



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
Civil suit 52 of 1993**

**JOHN CHEGE MWANGI  
PETER CHEGE MWANGI  
VIRGINIA WANJIRU MWANGI  
SAMUEL NJOROGE MWANGI (as administrators of the estate of the late FRANCIS CHEGE  
MWANGI.....APPLICANTS  
VERSUS  
OBADIAH KIRITU METHU.....RESPONDENT**

**RULING**

This ruling is in respect of the Notice of Motion dated 29th September, 2011 brought under **Order 24 rule 3(2); Order 50 rule 6 and Order 51 rule 1** of the **Civil Procedure Rules**.

The applicants in this application, John Mwangi Chege, Peter Chege Mwangi, Virginia Wanjiru Mwangi and Samuel Njoroge Mwangi, are seeking for extension of time within which to file an application to substitute the Plaintiff in this suit, Francis Mwangi Chege, now deceased, with themselves as the administrators of the estate of the said deceased person.

The application is premised on the following grounds that the cause of action survived the plaintiff; that the time within which the applicants ought to have brought the application for substitution of the deceased lapsed as they were pursuing the grant of letters of administration of the estate of the deceased; that the delay in filing the application for substitution was not deliberate but was occasioned by factors beyond the applicants' control; that the applicants got to know of the pending suit late and; that the defendant will not suffer prejudice.

In reply to the application the respondent filed the grounds of opposition dated 8<sup>th</sup> November 2011, in which he states that, the application is grossly incompetent, bad in law and unknow in law; that the suit has already abated; that no reasons have been given for delay; and that there is a similar application pending in court.

Learned counsel for the applicant submitted that the delay in presenting the application for substitution has been sufficiently explained and that under **Order 24 rule 3 (2)** the court has unlimited power to extend time. She relied on the decision in the case of **Apufia Wangari Muraguri V. David Wanjohi Muraguri**, Nyeri HCCC No.156 of 1993.

Learned counsel for the Respondent, opposed the application and submitted that the application has been brought under the wrong provisions of the law, as the suit had abated. He opined that the application ought to have been brought under **Order 24 rule 7 (2)** and not under **Order 24 rule 3(2)** of the **Civil Procedure Rules**.

The law regarding substitution of a deceased plaintiff with his personal representative is found in **Order 24 rule 3** of the **Civil Procedure Rules**, under which the court has power, on application for substitution

by the legal representatives of the deceased, where the cause of action survives the deceased, to cause the representative of the deceased to be made a party to the suit in place of the deceased plaintiff.

Under **Sub-rule 2 of rule 3** the application for substitution must be made within one year from the date of death of the deceased failing which the suit shall abate so far as the deceased plaintiff is concerned by operation of the law.

The remedy available upon the suit abating is to apply for the revival of the suit before any other application can be made. See **Order 24 rule 7**:

**“The person claiming to be the legal representative of a deceased may apply for an order to revive a suit which has abated and if proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”**

The suit herein abated on 30<sup>th</sup> June 2010, a year after the death of the plaintiff as no application for substitution of the plaintiff was made by the applicants or any other person. The suit therefore, abated. The suit having abated it is, in law, dead and none existent. The only way to breath life into it is by way of an application for its revival under Order 24 rule 7 (2) aforesaid

No such application has been made before this court or any other court. The application before me is therefore premature and fatally defective as the same is based on a none existent suit.

Regarding the authority cited by the applicants, apart from the circumstances in the facts in the said authority being different from the facts in this case, it is a decision of a court of coordinate jurisdiction. See **Evanson Nguti Kamanda V. Peter Gicharu Ngige**, ELd. HCCC No.79 of 2001 and **Mark Akhonya Amunze V. Gopalbhai Karsan Patel & Another**, (2006) e KLR.

The upshot of the foregoing is that the application fails and is consequently dismissed with costs to the respondent.

**Dated, Signed and Delivered at Nakuru this 27<sup>th</sup> day of July, 2012.**

**W. OUKO  
JUDGE**