



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO.107B OF 1999**

**CRISPIN MAGIMA NDORIA .....1<sup>ST</sup> PLAINTIFF**  
**DICKSON MURIUKI NDORIA.....2<sup>ND</sup> PLAINTIFF**  
**NANCY WAMBUGO NYAMU.....3<sup>RD</sup> PLAINTIFF**  
**CHRISTOPHER MWANGI NYAMU.....4<sup>TH</sup> PLAINTIFF**

**Versus**

**JOSEPH MWANIKI NJAGI .....1<sup>ST</sup> DEFENDANT**  
**RAPHEL KIMARU NJAGI.....2<sup>ND</sup> DEFENDANT**  
**BILDAD IHIGA WAHOME .....3<sup>RD</sup> DEFENDANT**

**RULING**

This ruling is the outcome of the summons dated 3<sup>rd</sup> June 2010 in which Stephen Wahome Ihiga and Jackson Muchori Ihiga, being the 1<sup>st</sup> and 2<sup>nd</sup> Applicants herein sought for an order to be enjoined to this suit to substitute Bildad Ihiga Wahome, the 3<sup>rd</sup> Defendant herein. The 1<sup>st</sup> Applicant swore an affidavit in support of the summons. Raphael Kimaru Njagi being the 2<sup>nd</sup> Defendant swore a replying affidavit to support the application. Dickson Muriuki Ndoria filed a replying affidavit to oppose it.

I have considered the grounds set out on the face of the summons plus the facts deponed in the affidavits filed for and against the summons. I have also taken into account the oral submissions of learned counsels appearing in this matter. It is the Applicants' submission that Bildad Ihiga Wahome, passed away on 6<sup>th</sup> March 2000 before the conclusion of the suit. The duo indicated that they are the legal representatives of the estate of Bildad Ihiga Wahome, deceased. The 2<sup>nd</sup> Defendant indicated that it is necessary that the deceased is substituted to enable the court deal with the issues relating to partnership.

Dickson Muriuki Ndoria, the 2<sup>nd</sup> Plaintiff herein, is of the view that the application serves no useful purpose since the suit was not defended and that the application is brought after the lapse of ten (10) years from the date of death.

I have considered the material placed before me and the oral submission made by learned counsels. There is no doubt that this suit was filed way back in the month of July 1999. The summons plus the plaint were served but the Defendants did not enter any appearance nor file a defence. The suit was later heard as a formal proof and judgment in favour of the Plaintiffs was delivered on 22<sup>nd</sup> November 2002. The Defendants applied for the judgment to be set aside vide the application dated 19<sup>th</sup> June 2003. The aforesaid application was heard and dismissed on 30<sup>th</sup> September 2009. The Defendants did not disclose to this court during the hearing of the application dated 19<sup>th</sup> June 2003 that the 3<sup>rd</sup> Defendant had passed away on 6<sup>th</sup> March 2000. In fact by the time of delivery of judgment the suit as against the 3<sup>rd</sup> Defendant had abated pursuant to the provisions of Order XXVII rule 4(3) of the former Civil Procedure Rules. With respect, I agree with the submission of Mr. Wachira, learned advocate for the Plaintiffs that there is nothing pending to enable the Applicants pursue on behalf of the 3<sup>rd</sup> Defendant. By the time of making the application the suit had already been concluded. In any case the suit abated as against Bildad Ihiga, deceased a year after his demise i.e. on 7<sup>th</sup> March 2001. No application has been

made to first revive the suit.

In the end I find the application dated 3<sup>rd</sup> June 2010 to be without merit. It is dismissed with costs to the Plaintiffs.

Dated and delivered this 3<sup>rd</sup> day of June 2011.

J.K. SERGON  
JUDGE

In the presence of Mr. Kanyiri holding brief Macharia for Applicant, Mr. Kimunya holding brief Njoroge for 2<sup>nd</sup> Defendant and Wachira for Respondent.