



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 875 OF 1999**

**JOSEPHINE WANDII MUTUA :::::::::::::::::::: PLAINTIFF**

**VERSUS**

**WILLIAM MUTHENGI (DECEASED) THRO'**

**1. PHILLIP MUTISO MUTHENGI :::::::::::::::::::: 1 ST DEFEN DANT**

**2 DAVID MUTHENGI :::::::::::::::::::: 2 ND DEFENDANT**

**3. DANIEL MUTHENGI :::::::::::::::::::: 3 RD DEFENDANT**

**4. JOHN MUTHENGI :::::::::::::::::::: 4 TH DEFENDANT**

**Coram: J. W. Mwera J.**  
**Mule Advocate for Applicant/Defendant**  
**Makau J. Advocate for Respondent/Plaintiff**  
**Masika for Garnishee**  
**C.C. Muli**

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**R U L I N G**

20 In this suit the court file did not contain a plaint or defence and perhaps it was overlooked to require Mr. J. Makau for the Plaintiff/Respondent to supply them, having been on record all the time. Mr. Mule for the applicants – intending substitutes for the deceased defendants WILLIAM MUTHENGI, came on record as late as 20.4.2001 when he filed the application dated 26.3.2001 under O 44 r. 1(i), O 23 rr. 2, 3 and 4, O r. 9 A Civil Procedure Rules and S.67 Evidence Act (Cap.80) plus S.3A Civil Procedure Act.

The main prayers were that M/s V. V. Mule and Company Advocates replace M/s Wambua and Musyoka Advocates who all along acted for the deceased defendant until the judgement here was followed by execution by garnishee order. M/s Wambua and Musyoka Advocates signed a consent to this end so M/s V.V. Mule came on the record. The other prayer was that this court's judgement of 1.3.94 be reviewed and set aside because by the time it was delivered the said defendant William Muthengi 10 had died on 25.4.93. So in effect there was no defendant against whom to proceed and/or that the suit had abated. The latter plea may not be correct entirely timewise. But Mr. Mule proceeded to pray that the applicants relatives of the deceased Muthengi be substituted at this point to go on with the case for whatever remains of it.

The prayer for review was on the basis that by ignorance or non-disclosure by the parties, the court went on to deliver the judgement on 1.3.94 oblivious of the fact that William Muthengi was dead since 25.4.93. That this was an error to be corrected by a review now.

20 Mr. Makau who cited several cases, not quite relevant here, posited that a review at this point of the judgement would serve no purpose, his client having since been paid via a garnishee order. That the prayer for review took inordinately long and no explanation had been put forward for it and that no application was made to enlarge time to substitute the deceased defendant.

Having heard both sides this application must fail. The judgement was delivered on 1.3.94. The present

applicants knew then and long thereafter that their father died before that date. They did nothing including not enlightening the court on that fact. They got a grant to administer the estate of William Muthengi on 18.7.95 and again did not move to review the judgement. Six years or so have gone by and no explanation is given for the long delay. An application to review must be lodged without unreasonable delay. The court feels that this one had been brought after unreasonably long delay which is not even explained.

10 S.67 of the Evidence Act (Cap.80) was thrown in by Mr. Mule who revealed that the judgement under attack was arrived at when some documents were produced not by their makers in the running down cause that it was. It has been remarked upon earlier that the plaint and defence in this case were not traced on the file. The court heard that William Muthengi, owner of a certain motor vehicle was sued along with another - his driver. Be that as it may but the merits of the judgement are matters of appeal rather review.

Last but not least the Respondent was paid and that closed the chapter. What will a review give to the applicants? In substance nothing much. With payment of 20 the decretal sum to the respondent, a matter which Mr. Mule conceded ends litigation there and it is so ordered. Lest it be overlooked, at no time did the applicants seek enlargement of time under O 49 r. 5 Civil Procedure Rules in order to consider their plea for substitution under O 23 rr. 2, 3 and 4 Civil Procedure Rules.

In sum this application is dismissed with costs. Orders accordingly.

**Delivered on 9th May 2001.**

**J. W. MWERA**

**JUDGE**