REPUBLIC OF KENYA

HIGH COURT OF AT NYERI

Civil Case 402 of 1993

CHARLES NDUNIA KABUGO ……...…..…….PLAINTIFF

VERSUS

DOMINIC KAMAU PAUL……..…..…….1ST DEFENDANT

NDIGA NJIRU…….……2ND DEFENDANT

AMOS KURENGA NDIGA……..…….…….APPLICANT

R U L I N G

I am being asked by **Amos Kurenga Ndiga**, hereinafter referred to as the 2nd respondent to declare that this suit as against his father, the initial 2nd respondent has abated. This is by virtue of the fact that the said 2nd respondent, one **Ndiga Njiru** passed on 21st August, 2003 and has since not been substituted in accordance with the provisions of **Order XXIII Rule 4** of the Civil Procedure Rules. It does appear that the applicant on 5th September 2000 made an application to be appointed guardian *ad litem* in this suit to represent the interests of his father. The grounds upon which that application was made were that the 2nd defendant (**Ndiga Njiru**) and who as I have already stated was the father of the applicant was of senile age and could not therefore prosecute his defence in the suit. It was alleged that the said father was aged 95 years and could not remember the events relevant to the suit.

The application was heard and the applicant was appointed guardian *ad litem* on 29th September 2000 and he has since remained on record as such. Sometimes on 21st August, 2003 his father passed on and since then he has not been substituted in the suit. Since it is a year plus following the death of his father, the applicant through **Mr. Chomba**, Learned Counsel believes, that the suit as against his deceased father has abated. It is for this reason that the applicant now wants this court to so declare.

The application was vehemently opposed by the respondent through **Mr. Wachira**, Learned Counsel. In his grounds of opposition, the respondent maintains that the application is bad in law, that the applicant has no *locus standi* to mount such an application, that the applicant concealed to court the fact that his father had passed on at the time he applied to be allowed act in person and finally that the application is otherwise an abuse of due court process.

The respondent also filed a replying affidavit in which he expounded on the grounds aforesaid. He however added that since the applicant was allowed to act in person, he brought himself on record and the issue of his father's death or the suit abating therefore does not arise. He also deponed that the applicant being properly on record, there was no need to substitute his late father whom he had replaced in the suit.

In his oral submission in opposition to the application, **Mr. Wachira** stated that the applicant has not acted in good faith in bringing the instant application. That the respondent had no knowledge of the death of the deceased. That the applicant was still on record and therefore the issue of abatement of the suit does not arise. Finally he submitted that there was no need to substitute the deceased when the applicant was still on record.

I have anxiously considered the application, the supporting affidavit and the annextures thereto, the

grounds of opposition, the replying affidavit as well as respective submissions of learned counsel in the matter. From the outset I must state that I read mischief in this application. The applicant stands to gain immensely if the application is allowed as he will not be called upon to pay for the developments on the land effected by the respondent which he now occupies. Litigants must always act in good faith. Obviously the applicant cannot be said to have those traits in the circumstances of this case.

The applicant voluntarily made an application to be made a guardian *Ad litem* of his father in the suit. The application was allowed. That being the case he entered into the shoes of his father in the suit. His role in the suit was not limited. As a guardian *ad litem* he was too see the suit through on behalf of his father. He literally replaced his father as a defendant in the suit. What the father could have done in the suit was now upon the applicant to do. There was no room for half – measures. He therefore became the 2nd defendant in place of his father. It matters not that his father subsequently passed on. As long as the applicant remained on record after the passing on of his father, there was no need for his deceased father to be substituted within one year in the suit. The suit could not have abated against the applicant when he was alive and on record. The applicant cannot be heard to say that he was a mere guardian *ad litem* for his father and since his father had passed on his responsibility as such had come to an end. For that to happen he must move the court as appropriate. However as long as he remains on record, there was no need for the plaintiff to apply that his late father be substituted pursuant to the provisions of **Order XXIII rule 4 (3) and 12** of the Civil Procedure Rules. He took on the father's shoes. They may be too big or small for him but for the moment he is stuck with them. He has to confront the challenges and consequences of wearing those shoes.

Further even if we were to accept the argument of the applicant, then the question that automatically arises is, how was the respondent to know that the applicant's father had passed on so as to make the appropriate application. The applicant came to this court on 11th February, 2006 and filed an application to be allowed to act in person. Knowing very well that his father had passed on way back on 21st August, 2003, he never disclosed this fact to court or the respondent. Further how was the respondent to know who the administrator of the deceased estate was so as to make the application for substitution thereof. He was not expected to go on a fishing expedition to find out who among the deceased's siblings and or relatives had obtained a grant of letters of administration of the deceased's estate so as to make him a party to the suit in place of the deceased. When asked by court whether letters of administration of the deceased's estate had been obtained, the applicant through his counsel, **Mr. Chomba** stated categorically that no such letters had been obtained. In those circumstances, how can the respondent be expected to bring anybody on board on behalf of the deceased's estate. **Order XXIII** is categorical as to the person who can be substituted in the suit in the event of plaintiff(s) or defendant(s) passing on and the cause of action surviving him. The person to come in board on those circumstances must be a legal representative of the deceased. A legal representative in my view presupposes a person who has been appointed by court to administer the estate of the deceased pursuant to the relevant provisions of the law of Succession Act. It cannot just be any other person. The applicant being a son of the deceased could have applied for letters of administration of his deceased's father's estate. He has not done so. Yet he wants to take advantage of his failure which in my view is deliberate and meant to short circuit the respondent. I dare say the applicant is determined to benefit from his own mischief. The court of law must resist and frown upon such escapades and machinations. One may also be tempted to ask, if the applicant has not obtained letters of administration of the deceased's estate, in what capacity is he bringing this application? Clearly he has no *locus standi* to bring this application as he is not a legal representative of the deceased. The application is therefore incompetent and indeed an abuse of court process.

For all the foregoing reasons, I find the application unmerited and misconceived. Accordingly it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 16th day of July 2007.

……

M.S.A. MAKHANDIA

JUDGE