018,

6.On 5.3.2019 the Appellant advocate pointed out that the fact that the Appellant had passed on 22.09.2018 and the fact that this being an appeal whose subject matter touched on Land, consequently, the Appeal was transferred to the ELC court pursuant to orders issued on the said date 05.03.2019 and hence it was given the new number Eldoret ELC Appeal number 11 of 2019.

6. The Appellant advocates without substituting the deceased appellant filed submissions on 27.3.2019 and the matter was reserved for judgment which has not delivered as the substitution had not been done.

7. When the ELC Court at Kapsabet was established the appeal was transferred to Kapsabet for hearing and determination. On 3.11.2021 it was brought to the courts attention by Miss Leitich Learned counsel for the Respondent that the appellant had passed on 22.9.2018 and the Appeal ought to be deemed to have abated and sought time to file an application.

8. Mr. Arap Sego Learned Counsel for the appellant confirmed this position and sought time to regularize the position by substitution of the deceased appellant. Both parties were directed to file their respective applications for consideration and determination by the court, now this ruling;

Motion application dated 9.12.2021

9.This motion seeks that the Applicant **Philister Chemaiyo Sosten**, a daughter of the deceased Appellant to substitute the Appellant and upon such substitution a date for Judgement be given. It is made on the grounds interalia:

i) that the deceased had filed her appeal and submissions and the matter is pending judgment,

ii)that the appellant passed on 22.9.2018 and submissions filed on 27.3.2019 and that the applicant is desirous of being joined in the appeal in place of the deceased appellant for purposes of taking the judgment.

10. The Application is supported by the supporting affidavit of the applicant who describes herself as the daughter of the deceased Appellant and reiterates the grounds in support thereof and has annexed copies of the Certificate of Death of the Appellant and further submits that there is no time frame for substitution under order 42 of the Civil Procedure Rules this being an appeal as opposed to the timelines given under order 24 of the Civil Procedure Rules for substitution in ordinary suits, for the above reasons the Applicant prays that application be allowed.

ANALYSIS AND DETERMINATION.

11. This court relying on the decision in **JOSEPH KIRUI V SAID K. KEITANY [2021] eKLR** revived an abated appeal in the case of **Kapsabet Civil Appeal No.6 of 2021 between Edwin Kipchumba Asis and Elizabeth Kering** where on an application by a widow who was also the Administratrix of the Estate of a deceased Appellant., so as to determine the Appeal on its merits.

12. However in this instant Appeal whereas the facts are similar to the **Edwin Kipchumba Asis** case above, a major distinction is noted. In this Appeal, the Applicant **Philister Chemaiyo Sosten** is the daughter of the deceased Appellant but is not the Administratrix of the Estate and lacks capacity to bring the application as well as be allowed to substitute the deceased appellant. Had the daughter taken out and exhibited the Grant of Letters of Administration I would have allowed the application for substitution. For the above reason, the application dated 9.12.2021 is hereby dismissed.

MOTION DATED 14.12.2021

13. Turning to the Second motion, seeking that the suit be marked as abated, and noting that it is common ground that the Appellant passed on 22.9.2018 and there be no substitution by a personal representative thereof

15. Noting that it is over a year since the appellant passed on and that under order 24(3)(2) of the Civil Procedure Act as read together with Order 24(9) and the application dated 14.12.2021 is hereby allowed and this suit is marked as abated.

16. In view of the circumstances of the appeal and the demise of the appellant. Each party shall bear its own costs

17. Orders accordingly.

DATED AT KAPSABET THIS 18TH DAY OF JANUARY, 2022

M. N. MWANYALE

JUDGE

RULING DELIVERED IN THE PRESENCE OF: -

MS. CHEROTICH HOLDING BRIEF FOR MS. LEITICH FOR THE RESPONDENT

NO APPEARANCE FOR MR. MR. ARAP SEGO FOR THE APPELLANT