



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**HIGH COURT CIVIL CASE NO. 70 OF 1995**

**DAVID MUTISYA MUMO.....PLAINTIFF**

**VERSUS**

**ESTHER MBAIKA ..... DEFENDANT**

**R U L I N G**

Coming up for hearing were two applications dated 22/1/04 filed by the defendant who was seeking orders that the suit herein be marked as abated as against the defendant and be dismissed and the costs of the suit be recovered from the deceased plaintiff's Estate.

The other application for hearing is dated 25/4/04 by one Zakayo Matheka Mutisya the legal representative of the deceased's Estate David Mutisya in which he seeks orders to be substituted as plaintiff in place of the deceased and that the suit be revived.

The defendant did not attend court on the hearing date though the hearing date was taken in the presence of the plaintiff's counsel and the defendant who acts in person. The court proceeded to hear the plaintiff's application dated 25/4/04.

The plaintiff herein, one David Mutisya died on 26/1/00. The Death Certificate is annexed to defendant's application. The applicant Zakayo Mutisya is the legal representative of the plaintiff's Estate having been issued with limited grant on 27/2/04.

Under Order 23, when a plaintiff dies and the suit survives him, the legal representative of the deceased plaintiff can be made party and take over the proceedings. The application by the legal representative is supposed to be made within a year of the plaintiff's death. In the present case, the plaintiff died in 2000. No application for substitution was ever made till 25/4/04. Time to bring the application for substitution expired three years ago on 27/1/01. The question is whether the court can extend that time and allow a substitution at this time. The reason for the delay is attributed to an attempt to an out of court settlement between the legal representative and the defendant and that the chief gave a decision which the defendant did not agree with. What is annexed to the applicant's affidavit is a letter from the chief addressed to Mulwa advocate. There is really no evidence of negotiations having taken place. This letter is dated 2/1/04. It is soon after the said letter that the defendant filed her application to have the suit dismissed. It is likely there were negotiations otherwise the defendant might have moved the court earlier for dismissal of the suit. The defendant did not oppose this application for revival of the suit.

This is a land matter involving family members and it is only fair that the matter be heard on merit so that the dispute is settled. Despite the delay of three years, the court is here to do substantive justice and will allow the application to have the suit revived and Zakayo M Mutisya be substituted as the plaintiff. The defendant's application dated 22/1/04 is overtaken by events and is hereby dismissed with costs. The plaintiff will bear costs of this application dated 25/4/04.

Dated at Machakos this 9th day of December 2004

Read and delivered in the presence of

**R.V. WENDOH**

**JUDGE**