



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. APPEAL NO. 115 OF 2007**

**BENJAMIN KAVOO NZING’U.....APPELLANT**

**VERSUS**

**DOMINIC KILONZO NZING’U.....RESPONDENT**

**AND**

**PETER MUEMA NZING’U.....1<sup>ST</sup> APPLICANT**

**ALEXANDER MUNG’AU NZING’U.....2<sup>ND</sup> APPLICANT**

***(Being an Appeal from the Judgment of the Eastern Provincial Appeals Committee dated/read***

***to the parties on 11<sup>th</sup> April, 2007; in the said Appeals Committees Land Appeal Case No. 12 of 2006)***

**RULING**

1. In the Amended Notice of Motion dated 21<sup>st</sup> September, 2015, the Applicants have sought for the following orders:

***a) That the Honourable Court do order for the revival of the present Appeal which abated on or about 15<sup>th</sup> October, 2012.***

***b) That the name of the late Dominic Kilonzo Nzing’u, the Respondent herein be substituted with the names of Peter Muema Nzing’u and Alexander Mung’au Nzing’u who are part of the legal representatives of the deceased’s Estate.***

***c) The costs of this Application be in the cause.***

2. The Application is supported by an Affidavit sworn by the two Applicants who have deponed that the Respondent died on 16<sup>th</sup> October, 2011; that the present Appeal abated on or about 15<sup>th</sup> October, 2012 and that the delay in filing the Application for substitution was occasioned by the delay in obtaining the Letters of Administration which they have since obtained.

3. The Applicants lastly deponed that the subject matter is land which survived the Respondent upon his demise; that the orders sought will ensure that the deceased is properly represented in the proceedings and that it is in the interest of justice that the Application be allowed.

4. The Appellant filed a Notice of Preliminary Objection in which he argued that the Appeal has long abated pursuant to Order 24 of the Civil Procedure Rules 2010; that there cannot be substitution in a non-existent suit/appeal and that the Application is incompetent and an abuse of the court process.

5. In his submissions, the Applicants’ counsel submitted that Order 24 Rule 3 of the Civil Procedure Rules makes a provision for the extension of time to substitute a deceased party where good reasons are given; that the same order allows for the revival of an abated suit and that the Appeal should be revived.

6. In contrast to the Grounds of Opposition filed by the Appellant, the Appellant’s advocate submitted that the Appellant “*has opted NOT to oppose the Applicant’s Notice of Motion dated 21<sup>st</sup> September, 2015*” and that the same may be allowed, but with costs to the Appellant.

7. The record shows that the Appellant filed the Memorandum of Appeal challenging the decision of the then Eastern Provincial Appeals

Committee dated 11<sup>th</sup> April, 2007 in Appeal Case Number 12 of 2006. The Appellant filed his Record of Appeal on 20<sup>th</sup> May, 2019.

8. The Certificate of Confirmation dated 28<sup>th</sup> February, 2014 annexed on the Applicants' Affidavit shows that the Respondent herein died on 16<sup>th</sup> October, 2011 and his Estate was distributed by the court on 28<sup>th</sup> March, 2014 without any objection from the Appellant.

9. The Applicants' Affidavit shows that '*alongside two other representatives*', they have been appointed to be the legal representatives of the Respondent (*deceased*), and that the other two legal representatives have agreed that the two Applicants represent the Estate in this Appeal.

10. However, the Applicants did not annex on their Affidavit a copy of the letter of authority from the other two administrators allowing them to swear the Affidavit on their behalf and to have the Appeal revived.

11. Considering that the Estate of the deceased, (*the Respondent*) is represented by four Administrators, and in the absence of a letter of authority from the other two administrators conceding to the issue of having the Appeal revived and for the two Applicants to substitute the deceased, I find Application to be a nullity *ab initio*.

12. Indeed, it is not clear to this court what this Appeal will serve, even if it was to succeed, considering that the suit property was distributed by the court upon the demise of the Respondent in Machakos Succession Cause No. 533 of 2012 on 21<sup>st</sup> February, 2014 without any objection by the Appellant.

13. Furthermore, and considering the Notice of Preliminary Objection filed by the Appellant, which has never been withdrawn, the Appellant seems not to be keen with the revival of the Appeal after the demise of the Respondent.

14. For those reasons, I dismiss the Application dated 21<sup>st</sup> September, 2015 with no order as to costs. The Respondent having died in the year 2011, this Appeal is marked as having abated.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**O.A. ANGOTE**

**JUDGE**