



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MERU**

**Civil Case 191 of 2001**

**BENJAMIN NJERU KIRAITHE ..... PLAINTIFF**

**VERSUS**

**M'CHABARI KIRAITHE ..... DEFENDANT**

**RULING**

The defendant in this case died on 1<sup>st</sup> June 2004. By operation of Order XXIII Rule 4(3) the suit as against that deceased defendant abated on 2<sup>nd</sup> June 2005. The plaintiff by a chamber summons dated 8<sup>th</sup> July 2005 sought an order for the appointment of the deceased's wife and son as legal representatives of that deceased defendant. By a ruling dated 30<sup>th</sup> January 2006 Hon. Mr. Justice Isaac Lenaola dismissed that application and had this to say in respect of that application:-

***“Rule 5 so far as I can see is not the Rule to be used in appointing legal representatives as is being said by the applicant herein.”***

On that application being dismissed, the plaintiff has now again approached this court by way of chamber summons dated 22<sup>nd</sup> February 2006. That application is the subject of this ruling. Learned counsel Mr. Joe Kathungu was denied audience in respect of that application because he represented the deceased defendant. In effect, Mr. Kathungu had no client. The chamber summons seeks an order as follows:-

***“That this Hon. Court be pleased to make an order to revive this suit the same having abated.”***

Under Order XXIII Rule 4(3) as stated before, the suit as against the deceased defendant abated on 2<sup>nd</sup> June 2005. Under Rule 8 (2) the court can revive a suit that has abated. That as it may be I am of the considered view that the plaintiff's present application to revive the suit is misconceived and cannot be allowed. The reason is because a suit abates for lack of a party, that is, after the defendant died. To revive a suit that has abated because of the death of a party, the court can only be moved to do so if there is a party to replace the dead party. In this case, the plaintiff does not seek to replace the deceased defendant and yet seeks to have the suit revived. That cannot be granted. For to do so the action cannot proceed to hearing in the absence of a known defendant. I therefore find that the application is misconceived and I do hereby dismiss the same with no orders as to costs.

Dated and delivered at Meru this 5<sup>th</sup> day of November 2009.

**MARY KASANGO**

**JUDGE**