



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 4409 OF 1991

JOHN KARANJA WANJAU .....1<sup>ST</sup> PLAINTIFF  
JAMES WAWERU KANGETHE .....2<sup>ND</sup> PLAINTIFF  
DOUGLAS MUCHOKI .....3<sup>RD</sup> PLAINTIFF  
KINUTHIA NJOROGE .....4<sup>TH</sup> PLAINTIFF  
GIKONYO KIHUMBA .....5<sup>TH</sup> PLAINTIFF

V E R S U S

MAINA GITHAIGA .....1<sup>ST</sup> DEFENDANT  
JOHN NGETHE .....2<sup>ND</sup> DEFENDANT  
DANIEL MWANGI MUHIA .....3<sup>RD</sup> DEFENDANT  
MUREITHI URUGARI .....4<sup>TH</sup> DEFENDANT  
KIRUGI GATHOGO .....5<sup>TH</sup> DEFENDANT  
JOHN KING'ARA .....6<sup>TH</sup> DEFENDANT  
KAMAU NJORA .....7<sup>TH</sup> DEFENDANT  
ALI HUSSEIN .....8<sup>TH</sup> DEFENDANT

**RULING**

The Plaintiffs have applied under Order 1 rule 13 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act to have the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants, who are now dead, to be substituted by their respective sons whom they indicate to be their legal representatives. The suit is over a suit of land that is L.R. No. 209 /136 /119, which either side claims. It is not indicated when the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants died, but it was in the course of this case which was filed in 1991.

The supporting affidavit to the application was sworn by the 3<sup>rd</sup> Plaintiff. It is clear from paragraph 6 of the affidavit that the persons sought to take over the case on behalf of the deceased Defendants have not taken out letters of administration. It is deponed as follows:-

“6. THAT the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants legal representatives of the respective deceased have refused, failed and or neglected to apply for the Letters of Administration, intentionally and deliberately with bad motive to frustrate the hearing and determination of this matter.”

I agree with M/s Machio for the Defendants that the persons sought to replace the deceased Defendants have no capacity to be sued in the matter now that they have no grant of letters of administration. I agree with the decision in **Centaury Oil Trading Co. Ltd. –Vs- Gerald M. Mwaniki & Another, HC Milimani Commercial Courts) C.C No. 14 of 2006**, but wish to add as follows. Under Sections 79 and 82 of the Law of Succession Act (Cap. 160) it is only the administrator of the estate of a deceased who

can sue or be sued following the death of the deceased. In **Troustik Union International And Another – Vs- Mrs. Jane Mbeyu And Another, Civil Appeal No. 145 of 1990** the Court of Appeal held that the deceased's chose in action cannot be vested in or agitated by members of his family who are not his personal representatives, and that personal representatives are persons who have obtained probate or letters of administration. In other words, and for the purposes of the instant application, the only persons who can be substituted as Defendants in this case are those who have probate or letters of administration. Not their sons who have neither.

This is sufficient to dispose of the application which I dismiss with costs.

DATED AND DELIVERED AT NAIROBI

**THIS 31<sup>ST</sup> DAY OF MARCH 2011**

**A. O. MUCHELULE**  
**J U D G E**