



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Maingi v Dee Properties Limited & 4 others (Environment & Land Case  
16 of 2020) [2022] KEELC 13601 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13601 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 16 OF 2020**

**A NYUKURI, J**

**OCTOBER 12, 2022**

**BETWEEN**

**SUSAN NDUNGE MAINGI ..... APPLICANT**

**AND**

**DEE PROPERTIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MAINGI MUKEKA TUTO ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, MACHAKOS ..... 3<sup>RD</sup> RESPONDENT**

**FREDRICK MUTHAMA NZIOKA ..... 4<sup>TH</sup> RESPONDENT**

**BERNARD NTHUSI NDAMBUKI ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**Introduction**

1. The Notice of Motion before court is dated 17<sup>th</sup> December 2021 and brought by the Plaintiff pursuant to Order 24 Rule 4 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#). The Plaintiff/Applicant sought for the following orders;
  - a. That the Honourable court be pleased to substitute the 2<sup>nd</sup> Defendant with the legal representative of the estate of the 2<sup>nd</sup> Defendant herein being Joseph Musyimi Makato, Nzomo Makato and Hellen Ndinda Makato.
  - b. That costs of this application be provided for.
2. The application is premised on the affidavit sworn on 17<sup>th</sup> December, 2021 by Mr. Wambua Kituku, Counsel for the Applicant. It is the Applicants case that the 2<sup>nd</sup> Defendant passed away on 20<sup>th</sup> September 2021 and subsequently grant of letters of Administration Ad litem for purposes of prosecuting and defending suits where the deceased was a party were granted to Joseph Musyimi



Makato, Nzomo Makato and Hellen Makato vide Machakos Chief Magistrate Court Succession Cause Misc No. E051 of 2021. Further, that the administrators of the deceased's estate have not sought for the substitution of the deceased 2<sup>nd</sup> Defendant, which has delayed this matter to the detriment of the Plaintiffs. She therefore stated that the interests of justice demanded that the orders sought be granted.

3. The application was not opposed.

### **Analysis and Determination**

4. I have carefully considered the application and the supporting affidavit. In my considered view, the sole issue that arise for determination is whether the orders sought ought to be granted.
5. Order 24 Rule 4 of the Civil Procedure Rules provides for substitution of a deceased defendant as follows:
  - (i) Whether one of two or more Defendants dies and the cause of actions does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.
  - (ii) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.
  - (iii) Where within one year no application is made under subrule 1, the suit shall abate as against the deceased Defendant.
6. It is therefore clear under Order 24 Rule 4 of the Civil Procedure Rules that where one of the Defendants dies and the cause of action survives, the court has power to join to the suit the legal representative of the estate of such deceased Defendant before proceeding with the suit.
7. Section 2 of the *Civil Procedure Act* defines "legal representative" to mean;

“a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.”
8. In the instant suit, the 2<sup>nd</sup> Defendant died on 20<sup>th</sup> September, 2021 as demonstrated by the death certificate annexed to the Applicant's supporting affidavit and marked as WK-1. In addition, the attached grant of letters of Administration Ad Litem marked as annexure WK-2 obtained vide Machakos Chief Magistrates' Court Probate and Administration Cause Miscellaneous No. E051 of 2021, show that Joseph Musyimi Makato, Nzomo Makato and Hellen Ndinda Makato were appointed as legal representatives of the estate of Maingi Mukeka Tuto and granted letters of Administration Ad Litem for purposes of filing and prosecuting ELC No. 414 of 2018, ELC case No. 16 of 2020, Matrimonial Cause No. 10 of 2017 and ELC No. 255 of 2016.
9. In view of the fact that Joseph Musyimi Makato, Nzomo Makato and Hellen Makato are the legal representatives of the estate of the deceased, 2<sup>nd</sup> Defendant, I find and hold that they have the requisite capacity to be joined to this suit in the place of the deceased 2<sup>nd</sup> Defendant.
10. In the premises, I find and hold that the application dated 17<sup>th</sup> December 2021 is merited and I grant the following orders;



- a. The deceased 2<sup>nd</sup> Defendant be and is hereby substituted with the legal representatives of his estate namely Joseph Musyimi Makato, Nzomo Makato and Hellen Ndinda Makato.
- b. The substituted Defendants are granted leave to file and serve their amended defence and any other documents they deem fit within 14 days of this ruling.
- c. The costs of this application shall be in the cause.

11. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 12TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of:**

Mr. Kaluu for the 1<sup>st</sup> Defendant

Mr. Maingi for the Plaintiff

Ms Josephine Misigo – Court Assistant

