

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Case 149 of 1999

JORAM THUO WAIREGI PLAINTIFF

VERSUS

KENYA COMMERCIAL FINANCE COMPANY LIMITED DEFENDANT

R U L I N G

This is an application for substitution of one **MICHAEL MWANGI THUO** in place of the deceased Plaintiff, **JORAM THUO WAIREGI**, who is said to have died on 12th March 2005. The aforesaid **MICHAEL MWANGI THUO** has the necessary limited grant of letters of administration *ad litem* dated 15th June 2005 duly issued in Nairobi Probate and Administration Cause No. 1511 of 2005. The application is brought under Order 23, rule 3 of the Civil Procedure Rules, though the wrong rules have been quoted on the application. Under subrule (1) of that rule, where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

There is no dispute that the Plaintiff died as stated on 12th March 2005. It is also not disputed that the present application was made within one year from the date of that death, and that therefore the suit has not abated. Nor is it urged that the cause of action did not survive the Plaintiff's death. Finally, it is not disputed that **MICHAEL MWANGI THUO** is the legal representative of the deceased Plaintiff. In these circumstances, it is difficult to understand why the application has been opposed by the Defendant on the technical ground that the affidavit in support thereof is defective. The only alleged defect stated by the Defendant's learned counsel is that the supporting affidavit should have been sworn by **MICHAEL MWANGI THUO** and not by the Plaintiff's learned counsel. But there are no contentious issues of fact or law deposited in the supporting affidavit. Therefore, there is nothing wrong with the Plaintiff's learned counsel swearing the supporting affidavit.

In these circumstances I will allow the application with costs in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 10TH DAY OF FEBRUARY, 2006.