



**Mwiraria v Gitahi & another (Environment & Land Case  
167 of 2015) [2023] KEELC 479 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 479 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 167 OF 2015  
JO OLOLA, J  
FEBRUARY 2, 2023**

**BETWEEN**

**STEPHEN MBUI MWIRARIA ..... PLAINTIFF**

**AND**

**JAMES WANJOHI GITAHU ..... 1<sup>ST</sup> DEFENDANT**

**CHARLES WANYEKI WAIRAGU T/A HIPPO GENERAL  
MERCHANTS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated February 17, 2022 Stephen Mbui Mwiraria (the plaintiff) prays for an order that this court be pleased to compel one of the respondents to substitute the deceased 1<sup>st</sup> defendant who passed away when this matter was pending.
2. The application which is supported by an affidavit sworn by the plaintiff is based on the grounds:
  - (i) That this suit was filed on October 14, 2011 being Nyeri HCCC no 119 of 2011 and the 1<sup>st</sup> defendant was served with summons;
  - (ii) That the 1<sup>st</sup> defendant is now deceased having passed away on August 20, 2019 when this suit was still pending and there is need to substitute him to facilitate adjudication of this matter to its finality;
  - (iii) That the cause of action survives the death of the 1<sup>st</sup> defendant;
  - (iv) That the 3 proposed 1<sup>st</sup> defendants are the administrators of the estate of the 1<sup>st</sup> defendant and the right people to be appointed to substitute the deceased 1<sup>st</sup> defendant;
  - (v) That to avoid confusion of 3 people representing the 1<sup>st</sup> defendant, one of the 3 administrators ought to be compelled to substitute the deceased 1<sup>st</sup> defendant; and



- (iv) That it is in the interest of justice that the orders sought herein are granted.
3. The 2<sup>nd</sup> defendant – Charles Wanyeki Wairagu t/a Hippo General Merchants is opposed to the application. By his Grounds of Opposition dated February 26, 2022, the 2<sup>nd</sup> defendant states that:
1. The application is misconceived and incompetent;
  2. The application is bad in law, a gross abuse of the process of the court and untenable;
  3. The application is fatally and incurably defective;
  4. The application is frivolous and vexatious; and
  5. The application is otherwise without merit and should be dismissed with costs.
4. I have carefully perused and considered both the motion as well as the Grounds of Opposition. I have similarly perused and considered the written submissions placed before me by the learned counsels representing the plaintiff and the 2<sup>nd</sup> defendant.
5. By this application before me, the plaintiff has urged the court to be pleased to issue orders to compel one of the proposed respondents to substitute the deceased 1<sup>st</sup> defendant who is said to have passed away during the pendency of the suit. It is the plaintiff's case that the cause of action survived the 1<sup>st</sup> defendant and that since the proposed respondents have since been issued with letters of administration to administer the 1<sup>st</sup> defendant's estate, one of them should be compelled to substitute the 1<sup>st</sup> defendant.
6. The proposed respondents are listed as Anthony Gitahi Muthoga, Julia Wanjiru Wanjohi and David Njagi Wanjohi. When this application was first instituted under certificate of Urgency, it was placed before the Honourable Lady Justice Kossy Bor who directed on February 28, 2022 that the same be served upon all the parties. I was however unable to find any evidence on record that the said proposed respondents were served with the application as directed by the learned judge.
7. Again, while the plaintiff prays for substitution of the 1<sup>st</sup> defendant, it was apparent from a perusal of the record herein that the said 1<sup>st</sup> defendant passed away on August 20, 2019. Subsequently, on October 14, 2020 the matter was placed before the Honourable Lady Justice M C Oundo who proceeded on the submissions of the defendants' counsel to mark the suit as against the 1<sup>st</sup> defendant as abated.
8. The suit having abated as against the 1<sup>st</sup> defendant, I was not persuaded that there was any suit upon which any of the proposed respondents can be substituted in the manner sought by the plaintiff.
9. It follows that the application before me is misconceived and must fail. I dismiss the same with costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 2<sup>ND</sup> DAY OF FEBRUARY, 2023.**

**In the presence of:**

**Mr S K Njuguna holding brief for Wahome Gikonyo for the defendant**

**No appearance for the plaintiffs**

**Court assistant - Kendi**

**J O OLOLA**

**JUDGE**

