



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**  
**ELCA NO.13 OF 2019**

**MARY NJOKI SIMON**

**(suing as the personal representative of MUCHOGO MURIU).....APPELLANT**

**VS**

**MONICAH WANJIRU WANGONYA**

**(suing as the personal representative of WARUI MURIU).....RESPONDENT**

**RULING**

1. The instant Appeal arose from the ruling by the Honourable Chief Magistrate M. Wachira on 27/6/2019 in Land Dispute Tribunal case No. 66 of 2005 as preferred by the Plaintiff /Appellant vide her Memorandum of Appeal dated 2/7/2019 and set forth the following grounds of Appeal;

- a. That the learned trial Magistrate erred in fact and in law by holding that the Appellant's application was bad in law.
- b. The learned Magistrate erred in fact and in law by misapplication of the law in matters that were pending before the Magistrate's Court having been transferred from the defunct district land disputes tribunals.
- c. The learned trial Magistrate erred in fact and in law by being misguided as to the law applicable in substitution of parties after death.
- d. The learned Magistrate erred in fact and in law by dismissing the Appellant's application and failing to appreciate the Appellant's submissions on record.

2. In the impugned ruling the honourable Magistrate gave the following orders;

- a. That the application dated 21/2/2019 is bad in law and is hereby struck out.
- b. That there be no orders as to costs.

3. The ruling was in respect to the Notice of Motion application dated 21/02/2019 by the Plaintiff/Applicant now Appellant seeking to substitute the Defendant/Respondent in Murang'a L.D.T Case No. 66 of 2005 who died on 17/8/2017. In her supporting affidavit Applicant /Appellant deposed that after the death of the Defendant/Respondent in that Land Dispute Tribunal case namely Ware Muriu on 7/8/2017, he was survived by his wife Monicah Wanjiru Wangonya. That Warui Muriu's death occurred while the Land Dispute Tribunal Case was pending hearing and determination after which the Applicant cited his said wife to take out letters for grant adlitem for purposes of the Land Dispute Tribunal Case but she declined to do so. Thereafter the Appellant successfully applied for a grant of letters of Administration adlitem for purposes of substitution in the Land Dispute Tribunal case, the same were issued to the deceased's wife on 18/01/2018. The Applicant submitted that her application was necessary to guard the suit from abating in line with order 24 Rule 4 of the Civil Produce Rules. The Applicant further averred that the Magistrate's Court had jurisdiction to hear the pending Land Dispute Tribunal Case under the practice directions vide gazette notice No. 16268 under practice direction no. 6 thereof.

4. In opposition to the application for substitution the Respondent took issue with the manner in which she was appointed as a legal representative to her husband's estate without her consent. She in fact contended that it was illegal for the Applicant to petition for the said grant of letters of administration on her behalf. The Respondent also cited ill health and inability to undertake the rigorous activities of litigating the case. The Appellant also claimed that her family has since lodged succession proceedings to her husband's estate vide

succession cause No. 467 of 2018 and was of the view that the two proposed administrators of the estate therein would be appropriate persons to substitute her deceased husband in the Land Dispute Tribunal Case. She felt unfairly coerced and prayed for dismissal of the application.

5. The learned trial Magistrate in the impugned ruling in dismissing the application for substitution held that the case was based on repealed law for having been determined by the Land Dispute Tribunal and that the proceedings were improper and needed to be regularized for those reasons the honorable Magistrate struck out the application for being bad in law.

6. The pending proceedings in the Land Dispute Tribunal Case is in respect to the execution proceedings of the Land Dispute Tribunal award of three (3) acres out of land parcel number LOC.17/IGANJO/3440 to the Appellant's father made on 18/07/2005 and adopted as judgment of the Court on 22/02/2005. Thereafter there was an application requiring the Executive officer of the Court to execute the consent and transfer forms which was granted on 13/06/2008. The Respondent in the case was dissatisfied with the verdict of the Land Dispute Tribunal and Appealed to the Provincial Appeals Tribunal which ruled that the Land Dispute Tribunal lacked jurisdiction in matters of title to land on 23/9/2010 and directed the Respondent to Appeal to the rightful Court but he failed to do so. To this end the Applicant/Appellant's application dated 29/02/2016 awaits determination.

7. The Appeal was argued through written submissions.

8. The Appellant argued that her application was well within the law as it was brought under order 24 Rule 4 of the Civil Procedure Rules. That the case before the subordinate Court was filed in 2005 and the transitional directions were issued in 2012 vide gazette notice number 16268, that the case was properly before the Court as it was pending before the Magistrate's Court as at the time the Land Dispute Tribunals were disbanded. That the Appellant had already obtained grant of letters ad litem from the succession Court.

9. The Respondent submitted that the establishment of the Environment and Land Court and its subsequent operationalization on the 05/11/2012 rendered the gazette notice no. 16268 which the Appellant seeks to rely on is in-operational in effect the tribunal lacked jurisdiction to continue to hear the suit. That the finding of the trial Magistrate was proper as the Court lacked jurisdiction to hear the case.

10. The trial Magistrate in her ruling appears to have addressed the initial application of the 29/02/2016 instead of restricting her findings on the application for substitution only then pave way for the execution proceedings application to be heard on merit. The ruling ought to have addressed the issue of whether the Respondent would be substituted in place of her late husband or not if her appointment as the legal representative to the suit had been done within the law or otherwise in order to enable the Court to make a finding on whether or not to allow for the substitution.

11. The application of 29/02/2016 seeks to enforce the orders of the Court as issued on 22/05/2005 which remain in force to date as there was no evidence of the said orders having been set aside, Appealed and or vacated. The legality or otherwise of the said orders can only be addressed by the Court after the defendant /Respondent is substituted after his death.

12. The trial Court ought to have made a finding on the issue of substitution only. This being the 1<sup>st</sup> Appellate Court has powers to reevaluate the evidence placed before the trial Court. In *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates (2013) eKLR*, the Court of Appeal stated as follows regarding the duty of a first appellate Court:-

**“This being a first Appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”**

13. Order 24 Rule 4 on which the application was premised provides;

“4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant 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 Defendant to be made a party and shall proceed with the suit.

(2) any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.”

14. The Law of Successions Act provides the procedure to be followed in the application for a grant of letters of administration to the estate of a deceased person, and the various forms a grant may take including letters of administration ad litem in order to acquire legal representative status. Section 54 of the 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. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“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.”

15. The Applicant accused the Respondent of frustrating her efforts of substituting her deceased husband and the Respondent did not dispute the same. The Respondent only contests to the procedure followed by the Applicant in causing her to be appointed as a representative of her husband in the case and was of the view that the petition for letter of grant ad litem could not be done on her behalf. The Applicant was at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings only. It would appear the succession proceedings in respect to the Respondent's husband's estate begun after the citation for substitution purposes had been lodged through the documentation that have been supplied in support. Evidently therefore the procedure followed by the Applicant was within the law as stipulated under the law of succession Act.

16. Section 31 of the Environment and Land Court Act repealed the Land Disputes Act. Section 30 of the Environment & Land Court Act provided for a transitional framework for cases pending before the Land Disputes Tribunals. Such proceedings were to continue before Courts or local Tribunals in which they were filed until the Environment and Land Court was established. After the Environment and Land Court was established the Chief Justice would then refer part heard cases, where appropriate, to the Court.

17. The import of section 23(3) of the Interpretation and General Provisions Act, was that the decisions and awards of the defunct Land Disputes Tribunals were preserved and protected. The adoption judgements made by Magistrates Courts within the framework of the repealed Land Disputes Act were also preserved and protected by that provision.

18. The Land Dispute Tribunal decision was adopted by the Court on the 22/12/2005 and the same has not been challenged at all. It remains the orders of the Court. The application before the Learned Magistrate was for substitution. It is difficult to understand why the Magistrate found the application to have been based on a repealed law when already the matter had been brought under the jurisdiction of the Court by way of adoption of the award which then changed character to an order of the Court. Before she had rendered previous rulings in the matter in recognition that the matter was now formally and rightly before the said Court.

19. The Appeal is allowed. The ruling of the Learned Magistrate issued on the 26/6/19 be and is hereby set aside.

20. The application for substitution is hereby allowed.

21. The cost of the Appeal and the application in the lower Court shall be paid by the Respondent.

**22. It is so ordered.**

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 12<sup>TH</sup> DAY OF MAY 2020.**

**J G KEMEI**

**JUDGE**