



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 90 OF 2001**

1. NZIOKI KONGU MUTISYA
2. NZAU KONGU MUTISYA
3. MBEVO KONGU MUTISYA ..... APPELLANT

VERSUS

1. JOSEPH KATUTA KIMONGO
2. MOSES MULWA MUTUA ..... RESPONDENTS

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*(Before B. Thuranira Jaden J)*

**RULING**

1. Following the death of the Respondents herein, this appeal was marked as abated on 10/11/11.
2. Subsequently, the application dated 13/2/12 was filed. The application sought to substitute two of the Appellants who had since passed on. The application also sought to substitute one of the Respondents and further sought orders that the suit be revived for hearing and determination. At the heart of the matter is a land dispute which emanated from the **Land Disputes Tribunal**.
3. On the date fixed for the hearing of the application, **Ms Ngatia** the counsel for the Applicants objected to the appearance by **Mrs Nzei** the counsel for the Respondents, stating that the said counsel had no instructions as the Respondent had since passed on and therefore the counsel had no client to instruct her and had no right of audience.
4. **Mrs Nzei** in reply gave highlights of the application dated 13/2/12 and pointed out that she appeared in court since she was served with the application and stated that the person to replace the 1<sup>st</sup> Respondent was not named or served. **Ms Ngatia's** reply was that she was not aware that the 1<sup>st</sup> Respondent was not alive.
5. The court record clearly reflects that the appeal herein was marked as abated on 10/11/11 following the death of both Respondents. The Appellants had the same firm of Advocates on record then. **Ms Ngatia** therefore ought to have been aware of the reason why the appeal was abated.

6. **Mrs Nzei** on the other hand cannot prematurely highlight the lack of merits of the application dated 13/2/12 when she has no instructing client now that both the Respondents are not alive. **Mrs Nzei** therefore has no right of audience until that issue is regularized.

7. With the foregoing, this file is returned to the registry for both counsels to put their houses in order. Costs in cause.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 29<sup>th</sup> day of **September** 2014.

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**B. THURANIRA JADEN**

**JUDGE**