



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

**AT NYERI  
Civil Case 274 of 1996**

**DAVID KARIUKI  
MAGURU.....  
.....PLAINTIFF**

**VERSUS**

**JOHN WACHIRA  
WAMAGURU )  
GABRIEL WANGARA  
MAINA ).....  
.....DEFENDANTS**

**RULING**

DAVID KARIUKI MAGURU, the applicant herein, took out the summons dated 9<sup>th</sup> July 2009 pursuant to the provisions of Order XXIII rules 2, 3, 8(2) and 12 of the Civil Procedure Rules in which he applied for the following:-

1. THAT the Honourable Court be pleased to revive this suit.
2. THAT the Honourable Court be pleased to substitute JOHN WAMAGURU MAINA and STEPHEN WANGARA MAINA for the defendant MAINA WAMBUGU (deceased).
3. Costs of this application be provided for.

The applicant filed an affidavit he swore in support of the summons. The defendants, John Wachira Wamaguru and Gabriel Wangara Maina filed grounds of opposition to oppose the summons.

It is the submission of the applicant that he could not substitute the deceased because his relatives kept his succession cause a secret from him. He alleged that it took him time to discover that the deceased's first wife had in 2002 filed succession proceedings but she died before completing prompting the deceased's two sons to take over the aforesaid proceedings. It is argued that the duo having been appointed administrators are now in the process of subdividing the suit land. In the opinion of the applicant, the suit survived the deceased hence the two sons should be substituted in place of the deceased. It is important to note that the respondents did not file any affidavit to controvert the averments made in the affidavit filed in support of the application.

The substantive suit is expressed in the plaint dated 4<sup>th</sup> October 1996 in which the applicant herein sued Maina s/o Wambugu, deceased claiming for inter alia a declaration that the deceased held 1.5 acres to be excised from the parcel of land known as L.R. No. Thegenge/Kihora/46 in trust for the plaintiff. The record shows the deceased was served with the plaint and the summons to enter appearance. The deceased engaged the services of the firm of Gathiga Mwangi & CO advocates to enter appearance and to file a defence on his behalf. It would appear the aforesaid firm of advocates entered appearance and subsequently filed a defence. Before considering the merits of the application it is important to bring to the attention of the parties that this matter was placed before Lady Justice Kasango on 16<sup>th</sup>

July 2007 by the Deputy Registrar for dismissal for want of prosecution under Order XVI rule 6 of the Civil Procedure Rules. The honourable judge proceeded to dismiss the suit under Order XVI rule 6 of the Civil Procedure Rules. This order is on record and it would appear the same has not been drawn to the attention of the parties. In the circumstances, there is no suit which can be revived having been dismissed as aforesaid. In the circumstances, the best I can do is to strike out the summons dated 9<sup>th</sup> July, 2009 which I hereby order with no order as to costs. I believe the parties will be able to take the necessary steps to seek for the available remedies in law.

*Dated and delivered at Nyeri this 21<sup>st</sup> day of May 2010.*

**J.K. SERGON**

**JUDGE**