



REPUBLIC OF KENYA

High Court at Embu

Civil Case 73 of 2001

NICHOLAS NGUTHI KIVINDA.....PLAINTIFF

VERSUS

FESTUS KEITHLY KAGUNDU.....DEFENDANT (DECEASED)

RACHEL M. KAGUNDU.....APPLICANT

RULING

This is the application dated 8/5/2012 by way of Notice of Motion. Its brought under Order 24 Rule 4 of the Civil Procedure Rules 2011, Section 3 and Section 3A of the Civil Procedure Rules. It seeks an order to substitute the deceased defendant with one Rachel M. Kagundu. Its supported by the grounds on the face of the application and the application and the applicants supporting affidavit. She has taken out letter of administration ad litem.

The plaintiff/Respondent has filed a long replying affidavit. He opposes the application. Both counsels agreed to file written submissions which they promptly did.

I have carefully read the submissions plus the affidavit filed herein. The issue before this Court is substitution of the Defendant who is deceased. There is no dispute about the death.

All the other issues being raised in the affidavits and submissions do not concern the present application with all due respect. In spite of the fact that the Plaintiff/Respondent filed a Notice of discontinuance of this suit there is NO order allowing the withdrawal.

The Notice has not been minuted and neither has any been issued. Therefore the bill of cost filed by the Defendant's counsel was prematurely done. Its also curious to note that on 16/11/2011 both counsels were before this Court when Mr. Njoroge for the Defendant informed the Court that the Defendant had passed away the previous week.

On the same day the Notice for discontinuance of the suit was filed by the Plaintiff with full knowledge that the Defendant had died and directions had been given. Its Ms. Njeru's submission that the right does not survive. But there are costs which have been incurred even if the suit is being discontinued. This is a matter which has dragged in Court since 2001!

The applicant has obtained limited grant ad litem. The Defendant died on 9/11/2011. she obtained the

limited grant on 26/4/2012 for purposes of defending this suit and HCCC 53/2007. The application for substitution was filed six (6) months after the death.

The Hon. Justice Muchelule had ordered on 20/7/2011 that this matter starts afresh. And as such there is no evidence before this court to determine who was on the land and/or in occupation. The Defendant passed away before the matter proceeded to hearing. He had been brought to the Court by the Plaintiff/Respondent who has decided to discontinue the case. Nobody knows what the outcome of the case would have been. The Defendant would have been entitled to costs had the suit been discontinued during his life. And who would pursue the costs? Of course his legal representative? And that is why the Deputy Registry struck out the bill of costs as there was no legal representative.

I therefore allow the application for substitution of Rachel Kagundu for the deceased/defendant. Following the filing of the Notice to discontinue this suit, I hereby allow the discontinuation of this suit with costs.

I am not seized of the facts in HCCC No. 53/2007 and CMCC No. 87/2012 and will not make any order in respect of those cases.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU THIS 6TH DAY OF NOVEMBER 2012.

**H.I. ONG'UDI
J U D G E**

**In the presence of :-
Ms. Nyaga for Njeru for Respondent
Mr. Njoroge for Applicant
Njue CC**