

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 52 OF 2007

M'IKIARA MUTIRITHIA APPELLANT

VERSUS

NTONJA MUTIRITHIA RESPONDENT

RULING

An earlier application dated 26th April 2010 was struck out by this court's ruling dated 19th November 2010. That application was struck out for seeking the substitution of the deceased appellant and the deceased respondent without seeking the revival of this appeal which had abated. Following that striking out, an application is now before me dated 31st January 2011 by way of Notice of Motion. That application is made by Samuel Mungathia M'Ikaira and Julia Mbura M'Ikiara. Those two are the son and the wife of the deceased appellant respectively. They seek an order that they substitute the deceased appellant. They also seek an order that Isaaya Ikamati M'Njaa be substituted instead of the dead respondent in this appeal. They also seek an order that this appeal be revived for hearing and determination. Although the applicants Samuel Mungathia M'Ikiara and Julia Mbura M'Ikiara deponed that they were appointed personal representatives of the estate of the deceased appellant, that deposition is not supported by the documents they rely upon. The documents before court is a notice that if objection is not filed within 30 days since February 2009, a grant would be issued to both Samuel Mungathia and Julia Mbura. As matters stand therefore, both those applicants have not obtained the grant from the court to enable them to be substituted for objection of the deceased appellant. Just to make myself clear, I will proceed to reproduce that notice which they rely upon as follows:-

“Let all the parties concerned make note that the petition for a grant of letters of administration intestate of the above named deceased who died at Thuuru on 23rd July 2007 has been filed in this Registry by Julia Mbura & Samuel Mungathia of P.O. Box 278 Maua as an administrator of the deceased's estate.

And further take notice that objections on the prescribed form to the making of the proposed grant are invited and must be lodged in this registry within thirty (30) days of the publication of this notice.

And further take notice that if no objection has been lodged in this registry in the prescribed form within (30) days of the publication of this notice the court may proceed to make the grant as prayed or to make such orders as it thinks fit.”

That being the case, the application by way of Notice of Motion dated 31st January 2011 is incompetent. It is incompetent because it is made by persons who do not have authority to represent the estate of the deceased appellant as provided under section 82 of the Law of Succession Act and the court cannot even revive the appeal without there being a surviving appellant in place. It is for that reason, that I hereby dismiss the Notice of Motion dated 31st January 2011 with costs being awarded to Isaaya Ikamati M'Njaa.

Dated, signed and delivered at Meru this 10th day of August 2011.

**MARY KASANGO
JUDGE**