



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**E.L.C. NO 27 OF 2014**  
**FORMERLY CIVIL APPEAL NO. 87 OF 2010**

**MURIITHI NGARI alias TITUS MURIITHI.....APPELLANT**

**VERSUS**

**PETER GITHINJI MUTHIGANI.....1<sup>st</sup> RESPONDENT**

**MURIITHI NGARI MBARU.....2<sup>nd</sup> RESPONDENT**

**RULING**

**Introduction**

The appellant/applicant by her notice of motion dated 24<sup>th</sup> August, 2012 has sought the following orders from this court:

1. That service of this application in the first instance be dispensed with and the application be heard *ex-parte*.
2. That this court do substitute the late Muriithi Ngari alias Titus Muriithi deceased with one Jane Njeri Muriithi, the applicant herein.
3. Costs be provided for

The application is supported by an affidavit dated 24<sup>th</sup> August 2012, sworn to by Jane Njeri Muriithi.

**The Case for the Appellant/Applicant:**

The applicant has sought to substitute the late Muriithi Ngari alias Titus Muriithi with Jane Njeri Muriithi. According to her affidavit, she is the daughter of the deceased (Muriithi Ngari). Additionally, she is the legal administrator of her father's estate. She also states that her late father was the original registered owner of land parcel number Mwerua/Kanyokora/118 measuring 6 acres.

According to her, the second respondent sued her father in Baricho Land Disputes Tribunal in respect of the suit land. That tribunal ordered for the subdivision of the suit land with one portion being registered in the name of her mother Esther Muriithi jointly with Muriithi Ngari and the other portion was to be registered in the name of her late father jointly with second respondent.

Furthermore, her father was dissatisfied with the decision of the tribunal. As a result, he filed an appeal in the High Court at Embu, being Civil Appeal number 87 of 2010. Before the hearing and determination

of that appeal, her father died. Finally, she states that she be substituted in place of her father to prosecute this appeal, amongst other matters.

### **The Case for the Respondent (Peter Githinji Muthigani)**

The respondent did not file any replying affidavit. However, he opposed the application for substitution through his counsel. According to his counsel, the applicant was granted a limited grant which was issued on 15<sup>th</sup> January, 2013 following the death of the deceased. This he says was one year after the death of the deceased. According to him substitution should have been applied for within one year of the death of the deceased. He says that **Order 24 rule 3(2) of the 2010 Civil Procedure Rules** substitution should have been done within one year following the death of the deceased.

Furthermore, he submits that the language of **Order 24(3)(2)** is coached in mandatory language. There is no provision for extending the one year limitation period. He finally urged the court to dismiss the application for not being properly before the court.

### **The Applicable Law:**

The applicable law in this application is found in Order 24 rule 3(2) which is in relation to the substitution of parties as plaintiffs or defendants. Order 24 rule 3 contemplates situations where the cause of action survives or continues. It also gives the court discretion to extend the time after the time allowed for substitution has expired.

In addition, to Order 24 rule 3(2), there is in existence Order 50 rule 6 which also authorizes the court to extend the time to apply for substitution if the permitted period has expired.

Furthermore, Section 2 of the Law Reform Act Cap 26 Laws of Kenya clearly indicates that it is only in cases of defamation, seduction, adultery or inducing ones spouse to leave or remain apart from the other one that the cause of action does not survive or continue after the death of a party. This is a land case and therefore the cause of action has survived or continues notwithstanding the death of the deceased.

### **Issues for Determination:**

The issues for determination in the light of the foregoing are as follows:

1. Whether or not the cause of action has survived or continues notwithstanding the death of the deceased.
2. Whether or not the court is authorized to extend the time for the substitution of the deceased with another person.
3. Who should pay for the costs of this suit.

### **Evaluation of the Affidavit Evidence, Findings and the Law**

I have considered the affidavit evidence of the applicant and I find that she is the daughter of the deceased. I also find that she had taken a limited grant to prosecute cases in respect of the estate of his late father. Furthermore, I find that her father had filed an appeal in the High Court being Civil Appeal number 87 of 2010 which is still pending in this court.

I also find that this court is given discretion firstly to by Order 24(3) to enlarge the time to allow for the substitution of the death of a person with another person. Similar provisions exist in Order 50 rule 6. It is important to note that the cause of action in this case being a land matter has survived the death of the original appellant who is sought to be substituted. In the circumstances, I exercise the discretion to allow for the substitution of the appellant with the applicant who is the daughter of the deceased person.

In doing so. I bear in mind that the application was made after one year within which it should have been made. In the circumstances of this case, I find it is just and fare that substitution be allowed.

**Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. The substitution of the deceased applicant is allowed with the applicant as the appellant.
2. Costs of this application shall be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this.. **12<sup>th</sup>** ... day of **March,..2015**

In the presence of Mrs Jane Njeri Muriithi and in the absence of her counsel.

Court clerk Mr Muriithi

**J.M. BWONWONGA**

**JUDGE**