



**In re Estate of Eunice Wanjiru Ngai-Imwe (Deceased) (Civil Appeal
67 of 2019) [2023] KEHC 3259 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3259 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 67 OF 2019**

RM MWONGO, J

APRIL 19, 2023

**IN THE MATTER OF THE ESTATE OF EUNICE WANJIRU NGAI-IMWE
(DECEASED)**

BETWEEN

BEATRICE NDUNGURI MWAI 1ST APPELLANT

CHARLES WAWERU KIURA 2ND APPELLANT

AND

SICILY WAWIRA TITUS 1ST RESPONDENT

BANCY NJERI MURIUKI 2ND RESPONDENT

AND

PETER NGARI NDORO APPLICANT

RULING

Background

1. The applicant, Peter Ngari Ndoro filed an application dated August 4, 2022, to substitute himself in place of the 1st respondent Sicily Wawira Titus, who died on 27/7/2021. The application is made under rule 73 of the Probate Rules which gives the court inherent powers to make such orders as to meet the ends of justice.
2. The application is accompanied by the supporting affidavit of the applicant to which is attached the 1st respondent's death certificate, letter from the Chief identifying the applicant and the family members and a limited grant of Letters Ad Litem appointing the applicant to administer the unadministered part of the deceased's estate.



3. The application is opposed by Alfred Ngairé Ngai-Imwe on the grounds that : he was never made aware of the application for substitution until he perused the file. More substantively, he argues that more than one year and three months have lapsed since the deceased, who is sought to be substituted, died. He says that the application dated 4th August 2022 is bad in law and an abuse of the court process as it offends the provision of order 24 of the Civil Procedure Rules (CPR) in that the deceased ought to be substituted within a year from the date of her death.
4. Accordingly, he prays that the court do order that the appeal be marked as settled against the Respondents and record our consent with the 2nd respondent as the order of the court.

Issue

5. The only issue to be determined here is whether the applicant can be substituted for the deceased 1st respondent.
6. Order 24 rules (3) (1) and (2) of the CPR that have been relied upon to oppose the application provide that:
 - (1) “Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
 2. Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.”
7. These are, however, Succession proceedings which are governed by the Law of Succession Act and the regulations made thereunder. Rule 63 (1) of the Probate and Administration Rules cap 160 provides as follows: -

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely orders 5 rule 2 to 34 and orders 11,16,19,26,40,45, and 50 (cap. 21, Sub. Leg.), together with the High Court (Practice and Procedure) Rules (cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.” (Emphasis added).
8. Section 54 of the Law of Succession Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. Paragraph 14 of the Fifth Schedule provides:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other court between the parties, or any other



parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.”

9. In the present appeal, the applicant is seeking to substitute the deceased, who died whilst she was a respondent in the appeal, so as to proceed with the pending appeal. The applicant has obtained grant of letter of administration ad litem for the 1st respondent’s estate.
10. In the case of *Silas Njeru Njiru & 2 others v Mugo Mukere; Leonard Njeru Mukera & another (Intended Defendants/Respondents)* [2022] eKLR, it was held that:

“Where a defendant dies and the cause of action survives the defendant, then such deceased person can only be substituted by the legal representative of his estate.”
11. *In re Estate of Nyamanga Opiyo (Deceased)* [2022] eKLR Wendoh J held:

“It is clear from the above provision that Orders 17 and 24 of the Civil Procedure Rules do not apply in succession proceedings. Thus, as it was held in RE: Estate of Omar Abdalla Taib (supra), the concept of abatement does not apply in succession proceedings”.
12. Clearly therefore, the concept of abatement does not apply in succession proceedings. The applicant having complied with the provisions of section 54 of the *Law of Succession Act* and Paragraph 14 of the *Probate and Administration Rules*, the Court is obliged to allow the application
13. Accordingly the application for substitution is hereby allowed as prayed.
14. Orders accordingly.

DATED AT KERUGOYA THIS 19TH DAY OF APRIL, 2023

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R. MWONGO

JUDGE

Delivered in the presence of:

1. Munene holding brief for Ngigi for the Applicant
2. Alfred Ngaire Present in Person

