



**Dhanji & 3 others v Dhanji; Borkhataria (Applicant) (Environmental and Land  
Originating Summons 203 of 2013) [2025] KEELC 3920 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3920 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 203 OF 2013**

**OA ANGOTE, J**

**MAY 15, 2025**

**BETWEEN**

**PRABHUDAS DHANJI ..... 1<sup>ST</sup> APPLICANT**

**JAYANTILAL DHANJI ..... 2<sup>ND</sup> APPLICANT**

**KISHORLAL DHANJI (SUING AS THE ADMINISTRATORS OF THE ESTATE  
OF THE LATE CHANDULAL DHANJI) ..... 3<sup>RD</sup> APPLICANT**

**KISHORLAL DHANJI ..... 4<sup>TH</sup> APPLICANT**

**AND**

**MANSUKHLAL DHANJI ..... RESPONDENT**

**AND**

**BHAVIN JAYANTILAL BORKHATARIA ..... APPLICANT**

**RULING**

1. Before this court for determination is the Notice of Motion dated the 17<sup>th</sup> October, 2023, brought pursuant to the provisions of Section 19 of the *Environment and Land Court Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, and Orders 9 and 24 of the Civil Procedure Rules. The Applicant-Bhavin Jayantilal Borkhataria seeks the following reliefs:
  - i. That the firm of Sonal Raval Advocate be granted leave to come on record after judgment for the 2<sup>nd</sup> Applicant in place of the firm of Ibrahim Issack and Company Advocates.
  - ii. That the 2<sup>nd</sup> Applicant, Jayantilal Dhanji be substituted by his legal representative Bhavin Jayantilal Borkhataria (the Applicant).
  - iii. That the costs of this application be provided for.



2. The Application is based on the grounds on the face thereof and supported by the Affidavit of Bhavin Jayantilal Borkhataria, the Applicant herein of an even date.
3. Mr. Borkhataria deponed that the 2<sup>nd</sup> Applicant in the suit, Jayantilal Dhanji Borkhataria, passed away on the 24<sup>th</sup> July, 2020; that prior to his demise, he was represented by the firm of Ibrahim Issack and Company Advocates and that he has, as the deceased's son, obtained a grant of letters of administration without will in respect of the deceased's estate from the High Court of the United Republic of Tanzania at Temeke in Probate and Administration Cause No 65 of 2023 and has filed an application for the resealing of the aforesaid grant at the High Court-Milimani.
4. Mr Bhavin deponed that after judgment, leave of the court is required to change representation which is why he has, through the present Motion sought to change legal representation from the firm of Ibrahim Issack and Company Advocates to the firm of Sonal Raval Advocate and that he seeks to be substituted as an Applicant in place of the deceased.
5. The Applicant deposed that the parties in the suit are engaged in negotiations with a view to implementing the judgment delivered on the 26<sup>th</sup> November, 2018 and that unless the orders sought are granted, he will be unable to participate in the post judgment negotiations as the representative of the deceased thus delaying the final conclusion of the matter. He urged that the interests of justice dictate that the prayers are granted.
6. In response, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants/Respondents filed Grounds of Opposition dated the 6<sup>th</sup> February, 2024 in which they averred that:
  - i. The instant application is an abuse of court process, a waste of the court's time, fatally defective and hence ought to be struck off and/or dismissed.
  - ii. The application as filed is an abuse of the court process and ought to be dismissed.
  - iii. In so far as the same is based on affidavits which has deponed to contested facts, the orders being sought cannot be granted.
  - iv. In so far as the application is brought under the provisions of the Order 9 and 24 of the Civil Procedure Rules without disclosing which sub-rule the applicant is relying on, the same is defective and cannot be entertained by this court.
  - v. There is no suit pending for new parties to join since judgment was delivered on the 26<sup>th</sup> November, 2018 and the matter marked as settled.
  - vi. The Applicant has in no way resealed the grant if any where the grant is issued in another country as conferred upon by the Laws of Kenya.
  - vii. The Applicant has in no way engaged the firm of Ibrahim Issack and Company Advocates in any post judgment negotiations.
  - viii. The whole application is based on forestalling the execution process of the judgment which is at its tail end.
  - ix. The suit(sic) as filed offends the provisions of the [Civil Procedure Act](#) and the [Law of Succession Act](#).
7. No other response was filed to the Motion. The Applicant filed submissions which I have considered.



## **Analysis and Determination.**

8. Having read and considered the Motion, the response thereto and submissions, the issues that arise for determination are:
  - i. Whether the Application is competent?
  - ii. Whether the Applicant's plea for substitution is merited? And if so?
  - iii. Whether the firm of Sonal Raval Advocate should be granted leave to come on record for the Applicant?
9. Vide the Grounds of Opposition, the 1<sup>st</sup> and 2<sup>nd</sup> Applicants/Respondents seek to impugn the present Motion. It is contended, inter-alia, that the Motion does not disclose the sub-rules of Order 9 and 24 of the Civil Procedure Rules relied on; that there is no suit pending to which new parties can be joined; that the grant has not been resealed as required by law; that there are no post judgment negotiations and that the affidavit has deponed to contested facts.
10. It is trite that Grounds of Opposition only address issues of law. This position was articulated by the Court of Appeal in *Daniel Kibet Mutai & 9 Others vs Attorney General* [2019]eKLR thus:

“The position before us is that the appellants averred to certain facts under oath in an affidavit. These facts were not controverted by the respondents either through an affidavit in response or through cross examination. An affidavit is sworn evidence. It occupies a higher pedestal than grounds of opposition that are basically issues of law intended to be argued. Two things flow from this. First, by the mere fact of the affidavits not having been controverted, there is an assumption that what is averred in the affidavit as factual evidence is admitted...”
11. In responding to the Motion only through the Grounds of Opposition, it is presumed that there is no contention as to the validity of the facts deponed to in support of the Motion. Consequently, allegations such as the non-existence of post judgment negotiations and generalized allegations that the affidavit contains disputed facts cannot lie. The foregoing arguments are disregarded.
12. Moving to the issues of law raised therein, the present Motion is said to be premised on Orders 9 and 24 of the Civil Procedure Rules. It is opined that the failure to note the specific sub-sections relied on renders the Motion incompetent. Vide his submissions, the Applicant contends that the same is a mere technicality and cannot be used to defeat the Motion.
13. Order 51 Rule 1 of the Civil Procedure Rules explicitly provides that every order, rule, or statutory provision under which an application is made should ordinarily be stated. However, the section also provides that failure to comply with this requirement does not warrant an objection or the dismissal of an application. Further, an application cannot be defeated on a mere technicality or for want of form, provided the substance remains unaffected.
14. Indeed, the mere failure to cite a specific subsection cannot render a Motion incompetent. Even citing an entirely incorrect provision does not, in itself, invalidate a Motion. As the Supreme Court observed in *Hermanus Phillipus Steyn vs Giovanni Gnechi-Ruscione* [2013] eKLR:

“The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the



principles to be adhered to in the interpretation of *the Constitution*, as stipulated in Article 259 of *the Constitution*. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant's cause."I find that the citing of wrong provisions of law does not render an application defective and for this reason, the first ground of objection must fail."

15. As for the assertion that no suit is pending in which new parties can be joined, it is undisputed that the matter has been concluded. However, the Applicant is not seeking joinder as a new party, but rather, substitution as a representative of the second Applicant. The contention that the Applicant has not revealed the grant issued in a foreign jurisdiction, thus rendering the Motion defective will be addressed hereunder.
16. The legal framework governing the substitution of a deceased Plaintiff or Defendant is found in Order 24, Rule 3 and Rule 4 of the Civil Procedure Rules. These provisions stipulate that when a party to a suit dies and the cause of action survives, the legal representative of the deceased must be formally made a party through an application to the court. If no such application is made within one year, the suit abates as against the deceased party.
17. However, an exception to this rule is provided under Order 24, Rule 10, which states:

"Nothing in rules 3, 4, and 7 shall apply to proceedings in execution of a decree or order."
18. This means that at the execution stage, the requirement for substitution does not apply. Discussing this, the court in the case of *Agnes Wanjiku Wang'ondy vs Uchumi Supermarket Ltd [2008] eKLR*, noted:

"So, clearly, the requirement for substitution in Order 23 Rule 4 (3) does not apply to proceedings in execution of an order as was the case before the lower court. Secondly, was the application to "substitute" the personal representatives indeed necessary? In other words, was it necessary to enjoin the personal representatives to the suit? Order 30 Rule 1 would seem to say "NO". This is what it states:"Order 30 Rule 1: In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties." While the above rule states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit."
19. Similarly, the court in *Mueni Kiamba vs Mbithi Kimeu Kimolo [2017]eKLR* noted:

"I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties. This goes a long way in ensuring the overriding objective of the *Civil Procedure Act* and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit..."
20. The court concurs and finds that the proper position in law is that it is not mandatory to substitute a deceased decree holder or judgment debtor. Indeed, the rights and obligations arising from the decree



do not abate upon the death of the party. Instead, they devolve upon the estate and can be pursued or defended by the legally appointed personal representative.

21. However, where an Applicant elects to proceed with substitution, as herein, nothing prevents them from doing so save that they must demonstrate that they possess the requisite legal authority to do so. The law is clear that only a legal representative, as contemplated under the *Law of Succession Act*, can be substituted in place of a deceased party.
22. The Applicant must therefore establish his legal standing by providing sufficient proof of his authority to act on behalf of the estate of the deceased.
23. In this case, the Applicant has annexed a Grant of Letters of Administration issued on 15<sup>th</sup> August 2023 in Dar es Salaam, Tanzania—a foreign jurisdiction. While the grant establishes the Applicant’s authority within that jurisdiction, its legal efficacy in Kenya must be determined in accordance with the provisions of the Kenyan *Law of Succession Act*.
24. Section 77(1) of the *Law of Succession Act* provides the legal framework for the recognition of foreign grants of probate or administration. It states:

“Where a court or other authority, having jurisdiction in matters of probate or administration in any Commonwealth Country or in any other foreign Country designated by the Minister by notice in the gazette, has, either before or after the commencement of this Act, granted probate or letters of administration, or an equivalent thereof, in respect of the estate of the deceased, person, such grant may, on being produced to, and a copy thereof deposited with the High Court, be sealed with the seal of that Court, and thereupon shall be of like force and effect, and have the same operation in Kenya, as if granted and confirmed by that court.”

25. From the foregoing, it is evident that for a foreign grant to be legally valid and enforceable within the Kenyan jurisdiction, it must first be resealed by the High Court. Until the resealing process is duly completed, the foreign grant holds no legal effect in Kenya, and any attempt to rely on it remains premature and legally untenable.
26. In his affidavit in support of the Motion, the Applicant conceded that the grant of letters of administration he relied on had not yet to be resealed. This means that, at the time of filing the application, the Applicant lacked the requisite legal standing to act as the legal representative of the deceased’s estate within the Kenyan jurisdiction.
27. However, in a subsequent turn of events, Counsel for the Applicant has now asserted that the grant has since been duly resealed and has proceeded to annex a copy of the same to the written submissions. Is this permissible?
28. It is trite that submissions are not pleadings. This was articulated by the Court of Appeal in *Daniel Torotich Arap Moi vs Mwangi Stephen Muriithi and Another* (2014 )eKLR, as follows:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submission could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language,” each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented.”



29. Indeed, submissions cannot take the place of evidence, and any document intended to support a party's case must be properly introduced through an affidavit or other legally recognized means.
30. In the present case, the Applicant's failure to properly introduce the resealed grant in accordance with the prescribed legal framework is not a mere procedural lapse but a fundamental flaw that goes to the root of the application. Courts are duty-bound to balance the principle of substantive justice with adherence to procedural rules, as the latter ensures fairness, consistency, and orderly administration of justice.
31. The court finds guidance in the pronouncement of Kiage JA in *Nicholas Kiptoo Arap Korir Salat vs ERC & 6 OTHERS* (2013) eKLR as follows:

“I am not in the least persuaded that Article 159 of *the Constitution* and the Oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free for all in the administration of justice. This cannot and indeed all courts must never provide succour and cover to parties who exhibit scant respect for rules and timeliness.”
32. Ultimately, given the clear legal principles governing the admission of evidence, the court has no option but to disregard the resealed grant annexed to the submissions. Consequently, the Applicant has failed to demonstrate that he possesses the requisite locus standi to represent the estate of the deceased 2<sup>nd</sup> Applicant. Without proof of proper legal representation, the request for substitution is legally untenable and cannot be entertained.
33. Similarly, the prayer for a change of Counsel, which is sought by the Applicant in his purported capacity as the legal representative of the deceased 2<sup>nd</sup> Applicant, also fails.
34. In the end, the court finds the Notice of Motion dated 17<sup>th</sup> October, 2023 to be unmerited. The application is struck out with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

**O. A. ANGOTE**

**JUDGE**

