



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**

**ELC. CASE. NO 359 OF 1981**

**GATUNGU KIARIE.....1<sup>ST</sup> PLAINTIFF**

**FELISTER NYAKIO KUMA** Suing as the administrator

Of the estate of **KAMAU KIRIU.....2<sup>ND</sup> PLAINTIFF**

**KAMAU MACHARIA.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**NJOROGE KUNGU**

**ALICE WAGIKUYU NJOROGE**

**REBECCA WAMBUI NJOROGE**

as the administrators of the estate of

**JOSEPH NJOROGE KUNGU.....DEFENDANTS**

**RULING**

Coming up before me for determination is the Notice of Motion dated 28<sup>th</sup> November 2013 in which the Applicant sought for orders that the suit be revived as far as the 3<sup>rd</sup> Plaintiff is concerned and that costs of the Application be provided.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Peter Kamau Nderu sworn on 28<sup>th</sup> November 2013 wherein he stated that he is the Administrator of the estate of the late Kamau Macharia (hereinafter referred to as the “Deceased”) who was the 3<sup>rd</sup> Plaintiff in this matter. He further stated that the Deceased was his father and that he died on 18<sup>th</sup> October 2010. He further averred that he was granted Letters of Administration over the estate of the

Deceased on 30<sup>th</sup> September 2013 after which he embarked on the task of raising money for the filing of this Application. He stated further that there was no delay in filing this Application.

The Application is uncontested.

Both the Applicant and the Defendants filed their written submissions. The Applicant's submission was that he had moved to court without any unreasonable delay after obtaining Grant of Letters of Administration over the estate of the Deceased.

The Defendants on their part submitted that the suit in respect of the 3<sup>rd</sup> Plaintiff abated after there was failure to substitute him within the one year period stipulated by the rules. They further submitted that the Applicant had not demonstrated that he was prevented by sufficient cause from continuing the suit as is required by **Order 24 Rule 7(2)** which is the legal provision under which this Application is brought. The Defendants submitted that though the Deceased died on 18<sup>th</sup> October 2010, nothing was done to start the process of substituting him until almost 3 years later when a petition for grant of letters of administration was filed in the year 2013. They further submitted that the Applicant does not disclose what he was doing during those 3 years which prevented him from applying for the substitution. It was their further submission that this case was referred to arbitration on 18<sup>th</sup> January 1988 and an award by the Arbitral Panel of elders was filed in court and read on 7<sup>th</sup> November 1988. Further that although the Defendant attempted to set aside the award, his attempt was refused by the Court of Appeal on 3<sup>rd</sup> October 1997. Further that the only thing remaining in this case is the execution of the arbitral award which the Plaintiffs have never attempted which points to the laxity of the Plaintiffs. The Defendants pointed out that under the **provisions of section 4(1)(c) of the Limitation of Actions Act Cap. 22**, actions to enforce an award cannot be brought after the end of six (6) years and therefore this suit is already time barred and there is no need to revive the same. The Defendants further highlighted the provisions of **Order 24 Rule 10** which provides that nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order and that accordingly, the execution of the award in this case cannot be revived by invoking **rule 7(2)** of the said order. Further that the Defendant in this case died in the year 2000 and an application to substitute him has never been made and therefore there is no Defendant in this case. For those reasons, the Defendants sought for the Application to be dismissed.

On the issue of substituting the 3<sup>rd</sup> Plaintiff, **Order 24 Rule 7(2) of the Civil Procedure Rules, 2010** states that "if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit...". This is in reference to the person claiming to be the legal representative of the deceased plaintiff. In this particular matter, the Applicant stated that the 3<sup>rd</sup> Plaintiff passed on 18<sup>th</sup> October 2010 but that he filed the succession cause almost 3 years later in the year 2013. The Applicant has not offered any explanation as to why he failed to file an application to substitute the 3<sup>rd</sup> Plaintiff soon after the 3<sup>rd</sup> Plaintiff passed on. As such, I have not been shown any sufficient cause that prevented the Applicant to continue the suit as is required by the law cited herein. To that extent therefore, I find that this court is not convinced that the Applicant should be granted the orders he seeks and I decline to allow the substitution of the 3<sup>rd</sup> Plaintiff.

Further, it is not contested that the Defendant in this suit, Joseph Njoroge Kungu, died in the year 2000 and has to date never been substituted. It is true that Justice Nambuye allowed the Plaintiffs time to make an application to substitute the deceased Defendant in her Ruling dated 10<sup>th</sup> November 2010. This was never done and has not been done to date. According to **Order 24 Rule 4(3)**, where within one year no application is made under **subrule (1)** to substitute the deceased Defendant, then the suit shall abate as against the deceased Defendant. I therefore find that this suit has abated against the deceased Defendant.

On the issue of the Limitations of Actions Act, my finding is that the arbitral award in this suit has never been adopted as the judgment of this court. There is therefore no award to be executed and therefore **section 4(1)(c) of the Limitation of Actions Act Cap. 22** has no application herein.

The upshot of the above is that the Application is hereby dismissed with costs to the Respondents.

It is so ordered.

**DELIVERED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF JANUARY 2015.**

**MARY M. GITUMBI**

**JUDGE**