



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MERU**  
**Civil Case 76 of 2007**

ARITHO IGWETA ..... PLAINTIFF

VERSUS

M'IKUNYUA M'IKANDI ..... 1<sup>ST</sup> DEFENDANT

M'MWITHIGA M'MUKIRI ..... 2<sup>ND</sup> DEFENDANT

**RULING**

The plaintiff sued both defendants seeking eviction of both of them from parcel number *Nyaki/Munithu/522* and further an injunction to stop the defendants, their servants and agents or family members from trespassing that parcel of land. The plaintiff has applied by a Chamber Summons dated 25<sup>th</sup> January 2010 seeking to be appointed to represent the estate of the 2<sup>nd</sup> defendant who died in the year 2008. The date and the months that the 2<sup>nd</sup> defendant died is not disclosed. The application is brought under Order XXIII Rule 5 and 12 of the Civil Procedure Rules. The application is made on the ground that the plaintiff cited the widow of the 2<sup>nd</sup> defendant but the said widow failed to seek for grant of the estate of the 2<sup>nd</sup> defendant. The application was opposed on two main grounds. Firstly, that it was time barred. The deceased died in the year 2008 and the present application was filed in January 2010. In my view, the first ground of objection is well taken. The plaintiff should have filed the application within one year of the death of the 2<sup>nd</sup> defendant. See Order XXIII Rule 3. The plaintiff stated that the delay in making the application for substitution was caused by when the widow of the 2<sup>nd</sup> defendant failed to obtain grant to his estate. However, it is clear if the plaintiff faced such a difficulty, he ought to have moved the court under Order XXIII Rule 5 for the court to determine who would be the legal representative of the 2<sup>nd</sup> defendant. That Rule provides as follows:-

***“5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”***

The 2<sup>nd</sup> ground of opposition was that the plaintiff could not seek to substitute the 2<sup>nd</sup> defendant because there would be a conflict of interest. A conflict of interest is said to exist in a situation in which a person has a duty to more than one person or organization but cannot do justice to the actual or potentially adverse interest of both parties. That definition is by *Falex*. The plaintiff's interest are indeed and

definitely inconsistent with those of the 2<sup>nd</sup> defendant. The plaintiff cannot therefore be able to represent the interests of the 2<sup>nd</sup> defendant without that inconsistency coming to play. The application dated 25<sup>th</sup> January 2010 is therefore without merit and is incompetent and is dismissed with no orders as to costs.

Dated and delivered at Meru this 2<sup>nd</sup> day of July 2010.

**MARY KASANGO**  
**JUDGE**