



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 363 OF 2016**

**REV. EPHRAIM WAIGANJO KARIANJAH**

**(Suing as a trustee of the Full Gospel Churches of Kenya).....PLAINTIFF**

**VERSUS**

**REV. JULIUS MBURU GATHIRWA**

**REV. JACOB OLUOCH (Sued as trustees and or officials of Worldwide**

**Gospel Church of Kenya).....DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 4<sup>th</sup> April 2019. The following orders are sought in the application:

1. ...

2. *THAT the court be pleased to substitute the deceased Plaintiff in this suit with the applicant herein.*

3. *THAT upon substitution of the Plaintiff with the applicant, the suit be revived and be heard and determined on merit.*

4. *THAT upon revival of the suit the same be transferred to Chief Magistrate Court, Male for full hearing and determination.*

5. *THAT the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by David Macharia, the applicant. He deposed that he is a bishop and a trustee of the Full Gospel Churches of Kenya, which is essentially the plaintiff herein. He added that Rev. Ephraim Waiganjo Karianjahi who filed the suit on behalf of the church has since passed away and that the church has fully authorised him to be substituted in the place of Rev. Ephraim Waiganjo Karianjahi so that he proceeds with the case. He annexed a copy of deed of trustees and death certificate. He further deposed that this suit has abated since over one year has elapsed since Rev. Ephraim Waiganjo Karianjahi passed away.

3. The defendants did not file any replying affidavit. Instead, they filed grounds of opposition in which they stated that the applicant became a trustee on 12<sup>th</sup> October 2017 and that there had been inordinate and inexcusable delay in filing the application since there were other trustees at the time of the demise of Rev. Ephraim Waiganjo Karianjahi. They further stated that revival of the suit would be prejudicial to them.

4. The applicant filed a further affidavit sworn by David Macharia in which he admitted that although he became a trustee on 12<sup>th</sup> October 2017, there had been a regrettable delay in filing the application. He added that the decision that he replaces Rev. Ephraim Waiganjo Karianjahi required deliberation by the relevant boards within the church.

5. Parties agreed to canvass the application through written submissions. Nevertheless, the defendants did not file any submissions. Citing Order 24 rule 3 of the Civil Procedure Rules and the case of **James Mwaniki Kinuthia v Hemed Iddi Mukui & another [2019] eKLR**, the applicant urged the court to allow the application.

6. I have considered the application, the grounds of opposition and the submissions. **Order 24 rule 3** of the **Civil Procedure Rules** provides:

*(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:*

*Provided the court may, for good reason on application, extend the time.* [Emphasis supplied]

7. It is not disputed that Rev. Ephraim Waiganjo Karianjahi, passed away on 19<sup>th</sup> November 2016 as evidenced by the annexed certificate of death. Similarly, it is not disputed that Bishop David Macharia, the applicant, is a trustee of Full Gospel Churches of Kenya. The question that must be answered from the onset is: has the plaintiff herein passed away? Put differently, was Rev. Ephraim Waiganjo Karianjahi the plaintiff in this case? To answer that question, we need to look at the plaint herein. At the heading of the plaint Rev. Ephraim Waiganjo Karianjahi indicated that he was suing as a trustee of the Full Gospel Churches of Kenya. At paragraph 1 the plaintiff is described as "... an adult of sound mind residing at Nakuru ..." I venture into this discussion because there appears to be some confusion as to whether Rev. Ephraim Waiganjo Karianjahi was the plaintiff or whether Full Gospel Churches of Kenya sued through him.

8. Order 24 rule 7(2) of the **Civil Procedure Rules** provides:

*7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

*(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.* [Emphasis supplied]

9. Thus if Rev. Ephraim Waiganjo Karianjahi was the plaintiff then the suit abated by 19<sup>th</sup> November 2017 and his legal representative ought to be the one to apply for substitution and revival. The term "legal representative" is defined in section 2 of the **Civil Procedure Act** as meaning:

*a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.*

10. There is a long line of authorities to the effect that legal representative means executor or administrator of a deceased person duly appointed under the **Law of Succession Act**, Cap 160. Suffice it to quote **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor** [1993] KLR 230 where the Court of Appeal addressed the issue as follows:

*... The common law is that "action personalis moritur cum persona", that is, a personal action dies with the person. This rule was, however, to a large extent, supplanted by the Law Reform Act, which Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the Law of Succession Act, Cap 160. Section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act "shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act". ... To determine who may agitate by suit any cause of action vested in [a deceased person] at the time of his death, one must turn to section 82(a) of the Law of Succession Act, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all inclusive answer. It says "personal representative means executor or administrator of a deceased person".*

11. David Macharia, the applicant herein does not claim to be the legal representative of the deceased. He has not exhibited any grant issued to him under the **Law of Succession Act**. That being the case, he cannot seek substitution and revival of this suit. If however the plaintiff was in fact Full Gospel Churches of Kenya then the plaintiff is not deceased and the issues of abatement, substitution and revival do not arise. As pleaded, the present application is brought on the premise that the plaintiff is deceased. Since there is no evidence that the applicant is the legal representative of the deceased, prayers 2 and 3 cannot issue. Regarding prayer 4, I am reluctant to order transfer of the suit to the subordinate court until it is clear whether or not the suit is abated. It would be futile to transfer an abated suit. Counsel for the plaintiff will have to determine how next to proceed.

12. In view of the foregoing discourse, Notice of Motion dated 4<sup>th</sup> April 2019 is dismissed. Costs in the course.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of February 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Wangari for the plaintiff/applicant

Mr Tengekyon for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi