



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MAKUENI**

**ELC APPEAL NO.01 OF 2018**

**KITHAKUMU NGALA MOKO.....APPELLANT**

**VERSUS**

**JOSEPH MUTUA KITETE**

**FREDRICK KITETE MUSEMBI.....RESPONDENTS**

**AND**

**JONATHAN KITHAKUMU NGALA.....DEFENDANT**

**R U L I N G**

1. What is before this court for ruling is the chamber summons application expressed to be brought under Order 1 Rules 10(2) and 22 of the Civil Procedure Rules, Section 3A of the Civil Procedure Rules and any other enabling provisions of the law for orders:-

**(1) That the name of Jonathan Kithakumu Ngala as the Administrators of the Estate of the Deceased Appellant do substitute the Appellant in this Appeal and become the new Appellant.**

**(2) That costs of this application be in the cause.**

2. The application is predicated on the grounds on its face and is supported by the affidavit of Jonathan Kithakumu Ngala, the Applicant herein, sworn at Machakos on the 17<sup>th</sup> day of October, 2016.

3. The application itself is dated 17<sup>th</sup> October, 2016 and was filed in court on even date.

4. The Respondents have opposed the application vide their grounds of opposition dated 07<sup>th</sup> December, 2016 and filed in court on 08<sup>th</sup> December, 2016. The Respondents have raised the following grounds in opposition to the application:-

**(1) There is NO appeal on record as the same (appeal) abated one (1) year after the death of the appellant. The appellant having died on 17/10/2015.**

**(2) The application herein was filed a day after the appeal had abated.**

**(3) The application is incompetent and an abuse of this Honourable Court's process.**

5. On the 10<sup>th</sup> April, 2018, the court directed that the application be disposed off by way of written submissions.

6. In his submissions dated 13<sup>th</sup> April, 2018 and filed in court as 19<sup>th</sup> April, 2018 the counsel for the Applicant submitted that the time to substitute a deceased party is laid down in Order 24 Rule 3(2) of the Civil Procedure Rules. The counsel further submitted that the deceased Appellant passed away on the 17<sup>th</sup> October, 2016 and that it is therefore clear that the application for substitution was done within time and as such, the application should be allowed. The counsel was of the view that if for any reason the court deems otherwise, it should direct its mind to Order 50 Rule 4 of the Civil Procedure Rules. The Counsel pointed out that between 21<sup>st</sup> December and 13<sup>th</sup> January, time does not run with the only exception to this period of time being an order of injunction.

7. On the other hand, the counsel for the Respondents submitted that the orders sought by the Applicant are not available to him. The Counsel further submitted that the law and procedure on institution and prosecution of appeals is contained in Orders 42, 43 and 44 of the

Civil Procedure Rules, 2010 and pointed out the law in question has no provision of substitution of an appellant or respondent who dies during the pendency of an appeal. The counsel went on to submit that the courts power and jurisdiction to issue various orders is donated by specific provisions of the relevant laws, and where the law is silent on any particular aspect, then the court must down its tools. The Counsel pointed out that Order 1 Rules 10(2) and 22 of the Civil Procedure Rules under which the application is brought relates to suits and not appeals. The Counsel added that the said law applies to situation where a wrong person has been issued and/or named as defendant and that it does not relate to the death of appellant and/or respondent during the pendency of an appeal.

8. The Counsel was of the view that even if the court were to be guided by the law governing death of parties during subsistence of suits, substitution of such deceased parties and abatement of such suits, the application would fail in view of Order 24 Rule 3(2) of the Civil Procedure Rules which provides as follows:-

*“Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff”.*

9. The Counsel further submitted that there is no appeal on record as it abated one year after the death of the Appellant and termed the application as incompetent, without merit and an abuse of the court process.

10. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:-

*“The court may at any stage of the proceedings, either upon or without application to either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to be joined whether as plaintiff or defendant, or whose presence before court may be necessary in order to enable court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.*

Further Rule 22 of the same Order provides that:-

*“If a third party enters appearance pursuant to the third party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after a trial of the suit, as the court may direct; and, if not satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving notice against the third party.”*

11. My reading of the aforementioned two rules clearly shows that Rule 10 deals with substitution and addition of parties while Rule 22 deals with directions on liability between a defendant and a third party who has entered appearance. There is no mention of either appellant or respondent in the two rules. In the application before me, the parties herein are an appellant and a respondent who are not covered under the two rules. I do agree with the Respondent’s Counsel’s submissions that the orders sought cannot be granted under Order 1 Rules 10(2) and 22 of the Civil Procedure Rules. I also agree with the counsel that Orders 42, 43 and 44 which lay down the procedure for institution and prosecution of appeals have no provision for substitution of an appellant or respondent who dies. Whereas the overriding objective of the Civil Procedure Act and the Civil Procedure Rules is to facilitate just, expeditious, proportionate and affordable resolution of Civil disputes governed by the Act, (*See Section 1A of the Civil Procedure Act*), for the reasons that I have given, the application herein lacks merit and same is hereby struck out with costs to the Respondents. The end result is that the appeal is marked as abated.

**Signed, dated and delivered at Makueni this 22<sup>nd</sup> day of January, 2019**

**MBOGO C. G**

**JUDGE**

**In the presence of:**

Ms. Watta holding brief for Mrs. Nzei for the Respondent

Ms. Mwalosi holding brief for J. A. Makau for the Applicant

Ms. Nzioka – Court Assistant

**MBOGO C. G.,**

**JUDGE,**

**22/01/2019.**