



**Ekati v Mwima; Tsikhungunakuti (Interested Party) (Matrimonial Cause  
4 of 2020) [2025] KEHC 1653 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1653 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
MATRIMONIAL CAUSE 4 OF 2020  
SC CHIRCHIR, J  
FEBRUARY 20, 2025  
IN THE MATTER OF SECTION 7&9 OF THE  
MATRIMONIAL PROPERTY ACT NO.49 OF 2013**

**BETWEEN**

**WILSON NAKUTI EKATI ..... APPLICANT**

**AND**

**DORICUS AMASI MWIMA ..... RESPONDENT**

**AND**

**GAUDENCIAL TSIKHUNGUNAKUTI ..... INTERESTED PARTY**

**RULING**

1. By way of a chamber summons dated 10<sup>th</sup> May,2023, the Applicant herein seeks orders as follows;
  - a. That the honourable court do issue an order directing that one SR be substituted in place of DAM ( deceased).
  - b. That the honourable court do direct that the said SR be deemed as the Legal Representative of the Estate of the said DAM for purposes of prosecuting the present suit having obtained a grant of letters of Administration Ad Litem to do so
  - c. That the applicant be granted leave to amend the pleadings to read SR as administrator of the Estate of DAM
  - d. That the cost of this application be in the course
2. The application is premised on the grounds appearing on the face of the application and the supporting affidavit of the Applicant.



3. The applicant avers that the DAM ,respondent to the originating summons ,died on 8<sup>th</sup> December,2022 and was issued with limited grant of administration to represent the deceased reswpondent's estate; that it is in the interest of the deceased estate for her to be allowed to substitute the deceased. She has attached a copy of a grant of letters of Administartion adlitem issued on 12<sup>th</sup> January 2023 to the Application .
4. The application is opposed by the applicant/respondent vide grounds of opposition dated 27<sup>th</sup> June 2023 where he has stated as follows:
  - a. That the application is misconceived, fails to raise a valid point of law and is lacking in merit and any legal basis
  - b. That the application is defective in form and substance.
  - c. That the cause of action did not survive the deceased.

### **Applicant's Submissions**

5. The court directed that the application be canvassed by way of written submissions. The respondent/Applicant is the only one who had filed submissions by the time of writing this Ruling.
6. It is the Respondent's 's submission that this being a matrimonial cause, following a divorce cause, the suit is personal in nature and does not survive the deceased. He further argues that the respondent cannot substitute the deceased since matrimonial legislations creates personal rights and obligations which end with the death of a party to the marriage and cannot be pursued upon one's death. He has relied in the case of Karl Wehner Claasen vs Commissioner of Lands and 4 Others (2019) eKLR,where the court held that issues of divorce and marriage are personal and do not survive the demise of a party to a suit.

### **Determination**

7. A perusal of the record shows that the respondent herein filed the Originating Summons dated 15<sup>th</sup> October,2019 against the deceased,DAM . In the summons the respondent is seeking a declaration that he contributed to towards the purchase of a number of properties registered in the joint names of the deceased and himself, and one registered in the sole name of the deceased. Before the summons could be heard, the deceased died.
8. There is also evidence that the marriage between the Respondent and the deceased has since been dissolved . The dissolution was done prior to the filing of the summons through Vihiga principal Magistrate's court Divorce cause No. 7 of 2017.
9. It is the respondent's case that disputes over matrimonial property fall in the arena of personal laws which don't survive a litigant. The issue for determination therefore is whether a claim for sub-division of matrimonial property is an issue of personal law and therefore abated upon the death of the respondent in the originating summons.
10. Section 2 of the *Law Reform Act* Cap 26 (Laws of Kenya) stipulates that:-
  1. Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:



Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.”

11. It is pleaded that the intended respondent is an administrator in the estate of DAM the deceased herein. She is appointed under the Law of Succession Act to administer her estate. Section 3 of the Law of Succession Act defines estate as follows;

“estate means free property of a deceased person. free property in relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not been terminated by his death”

12. I have looked at the originating summons and noted that one of the properties is registered in the sole name of the deceased’s respondent . This is title No. west Bunyore/Ebusikhale/2183 . I consider this to be the deceased respondent’s free property within the context of section 3 of the Law of succession Act unless the Applicant will otherwise be in a position to convince the court regarding contribution, if any, he made.
13. Further in view of the fact that the respondent and the deceased had divorced the handling such a property , registered in her sole name will have to done pursuant to the provisions of the law of succession Act subject to any prove to the contrary as aforesaid.
14. Prima facie, the Applicant herein has demonstrated that she has been granted the authority to represent the deceased in this suit , whose subject matter is interalia the property of the deceased.
15. I have considered the court of Appeal decision in Karl’s case ( supra), and I noted that whereas the court of Appeal held that cases of divorce and custody of children fall under personal law , it is silent on the division of matrimonial property .The respondent therefore has failed to convince this court that property that is matrimonial or presumably matrimonial falls under personal law.
16. Am of the view that substitution is warranted and therefore prayer 1 and 3 of the Application are hereby allowed.
17. As for Prayer 2 of the Application , it is in my view misplaced, as the issue of representation of Doricus’s estate in the suit , at least in as far as this case is concerned, is a settled issue.
18. In the end , I hereby proceed to make orders as follows:
- a). SR shall henceforth substitute DAM in these proceedings .
  - b). The Applicant is hereby granted leave to amend the pleadings to the extent of substituting the name DAM with that of SR wherever the former name appears.
  - c). Each party to meet their own costs

**DATED, SIGNED AND DELIVERED AT ISIOLO ,VIA MICROSOFT TEAMS, THIS 20<sup>TH</sup> DAY OF FEBRUARY 2025.**

**S. CHIRCHIR**  
**JUDGE.**

In the presence of :

Godwin Luyundi- Court Assistant



Mr. Okanda for the Applicant

Mr. Ligare for Nandwa for the respondent

