



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 34 of 1978**

**JOHNSON MACHARIA**  
**MWANIKI .....SUBSTITUTED PLAINTIFF/DECEASED**

**VERSUS**

**JOSEPH GITHINGA ITHAGI.....APPLICANT**

**RULING**

**JOSEPH GITHINGA ITHAGI**, the applicant herein, took out the Summons dated 23<sup>rd</sup> June 2009 in which he sought for the following orders:

1. *That the Honourable court be pleased to revive this suit which has already abated due to the death of the substituted plaintiff.*
2. *That the Honourable Court be pleased to substitute JOSEPH GITHINGA ITHAGI for JOHNSON MACHARIA MWANIKI (deceased).*
3. *That the Honourable court be pleased to substitute LAWRENCE GITHINJI IRUNGU for IRUNGU GAITHO (deceased).*
4. *Costs of the application be provided for.*

In support of the Summons are two affidavits of **JOSEPH GITHINGA ITHAGI** sworn on 17<sup>th</sup> August 2009 and on 25<sup>th</sup> November 2009 respectively. **IRUNGU GAITHO**, the Respondent herein, opposed the Summons by filing grounds of opposition.

It is the submission of Kebuka Wachira, learned advocate for the Applicant, that the Plaintiff Johnson Macharia Mwaniki died on 12<sup>th</sup> June 1999. The suit before Court is one based on allegation of fraudulent transfer of land hence the suit survived the deceased. The

Applicant has now taken up limited Letters of Administration in respect of the Estate of his deceased father, Johnson Macharia Mwaniki. The Applicant has now beseeched this Court to allow him to revive the suit with an order substituting him in place of the deceased plaintiff.

The Respondent on his part urged this Court to dismiss the application because the same is frivolous, vexatious and incurably defective. It is pointed out that according to the Applicant, the substituted plaintiff died on 12<sup>th</sup> June 1999 whereas the Limited Grant he annexed to his affidavit indicates that he passed on 12<sup>th</sup> June 1990. It is argued that under the provisions of *Order XXIII rule 4 (3)* of the Civil Procedure Rules, the suit abates within one year of the death of the plaintiff. The Applicant must show, however, the reasons which prevented him from filing the application in time.

I have considered the written submissions filed by both sides. I have also taken into account the material placed before this Court. The application before me is filed pursuant to the provisions of *Order XXIII rules 2, 4, 8 (2) and 12* of the Civil Procedure Rules. This Court is given an unfettered discretion under *rule 8 (2) of Order XXIII* of the Civil Procedure Rules to revive a suit which has abated so long as the applicant gives good reasons for the delay to substitute. The record shows that the suit was originally instituted by Wandegwa Gichohi, deceased, the applicant's grandmother. In fact she testified before her death. She eventually died before the suit was heard and determined. John Macharia Mwaniki, deceased, was substituted to continue with the case. The said John is said to have died on 12<sup>th</sup> June 1999. After the death of John Macharia Mwaniki, deceased, the Applicant avers that his family was befallen with many challenges so that it was difficult for them to pursue this matter hence the delay. The Applicant mentioned that one of his brothers disappeared and has never been traced to date. It is also stated that two of the Applicant's sisters perished within a span of six years. The Applicant pointed out that all the aforesaid happenings drained the family finances so that he was forced to approach Kituo Cha Sheria to assist him pursue the case on *pro bono* basis.

It is conceded by Mr. Wachira, learned advocate for the Applicant, that the application was filed after a long delay. I have considered the reasons given for the delay. Mr. Wambugu, learned advocate for the Respondent, was of the view that the delay was inordinate. It is not in dispute that the law gives this Court a wide discretion to allow such applications so long as sufficient cause is shown. The Applicant has explained in detail of what his family underwent. The family finances were strained as a result. In fact he was forced to approach Kituo Cha Sheria to assist him pursue this case. The Applicant put his reasons in the Supplementary Affidavit he swore on 25<sup>th</sup> November 2009. Those averments were not controverted. There is no averment showing that the Applicant manufactured those

reasons to invoke the sympathy of this Court. I am convinced the Applicant has given good reasons to explain what prevented him from coming to Court. Though the delay is so inordinate, I will, however, countenance the same in exercise of my discretion under *Order XXIII rule 8 (2)* of the Civil Procedure Rules. Consequently the Chamber Summons dated 23<sup>rd</sup> June 2009 is allowed as prayed save that costs shall abide the outcome of the suit.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of February 2010.*

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. K. Wachira for the Applicant and Mr. Kingori holding brief Wambugu for Respondent.