



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Civil Case 57 of 1998**

**JULIUS M. MUGO MUCHIRI.....PLAINTIFF**

*Versus*

**WANJOKA NJAGI.....DEFENDANT**

*And*

**NJIRU K. NJAGI.....APPLICANT**

**RULING**

Vide an application dated 27<sup>th</sup> May, 2008 and filed in court on 17<sup>th</sup> June, 2008, **Njiru K. Njagi**, hereinafter referred to as “*the applicant*” seeks to be substituted in this suit in place of his deceased mother **Wanjoka Njagi** who was the defendant in the suit and passed on sometimes on 10<sup>th</sup> March, 2005. The applicant also seeks for the costs of the application to be provided for. The application was expressed to be brought under order XXIII rules 11 and 12 of the Civil Procedure Rules and all other enabling provisions of the law.

The grounds upon which the application is made are that the applicant’s mother died on 27<sup>th</sup> April, 2005 after judgment and decree in her favour was issued herein on 10<sup>th</sup> March, 2005. The applicant had since obtained a limited grant of letters of administration ad litem and that he was seeking substitution for purposes of executing the decree only since the case was no longer pending. In support of the application, he swore an affidavit which in the main he merely expounded and elaborated on the grounds in support of the application aforesaid.

The application was opposed. **Julius Mugo Muchiri**, hereinafter referred to as “*the respondent*” swore a replying affidavit. In pertinent paragraphs he swore that the application was brought in deceit and bad faith as the decree cannot be executed without reference to the appeal. That an appeal from the said decree is still pending in the court of appeal and has not been marked as abated. It is therefore clear that an order for substitution cannot be made for purposes of execution alone. That on 29<sup>th</sup> April, 2005, the court of appeal issued a stay of execution of the High Court decree and for that order to be discharged, the applicant has to apply for substitution in the court of appeal which he has been avoiding. That until a discharge by the court of appeal has been ordered, the applicant cannot execute the decree in superior court, hence, this application is calculated to avoid the court of appeal rulings.

From the record, on 18<sup>th</sup> May, 2009, the applicant filed a notice to Act in person. However when the application came up for interparties hearing and though he was in court, he never alerted the court that he had since withdrawn instructions from **Messrs Peter Muthoni & Co. Advocates**. Instead he allowed **Mr. Muthoni** to argue the application as though he was still on record. I am sure that the applicant had also not served the Notice on **Messrs A. Wahome & Co. Advocates**. Had he done so, I am certain that **Mrs. Wahome** would have taken up the issue of representation on that date. I have looked at the judgment delivered herein by **Khamoni J** where he bemoans the conduct of the parties in this suit. It is apparent that the applicant does not seem to appreciate the misgivings expressed by the judge as aforesaid. Parties in this matter have kept filing documents and applications willy nilly and with abandon. This trend must be discouraged. No wonder the court of appeal also frowned upon the parties insatiable desire for unnecessary litigation in this matter.

Be that as it may, the application was heard by me interparties on 5<sup>th</sup> October, 2009. **Mr. Muthoni** submitted that the applicant was the son of the deceased defendant. The case was concluded. What was left was execution of the decree. The applicant had obtained limited grant of letters of administration ad litem for that purpose. No prejudice would be occasioned to the respondent if the application was allowed.

On her part, **Mrs. Wahome** submitted that an appeal was still pending in the court of appeal over the judgment and decree. The appeal had not abated. The application was premature since the appeal was still pending and no substitution

had been effected in the court of appeal. She therefore sought the dismissal of the application.

I have now considered the application, respective affidavits in support of and in opposition to the application together with the annexures and the oral rival submissions. Order XXIII rule 11 of the Civil Procedure Rules seem to suggest that the provisions in relation to substitution of dead parties to a suit are inapplicable in proceedings in execution of a decree. In other words a legal representative of the deceased litigant need not apply to be made a party to the suit at the stage of execution. Further the said suit will not automatically abate within one year if an application for substitution is not made as happens with other cases before reaching the execution stage. It also appears that the provisions of rule 8 of order XXIII to the effect that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action are also inapplicable. That being the case it would appear therefore that there was no basis for this application.

And even if there was, I think that this was the wrong forum to lodge the application. The case was heard in this court and concluded. However it is subject to an appeal in the court of appeal. The applicant concedes that much. Pending the hearing and final determination of the said appeal, the court of appeal has issued an order of stay of execution of the decree. This much is conceded too by the applicant. Yet the applicant seeks to be substituted in this suit in this Court solely and for purposes of execution of the stayed decree. That is not possible in the light of the order of stay of execution of the decree in force. Until and unless the said stay order is lifted and or discharged by the court of appeal, execution of the same in this court is not possible. That being the scenario, for this court to grant the order sought in the application, it will be acting in vain and courts of law do not ordinarily issue orders in vain. It may well be that the appeal may be allowed in which event there will be no need for execution of the decree. Now if this court was to accede to the applicant's request, would not such scenario be absurd indeed.

This court heard the suit and delivered a judgment. That judgment is the subject of the appeal. As it is therefore this matter is no longer in the hands of this court. Rather it is in the hands of the court of appeal. That is the forum where this application ought to be canvassed since the appeal has yet to be marked as having abated by the court of appeal.

It is on record that an attempt was made by the applicant to mark the said appeal as having abated before the court of appeal. That attempt was however successfully thwarted and **Mr. Muthoni**, learned counsel for the applicant was personally ordered to pay the respondents costs of the application that were assessed at Ksh.5,000/=. The applicant did not disclose this fact in the instant application. Infact the applicant did not even disclose the fact that the court of appeal had ordered stay of execution of the decree, the very decree that he now seeks to execute if and when he is substituted. Clearly the applicant has been economical with the truth. Lack of candidness is certainly a consideration where an applicant in particular is seeking an exercise of discretion by court. I have no doubt in my mind that this application is calculated to go round the court of appeal rulings.

In the result it is dismissed with costs to the respondent.

*Dated and delivered at Nyeri this 19<sup>th</sup> day of November, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**