



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.161 OF 2018

STEPHEN MBUTHIA KIGOTHO.....PLAINTIFF

VERSUS

RICHARD GATHINIERI CHONGO.....1ST DEFENDANT

JAMES WAKABA CHONGO.....2ND DEFENDANT

AND

GEORGE GAITHO CHONGO.....APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **28th January 2020** by the Applicant seeking for orders that;

- 1. That the 1st defendant herein Richard Gathinieri Chongo be substituted with George Gaitho Chongo.***
- 2. That the costs of this Application be in the cause.***

The Application is premised on the grounds that the 1st Defendant is deceased having passed away in **June 2019**. That the intended 1st Defendant/Applicant is the brother of the 1st and 2nd Defendants and therefore, in the interest of Justice, substitution should be done to ensure completion of this matter.

In his supporting Affidavit **George Gaitho Chongo**, averred that he is the brother of the 1st and 2nd Defendants. He averred that the dispute in this matter revolves over **L.R Ndumberi/ Ndumberi/134 and T.91** which are registered under their father's name **Chongo Guanga**. That before the finalization of the suit, the 1st Defendant began ailing and passed away in **June 2019** and consequently the family decided that he be substituted in his place.

The Application is opposed and the plaintiff filed grounds of opposition dated **10th February 2020**, and opposed the Application on the grounds that the Application is in collision with the provisions of **Section 81 of the Law of Succession Act**. That the Estate of the late Daniel **Chongo Guanga** alias **Chongo Gaitho** is represented by virtue of **section 81** of the Law of Succession Act. Further that the Applicant has failed to provide evidence that **Richard Gathinieri Chongo**, passed away as claimed. That the Applicant has concealed material particulars in relation to **Richard Gathinieri Chongo**, including the beneficiaries of his estate and there has been no evidence that there was consensus in appointing the Applicant to substitute the 1st Defendant.

The Applicant filed a further Affidavit sworn on **27th October 2020**, and reiterated the contents of his supporting Affidavit and attached a copy of the 1st Defendant's **Death Certificate**.

The Application was canvassed by way of written submissions which the Court has now carefully read and considered. It is the Court's considered view that the issue for determination is ***whether the Applicant is entitled to the orders sought***.

The Applicant has sought to be substituted with the 1st Defendant as the 1st Defendant has since been deceased. To this effect the Applicant has produced in Court a Death Certificate evidencing that the 1st Defendant is deceased.

On whether the Applicant can be substituted with the 1st Defendant, It is not in doubt that the 1st Defendant was used as legal representative of the Estate of **Chongo Guanga**. **Order 24 Rule 4 of the Civil Procedure Rules** provides for the effect of death of one of several Defendants or of sole Defendant where it states as follows:

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

From the said provision of law, it is not in doubt that the 1st Defendant can be substituted. It is however clear that the person that the 1st Defendant can be substituted with is his legal representative. See the case of Muriithi Ngwenya ...Vs... Gikonyo Macharia Mwangi & 2 others [2018] eKLR where the Court held that;

“The law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.”

Section 2 of the Civil Procedure Act defines legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

It therefore follows that a legal representative being the one that represents the Estate of the deceased, the Applicant in order to be substituted in place of the 1st Defendant needed to prove that he is the legal representative of the Estate of the 1st Defendant. The Applicant apart from producing in evidence, a Death Certificate, the Applicant did not produced any letters of Administration **ad litem** to prove that he is a legal representative of the Estate of the 1st Defendant to warrant the Court Order for his substitution in place of the 1st Defendant. See the case of Muriithi Ngwenya ...Vs... Gikonyo Macharia Mwangi & 2 others [supra] where the Court held that:

The Applicant is seeking to substitute Lucy Wambui Gikonyo in place of 1st Defendant. Other than the mention of her being a wife of over 50 years, no evidence has been tabled to show that she indeed is a person contemplated by the above definition, that is to say, the legal representative of the estate of the 1st Defendant. The rule requires substitution of a Defendant with a party clothe with legal representation.

11. Can this Court permit the substitution of the 1st Defendant by the said Lucy Wambui Gikonyo? In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration.

Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis is mine)

12. It is in doubt whether the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased 1st Defendant’s estate. The Applicant is at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to this Court that indeed the said Lucy Wambui Gikonyo is such legal representative of the 1st deceased Defendant nor whether the Applicant has filed citation proceedings in that regard.”

Therefore, the Court finds and holds that the Applicant has failed to prove that he is a legal representative of the Estate of the 1st Defendant to warrant him being substituted with the 1st Defendant. Furthermore, the Court notes that the 1st Defendant was sued as legal representative of the Estate **Chongo Guanga** and unless the Applicant is replacing the 1st Defendant in his capacity as a legal representative of the said Estate there would be no reason as to why there is a need for substitution as the estate is represented by the 2nd Defendant who is a co administrator as per the provision of **Section 81 of the Law of Succession Act** as rightly submitted by the Plaintiff/Respondent. See the case in **re Estate of John Kabiro Wang’ombe (Deceased) [2017] eKLR** the Court held that;

“That besides there is section 81 of the Law of Succession Act which provides-

Upon the death of one or more of several executors or administrators to whom a grant of representation has been made, all the powers and duties of the executors or administrators shall become vested in the survivors or survivor of them:

Provided that, where there has been a grant of letters of administration which involve any continuing trust, a sole surviving administrator who is not a trust corporation shall have no power to do any act or thing in respect of such trust until the court has made a further grant to one or more persons jointly with him. (emphasis added)

I think as a co-administrator the applicant is not without recourse. He still retains the powers of an administrator.”

The Upshot of the foregoing is that the Court finds that the Applicant has failed to prove that he ought to be substituted. Consequently, the Court finds and holds that the **Notice of Motion Application** dated **28th January 2020**, is **not** merited and the same is dismissed entirely with costs.

It is so ordered.

Dated, signed and Delivered at Thika this 3rd day of December, 2020.

L. GACHERU

JUDGE

3/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Kariuki for Plaintiff/Respondent

Mr. Kimani Charage for Defendant/Applicant

L. GACHERU

JUDGE

3/12/2020