



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
Civil Misc. Appli. 216 of 2005**

**REPUBLIC
APPELLANT**

VERSUS

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT 1ST RESPONDENT

**CHIEF LAND REGISTRAR 2ND
RESPONDENT**

**MAKUENI D. LAND & SETTLEMENT OFFICER 3RD
RESPONDENT**

AND

**DAVID MUIA MATOLO 1ST INTERESTED
PARTY**

**DANIEL M MATOLO 2ND INTERESTED
PARTY**

**WALLACE M MATOLO 3RD INTERESTED
PARTY**

**MARIETA K KIVANGA MATOLO 4TH
INTERESTED PARTY**

RULING

1. The Application dated 17/1/2007 seeks orders under Order XXIII Rules 4 and 12 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all enabling provisions of the law that Alice Nthenya Matolo, legal representative of the estate of Wallace Mutungwa Matolo be substituted as **“the 1st Interested Party”** in this cause.
2. From the grounds on the face of the Application and in the Supporting Affidavit of Levi William Muoso sworn on 17/1/2007 it is argued that the 1st Interested Party died on 2/5/2006 and on 23/11/2006, Alice Nthenya Matolo was appointed a legal representative to his estate. That therefore it is in the interests of justice that she should be substituted in place of her deceased husband.
3. In opposition, Alice Nthenya Matolo in her Replying Affidavit sworn on 13/9/2007 has taken the

view that although she is the legal representative of her husband's estate, the "suit" herein has abated since all the interested parties have long died. That in any event, the suit land has since been sold to "**Dominic Mutisya Kasini, Martin Kioko, Stephen Kitaka Muli and Others.**" That there is therefore no lawful purpose to be served if she is enjoined in the suit.

4. Firstly, I think that parties must be reminded that this is a judicial review matter and the procedures applicable to it are wholly divorced from the procedures known to the Civil Procedure Act and the Rules promulgated under it. That being the case, none of the rules cited in support of the Application are in fact of any relevance and I hope that the Rules Committee will soon address this recurring procedural issue.

5. Secondly, in a judicial review matter, the substantive parties are:

- i. the ex-parte Applicant;
- ii. the respondent and;
- iii. sometimes, an interested party.

6. The place of an interested party is as envisaged by Order LIII Rule 6 of the Civil Procedure Rules which provides as follows:-

"On the hearing of such motion as aforesaid, any person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard shall be heard, notwithstanding that he has not been served with the notice or summons, and shall be liable to costs in the discretion of the court if the order should be made."

7. This rule must be read with Order LIII Rule 3 (2) which provides as follows:-

"3 (1)

3 (2) The notice shall be served on all persons directly affected, and where it relates to any proceedings in or before a court, and the object is either to compel the court or an officer thereof to do any action in relation to the proceedings or to quash them or any order made therein, the notice of motion shall be served on the presiding officer of the court and on all parties to the proceedings."

8. The two rules relate to persons who are "**directly affected**" and a "**person who desires to be heard in opposition to the motion and appears to the High Court to be a proper person to be heard.**"

9. Applying the rules to the Application before me and ignoring for a moment the unprocedural approach taken by the Applicant, the substantive Notice of Motion dated 12/8/2005 seeks orders of prohibition, and mandamus against the named Respondents. However, since the disputed parcels of land are also claimed by the Interested Parties, they were served with the motion as "**persons directly affected**" by the outcome of those proceedings. It was thereafter upto the Interested Parties to either file affidavits stating their position or seek to be heard when the motion is listed for hearing.

10. What I am in effect saying is that there is no procedure for substituting a dead interested party so far as I can tell from Order LIII of the Civil Procedure Rules. I am also saying that there is sufficient provision for bringing all affected parties to the cause and that is the route the ex-parte Applicant ought to take. I am not aware of any provision that a judicial review cause can abate upon the death of an interested party. I say so alive to the definition of suits generally.

11. In the end, I find no merit in the Application dated 17/1/2007 and the same is dismissed. I see no need to make an order as to costs in view of the fact that the parties are family members.

12. Orders accordingly.

Dated and delivered at Machakos this 17th day of September 2008.

ISAAC LENAOLA

JUDGE

In presence of: Mr Masika for Respondent

N/A for Applicant

ISAAC LENAOLA

JUDGE