



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

Civil Appeal 24 of 2008

SECILY MUTHONI.....1ST APPELLANT
ANDALINE WANJIRA GATHUYA.....2ND APPELLANT

VERSUS

WAGUAMA NDIGA.....RESPONDENT

AND

ALIKANDAR WATHUIYA MIANO.....APPLICANT

R U L I N G

This court dismissed the applicant's application dated 17.8.09 for having been filed under the wrong provisions of the law. A similar application was filed again still based on the wrong provisions of the law but Counsel quickly made an oral application to amend the order on which it was premised – an application that was allowed.

The applicant is seeking 2 orders. Firstly, that this suit be revived – an acknowledgement that it has abated and secondly that one **ALIKANDAR WATHUIYA MIANO** who is the applicant be substituted for the respondent who is now deceased.

Interestingly, Mr. Kariithi who appears for the Appellants has opposed the application saying that the Appeal has abated and it should not be revived. He told the court that the Appellants and the applicant herein are all sisters and the land in question is in the names of the Appellants and there is no property belonging to the deceased respondent and so substituting her will be an exercise in futility.

I have considered the application before me along with the rival affidavits. I have also gone through the file from which this Appeal arises. The appeal was filed by Mr. Kariithi for the Respondents in this Application. He and his clients do not wish the Appeal to proceed and wants the court to declare it as having abated. It is their Appeal. If they do not want it to proceed, of what benefit would that be to the Applicant herein who wants to be substituted as the Respondent?

I have actually observed that the Appeal itself was filed on 6.3.08 against a decision made on 20.8.07. There is no order granting leave that was annexed to the Memorandum of Appeal, nor is such order cited in the memorandum. The Appeal is therefore a non starter and even orders of substitution of the Respondent will not assist anybody.

The court does not give orders in futility. For these reasons, I must which I hereby do dismiss the application dated 25.2.2010 with orders that each party bears its own costs.

W. KARANJA
JUDGE

Delivered, signed and dated at Embu this 6th day of July 2010.

In presence of:- Mr. Kariithi for Appellants in the Appeal who are the Respondents in the application and Applicant in person.