



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL APPEAL NO. 25 OF 2005**

**PERIS WAMBUI NYOTA.....APPELLANT**

**VERSUS**

**PETER KAMAU NYOTA.....1<sup>ST</sup> RESPONDENT**

**JAMES KARIUKI MUCHIRI.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. Before this Court for determination is a Chamber Summons dated 15<sup>th</sup> January 2008 and taken out under **Order XXIII Rules 4 (1) and 12** of the **Civil Procedure Rules 1998** as Amended.
2. The application is premised on the grounds that Peter Kamau Nyota the 1<sup>st</sup> Respondent herein died on 29<sup>th</sup> September 2006, and was survived by his eldest son David Muchiri Kamau. That the appeal herein involved land namely L.R. No. Githunguri/Githunguri/73 wherein the deceased was wrongfully registered as a part owner, and that the results of the appeal herein will affect the deceased's Estate.
3. David Kamau Muchiri (hereinafter the Respondent) filed a Replying Affidavit on 13<sup>th</sup> March, 2008 and averred that he is the legal representative of the deceased Peter Kamau Nyota, and that he cannot be substituted for him in the appeal as he has not been issued with any letters of Administration by the court. That the appeal in this matter abated on 29<sup>th</sup> September 2006 and there has been no application to revive it. The Respondent further argued that L.R. Githunguri/Githunguri/73 does not exist and there is no proof of official search attached to the application by the Applicant.
4. Counsels on record made oral submissions. Mr. Chege learned counsel for the Applicant submitted that the application dated 15<sup>th</sup> January 2008 emanates from the court's order of 2<sup>nd</sup> April 2008 by Onyancha J. That the Respondent in the Appeal, Peter Kamau Nyota had passed on before the appeal was concluded and the court ordered that the Appellant/Applicant do cite David Kamau Muchiri to take out letters of administration to the Respondent's Estate – Peter Kamau Nyota.
5. Mr. Chege further submitted that the appellant did take out a citation in succession cause No. 1235 of 2008 which is also before the court.

6. It was argued in submission for the Respondent by Mr. Mwicigi learned counsel that the appeal against Peter Kamau Nyota abated some eight years ago because Peter Kamau Nyota died on 29<sup>th</sup> December 2007. That since there was no substitution within a year the appeal abated and there is no appeal to which David Kamau can be substituted until the Applicant applies for revival of the appeal.
7. Mr. Mwicigi argued that David Kamau Muchiri cannot be compelled to be substituted in this appeal, since the law requires that a personal representative who has a grant of representation can be substituted in such a matter. That the learned counsel has not obtained a grant limited or otherwise for David to be substituted, and the said parcel of land Githunguri/Githunguri does not exist.
8. Upon consideration of the application, the affidavits in support and reply and the rival submissions, I observe firstly, that this being a succession dispute the issue of abatement of the suit does not arise. Secondly section 66 Law of Succession Act provides that when a deceased has died intestate, the court shall, save as otherwise expressly provided, have a final discretion as to the person or persons to whom a grant of letters of administration shall, in the best interests of all concerned, be made, but shall, without prejudice to that discretion, accept as a general guide the following order of preference-

**“(a) surviving spouse or spouses, with or without association of other beneficiaries;**

**b. other beneficiaries entitled on intestacy, with priority according to their respective beneficial interests as provided by Part V;**

**c. the Public Trustee; and Grant of administration to universal or**

**(d) creditors”**

The issue as to whether the land the subject matter of the appeal exists or not shall be subject for determination within the appeal and not at this stage.

9. The court notes that the appellant did take out a citation in succession cause No. 1235 of 2008. In answer thereto the Respondent swore an affidavit in which he deposed that he was the son of the deceased Respondent in the appeal in question and that he stood in priority to obtain the grant of representation. Thereafter he did not however, take out the letters of administration for reasons he has not disclosed. Substitution cannot be ordered before letters of administration are taken out to the estate of the Respondent.
10. For the foregoing reasons and in the best interests of justice I grant orders as follows:
  - i. Fresh citation to be issued.
  - ii. If after 45 days of such issuance of citation there shall be no response thereto the Appellant/Applicant shall have leave to nominate a member of the Respondent’s family and apply for grant of letters of administration on behalf of that member of the family to be enjoined as party to the appeal for purposes of finalizing the said appeal.

It is so ordered.

**SIGNED DATED and DELIVERED** in open court this **1<sup>st</sup> day of April 2016.**

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**L. A. ACHODE**

**JUDGE**