



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Appli 208 of 2006

THENDU WATHINGIRA.....PLAINTIFF

V E R S U S

THE LAND DISPUTE TRIBUNAL GITHUNGURI.....DEFENDANT

R U L I N G

A Notice of Motion dated 15th May, 2006 was filed on the 16th May, 2006. The ex-parte applicant was named as **THENDU WATHINGIRA**. The respondents were named as **THE LAND DISPUTES TRIBUNAL GITHUNGURI and DISTRICT MAGISTRATE GITHUNGURI**. There is an interested party named as **PATRICK WATHINGIRA**. The application was filed to challenge the decision of the Land Disputes Tribunal by way of certiorari and prohibition. Apparently, the ex-parte applicant died on 30.4.2007. The Notice of Motion has todate remained pending in court.

On 9th August, 2008, the interested party filed this present application seeking for orders that-

1. ***The Notice of Motion dated 15th May, 2006 has abated and the same be struck out with costs to the interested party.***
2. ***The interested party be awarded costs of defending this suit against the ex-parte Applicant.***

The above is the application for determination herein. The reason for seeking the above orders is that nobody has been substituted to take over the place of the deceased ex-parte applicant and a year had lapsed, therefore under Order 23 rule 3 (2) of the Civil Procedure Rules, the suit has abated. At the hearing, both Mr. Kagiri who appeared for the applicant and Mr. Njenga Mbugua who appeared for the interested party addressed me.

There is no dispute that the ex-parte applicant died. There does not appear to be any dispute that the present application was filed more than one year after the death. There has so far been substituted to take over the case of the ex-parte applicant, though a Chamber Summons dated 12th February, 2008 was filed on 12th February, in an attempt to have **WAIRIMU THENDU**, the wife of the ex-parte applicant substituted for the deceased applicant. That application is still pending.

Having considered the application and documents filed as well as submissions of counsel who appeared before me, I come to the following findings.

Though the Chamber Summons dated 7th July, 2008 does not state so, it is predicated on Order 23 rule 3 (3) of the Civil Procedure Rules (*Cap. 21*). That rule provides-

3(2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.”

The above rule applies where in civil proceedings, an application to substitute a deceased plaintiff has not been filed within one year of the death. Courts have held severally that the Civil Procedure Rules do not apply to judicial review proceedings. Therefore, in my view the above provision, that is the Order 23 rule 3(2) of the Civil Procedure Rules does not apply to the Notice of Motion herein. On that ground, I will have to dismiss the application.

Secondly, the said application is premature because already, an application dated 12th February, 2008 was filed by the widow of the ex-parte applicant and was pending and the time this application dated 7th July, 2008 was filed. The interested party should have pursued the hearing and determination of the application dated 12th February, 2008, instead of filing this application. On this ground also the present application has to fail.

Thirdly, there is no rule under Order 53 of the Civil Procedure Rules that provides that after the lapse of 12 months from the death of a litigant, the cause or proceedings lapse. Since the Civil Procedure Rules do not apply to judicial review proceedings, the Notice of Motion could not have lapsed one year after the ex-parte applicant died. What the interested party should have done, is to fix the Notice of Motion for hearing, and get directions on who to be served for the purposes of hearing in terms of Order 53 rule 3(4) of the Civil Procedure Rules. The Court will then give directions on who to be served. Once the court is satisfied that all to be served have been served then the matter Notice of Motion, will proceed to hearing irrespective of whether those served have attended court.

The upshot of this is that I dismiss the Chamber Summons dated 7th July, 2008. Costs in the cause.

Dated and delivered at Nairobi this 2nd day of December, 2008.

GEORGE DULU

JUDGE.