



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 880 OF 1977**

**Consolidated with HCC No. 908 of 1977)**

**SAMUEL NGUNU KIMOTHO ..... 1<sup>ST</sup> PLAINTIFF**

**MAAKA MUKUHI MUGWERU by substitution in**

**Personal representative of**

**SIMON MUGWERU WAITHIRWA ..... 2<sup>ND</sup> PLAINTIFF**

**V E R S U S**

**JULIUS GICHUKI GICHUHI (by substitution and**

**being a Legal representative of the estate of**

**The Late GICHUHI KIMIRA..... DEFENDANT**

**AND**

**LOISE WAIRIMU MUGWERU**

**RUTH WANJIRU MUGWERU**

**WINNIE WANGU MUGWERU (By substitution and**

**being the Administrators of the estate of the late**

**MAAKA MUKUHI MUGWERU.....APPLICANTS**

**RULING**

1) The subject matter of this ruling is the motion dated 26<sup>th</sup> September, 2017 taken out by Loise Wairimu Mugweru, Ruth Wanjiru Mugweru and Winnie Wangu Mugweru, the administratrixes of the estate of Maaka Mukuhi Mugweru, deceased whereof they sought for the following orders inter alia:

- 1. THAT due to the urgency of this motion, the same be certified urgent, service of the same be dispensed with and the motion be heard ex-parte in the first instance.***
- 2. THAT upon hearing exparte, leave be granted for LOISE WAIRIMU MUGWERU, RUTH WANJIRU MUGWERU and WINNIE WANGU MUGWERU as the administratrixes of the estate of the 2<sup>nd</sup> plaintiff be enjoined and/or substituted as the 2<sup>nd</sup> plaintiffs in these proceedings in place of Maaka Mukuhi Mugweru.***
- 3. THAT upon hearing exparte, orders of this honourable court made on 20<sup>th</sup> March, 2014 awarding the defendant costs of the suit herein and all other consequential order be stayed pending the hearing and determination of this motion.***
- 4. THAT upon hearing interpartes, the orders of this court made on 20<sup>th</sup> March 2014 as against the estate of Maaka Mukuhi***

***Mugweru declaring the suit herein as having abated and awarding costs to the defendant herein be vacated and/or set aside.***

**5. THAT and/or in the alternative and without prejudice to the foregoing, the orders of this court made on 20<sup>th</sup> March 2014 be reviewed, set aside and/or vacated.**

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

2) The motion is supported by the affidavit of Loise Wairimu Mugweru and that of Ernest Kamau. When served, Julius Gichuki Gichuhi, being the legal representative of the estate of Gichuhi Kimira, deceased, filed a replying and supplementary affidavits to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to the motion disposed of by written submissions.

3) I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written and oral submissions. The motion has a long history behind it. This suit was filed in 1977 and was heard and determined in favour of the plaintiffs and against the defendants in 1989. An appeal was preferred against the judgement of this court in the Court of appeal. The appeal was eventually dismissed in 1998. Maaka Mukuhi Mugweru, the 2<sup>nd</sup> defendant died on 24.1.2007. On 17.12.2013, the defendant, the respondent herein filed an application under Order 24 rule 3(2) of the Civil Procedure Rules in which he sought for *inter alia*, a declaratory order that the suit against him has abated and to be awarded costs of the suit. On 20.03.2014, the aforesaid application was allowed in favour of the defendant/ respondent. It is the submission of the applicants that the order was never served upon them nor the estate of Maaka Mukuhi Mugweru, deceased. On 27.4.2017, the defendant/respondent filed a bill of costs which bill was taxed *exparte* at ksh.1,977,919/=. It is the submission of the applicants that the estate of Maaka Mukuhi Mugweru, deceased was not served with the bill of costs. The applicants have urged this court to find that there was no suit in existence as of 20.3.2014.

4) The applicants aver that they became aware of the suit on 8.9.2017 when the defendant/respondent filed an objection to the confirmation of grant of letters of administration.

5) Having given a detailed background of this matter, I now turn my attention to the merits or otherwise of the motion. It is the submission of the applicants that this court had no jurisdiction to hear the application dated 17.12.2013 because the suit had been heard and determined before this court and on appeal. It is also argued that the High Court cannot dismiss a matter pending and or determined by the Court of Appeal by virtue of the doctrine of hierarchy therefore the orders issued on 20.3.2014 were issued without jurisdiction were irregular and a nullity hence ought to be set aside *ex debito justitiae*.

6) The respondents strenuously opposed the application arguing that the firm of Njuguna, Kahari and Kiai Advocates was joined to the suit to safeguard the rights of the 2<sup>nd</sup> plaintiff in place of the firm of Muriithi and Ndonge. The respondent pointed out that no leave was sought by the firm of Njuguna, Kahari and Kiai to come on record in place of Muriithi & Ndonge advocates since there was judgement in place. The respondents further argued that the applicants were all along aware of the order of abatement and are being less candid when they claimed that they learnt of the same on 8.9.2017. The respondents are of the submission that the applicants have failed to advance any plausible reasons in support of the application and that there is no prayer for revival of the suit. It is the submission of the respondents that the court was right in issuing the orders for abatement and costs.

7) It is also the respondents' argument that the decree had not been executed and that a suit could abate even after being heard and determined where execution is not complete. This court was beseeched to find that the current motion is clearly a disguised appeal.

8) It is not disputed that on 20<sup>th</sup> March 2014 the Hon. Mr. Justice Waweru issued an order dismissing this suit as having abated pursuant to the motion dated 27.1.2014. The application appears to have been considered *exparte* due to the absence of the applicants. Two preliminary points commended themselves to be determined first. The first is whether or not the current application qualifies to be considered as an application for review. It is apparent that the applicants are seeking for the orders of Justice Waweru to be set aside. The main argument is that there is an error apparent on the face of record as well as sufficient material placed before the court to warrant this court to review the orders issued on 20<sup>th</sup> March 2014. It is said that the court was not informed that there was no suit in existence. It is also argued that the defendant/respondent concealed the fact that the preliminary decree had been enforced as a result the parcel of land known as L.R. no. 13041 was subdivided into three subdivisions namely: L.R. no. 13041/1, 13041/2 and 13041/3. It is also stated that the defendant concealed the fact that L.R. no. 13041/2 was in fact duly registered in the name of Maaka Mukuhi Mugweru, deceased.

9) Having critically examined the grounds the motion dated 26<sup>th</sup> September 2017 is premised, I am convinced that the motion meets the threshold of being regarded as an application for review, therefore the same is to be determined on its merit.

10) The second preliminary issue which was ably argued by the respondents is whether or not the firm of Njuguna, Kahari & Kiai is properly on record. The respondent is of the submission that since judgment had been entered, the aforesaid firm needed to obtain leave before coming on record in place of the firm of Muriithi and Ndonge advocates. The record shows that on 6<sup>th</sup> November 2017, the applicants applied to be enjoined to this suit to substitute the estate of Maaka Mukuhi Mugweru, deceased. The application was allowed when Mr. Kabue indicated that he has no objection to the proposal. The firm of Njuguna, Kahari & Kiai advocates appeared to represent the applicants. The applicants were not by then parties to this suit neither were they represented by the firm of Muriithi and Ndonge advocates. I find too no merit in the second preliminary objection. The firm of Njuguna, Kahari and Kiai advocates are properly on record to represent the administratrixes of this estate of Maake Mukuhi Mugweru, deceased. The aforesaid firm therefore is not on record to replace the firm of Muriithi and Ndonge advocates.

11) Having disposed of the preliminary points, I now turn my attention to the merits of the motion for review. I have already discussed in detail the grounds put forward by the applicants. It has been argued by the applicants that the respondent failed to disclose in his application dated 17.12.2013 that the preliminary decree had been implemented. I have perused paragraph 8 of the affidavit of Julius Gichuki Gichuhi

sworn on 17.12.2013 and filed in support of the motion of the same date and it is apparent that the deponent averred as follows:

**“That there exists on record a preliminary decree awaiting implementation of the issues envisaged under the said preliminary decree.”**

12) The applicants have emphatically averred that by that time, the preliminary decree had been executed leading to the subdivision of L.R no. 13041 into three subdivisions. It is also stated that by then subdivision known L.R. 13041/2 had actually been registered in the name of Maaka Mukuhi Mugweru, deceased. The aforesaid assertions were not disputed by the respondent. I am convinced that the respondent intentionally misled Justice Waweru into granting the orders by cancelling important and material facts. On this ground alone the motion succeeds. With respect, I am persuaded by the applicants’ submission that by then there was no suit in existence capable of abating as against the defendant/ respondent since the suit was long heard and determined and the resultant decree issued and executed.

13) In the end, I find merit in the motion dated 26<sup>th</sup> September 2017.

It is allowed in terms of prayer 5 with costs being awarded to the applicants.

Dated, Signed and Delivered in open court this 4<sup>th</sup> day of May, 2018.

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant