

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 203 OF 2013 (O.S)

PRABHUDAS DHANJI **1ST**
APPLICANT

JAYANTILAL DHANJI **2ND**
APPLICANT

**KISHORLAL DHANJI (Suing as the administrator
of the estate of the late CHANDULAL DHANJI)** **3RD**
APPLICANT

KISHORLAL DHANJI **4TH**
APPLICANT

VERSUS

MANSUKHLAL DHANJI
RESPONDENT

AND

BHAVIN JAYANTILAL BORKHATARIA
APPLICANT

RULING

1. Vide an application dated 30th June 2025, the Applicant moved this Court under **Section 19** of the **Environment and Land Court Act**, **Sections 1A, 1B**, and **3A** of the **Civil Procedure Act**, and **Orders 9** and **24** of the **Civil Procedure Rules**, seeking the following orders:

- a. That the firm of Sonal Raval Advocate be granted leave to come on record after judgement for the 2nd*

Applicant in place of the firm of Ibrahim Issack & Company Advocates.

b. That the 2nd Applicant, Jayantilal Dhanji Borkhataria, be substituted by his legal representative, Bhavin Jayantilal Borkhataria.

c. That the costs of this application be provided for.

2. The grounds upon which the application is premised are set out in the body of the Motion and the Supporting Affidavit sworn by Bhavin Jayantilal Borkhataria. It is deponed that the 2nd Applicant, Jayantilal Dhanji Borkhataria, passed away on 24th July 2020 and that prior to his demise, he was represented in this matter by the firm of Ibrahim Issack & Company Advocates.
3. The deponent averred that he, being the deceased's son, has since obtained a grant of letters of administration intestate in respect of the deceased's estate issued by the High Court of the United Republic of Tanzania at Temeke in **Probate and Administration Cause No. 65 of 2023**. The said grant was resealed on 9th April 2024 in the High Court of Kenya at Nairobi in **Probate and Administration Cause No. E084 of 2024**.
4. He further deponed that he is desirous of changing representation from the firm of Ibrahim Issack & Company Advocates to the firm of Sonal Raval Advocate, and that he communicated withdrawal of instructions to the former Advocates on 18th October 2021. Despite such communication, he deposed, the firm of Ibrahim Issack & Company Advocates

has persisted in purporting to represent the deceased and continues to act without instructions.

5. It is further deponed that it is imperative that the said firm be restrained from taking any further steps in this matter on behalf of the deceased's estate until the firm of Sonal Raval Advocate is properly placed on record.
6. The Applicant averred that since judgment has already been delivered, leave of the Court is required to effect a change of advocate, and further that substitution is necessary to enable him to participate in the pending execution proceedings as the deceased's legal representative.
7. He deponed that the Respondent has filed an application dated 12th February 2025 seeking to implement the judgment delivered on 26th November 2018, and that unless this application is heard and determined expeditiously, the estate of the deceased will be prejudiced as it will be unable to participate in those proceedings.
8. This application is unopposed. The Applicant's counsel filed submissions which this court has considered.

Analysis and Determination

9. Upon consideration of the Motion, the affidavit evidence, and the applicable law, the issues arising for determination are:-
 - a. *Whether the Applicant's plea for substitution is merited;*
 - and*

b. Whether the Applicant has met the legal conditions for the grant of leave to change advocates after judgment.

- 10.** It is not in dispute that the present application has been brought at the post-judgment stage. Judgment was delivered on 26th November 2018, wherein Obaga J entered judgment in favour of the Applicant. A decree was subsequently issued on 18th February 2019. It is further evidenced, through the death certificate annexed to the Supporting Affidavit, that the 2nd Applicant passed away on 24th July 2020 of natural causes.
- 11.** The Applicant herein seeks to be substituted as the deceased's legal representative and to change advocates after judgement.
- 12.** The Court takes judicial notice that a similar application was filed on 17th October 2023 but was declined on account of the Applicant's failure at the time to demonstrate that the grant of letters of administration had been duly resealed. The Court did not therefore render a final determination on the merits of substitution.
- 13.** With the requisite documentation now produced, and in light of the changed circumstances, the present application cannot be said to be barred by the doctrine of *res judicata*.
- 14.** The Court now proceeds to consider the first issue, namely, whether the Applicant has met the legal requirements for substitution as the deceased's personal representative.
- 15.** The applicable law on substitution of a deceased party is found in **Order 24 Rule 3** of the **Civil Procedure Rules**, which

provides that where no application for substitution is made within one year of the death of a Plaintiff, the suit shall abate as against the deceased, subject to the Court's power to extend time for good reason.

- 16.** However, the Rules expressly carve out an exception in respect of execution proceedings. **Order 24 Rule 10** stipulates that nothing in **Rules 3, 4** and **7** shall apply to proceedings in execution of a decree or order. The effect of this Rule is that abatement arises only in pending suits where the cause of action remains undetermined. Once judgment has been delivered, the matter transitions into execution, and the procedural requirements relating to substitution in pending suits no longer apply.
- 17.** This position is reinforced by **Section 37(1)** of the **Civil Procedure Act**, which expressly provides that where a judgment-debtor dies before the decree is fully satisfied, the decree-holder may apply to the court which passed the decree to execute it against the legal representative of the deceased, or against any person who has intermeddled with the estate. The statutory scheme therefore anticipates continuity of execution proceedings notwithstanding the death of a party, provided the estate is properly represented.
- 18.** In ***Agnes Wanjiku Wang'ondy vs Uchumi Supermarket Ltd [2008] eKLR***, the Court elaborated on this principle and clarified that the requirement for substitution under **Order 24** does not ordinarily arise in execution proceedings:

“So, clearly, the requirement for substitution in Order 23 Rule 4 (3) does not apply to proceedings in execution of an order as was the case before the lower court. Secondly, was the application to “substitute” the personal representatives indeed necessary? In other words, was it necessary to enjoin the personal representatives to the suit? Order 30 Rule 1 would seem to say “NO”. This is what it states: “Order 30 Rule 1: In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.” While the above rule states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit.”

19. The exception was further articulated in ***Samuel Matheri Githen vs Lawrence Mwaura [2017] KEHC 2456 (KLR)***, where the Court affirmed that the one-year limitation on substitution applies only to suits that are yet to be determined.

“The general rule is that an application to have the personal representatives of the deceased plaintiff/defendant replace him should be made within one year of the death of the deceased or else the suit shall abate. However, there is an exception to that rule where the proceedings involve execution of decrees and orders as is the case herein. This exception is provided for in Order 24 Rule 10 of the CPA that, “Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order”. This was the position taken in the case of Dhulla Harichand Vs. Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin (1940) KLR Vol. XIX where the court held that execution proceedings do not abate on the death of the decree holder.

It follows that in this case where the deceased Plaintiff died after judgment had already been given, the provision of Order 24 Rule 3 did not apply. It is only a suit which is yet to be determined that can abate.”

20. In this matter, judgment was delivered and a decree issued while the deceased was still alive, leaving only execution to be undertaken. The cause of action had thus been fully adjudicated before his demise, and the death of the 2nd Applicant did not, in law, result in the abatement of these proceedings.

21. Although substitution is not ordinarily required in execution proceedings, the Applicant has indicated that such substitution is necessary in order for him to effectively participate in and advance the execution process as the deceased's legal representative. Given the circumstances of this case, and for the orderly progression of the matter, the Court finds that the application for substitution is properly before it and is permissible within the framework of **Order 24 Rule 10** of the **Civil Procedure Rules**.

22. The next question for consideration is whether the Applicant has demonstrated that he is the lawful legal representative of the deceased, Bhavin Jayantilal Borkhataria, and is therefore competent to step into the deceased's place for purposes of execution.

23. **Section 2** of the **Civil Procedure Act** defines a legal representative as:

“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.”

24. The Applicant has annexed a Grant of Letters of Administration issued by the High Court of the United Republic of Tanzania on 15th August 2023, appointing him as administrator of the deceased's estate. He has further produced evidence showing that the said foreign grant was duly resealed by the High Court

of Kenya on 9th April 2024 in **Probate and Administration Cause No. E084 of 2024**, pursuant to **Section 77** of the **Law of Succession Act**, which governs the sealing of Commonwealth and foreign grants for use within Kenya.

25. Having complied with **Section 77** of the **Law of Succession Act**, the resealed grant operates with the same force and effect as a grant issued by the High Court of Kenya. It accords the Applicant full legal capacity to represent the deceased's estate in all legal matters, including execution of decrees.
26. In the circumstances, the Court finds that the Applicant falls within the statutory definition of a legal representative as contemplated under **Section 2** of the **Civil Procedure Act**. The Applicant has demonstrated a sufficient legal and factual basis to warrant substitution for purposes of safeguarding and advancing the interests of the deceased in the execution of this Court's decree. Consequently, the prayer for substitution is well-founded.
27. **Order 9 Rule 9** of the **Civil Procedure Rules** provides that once judgment has been entered, no change of advocate shall be effected without the leave of Court or consent between the outgoing and incoming advocates. It further requires that such an application be served upon all parties to the proceedings. The Rule ensures that advocates who have acted in a matter up to judgment are not displaced without notice, and that the orderly conduct of the suit is maintained at the post-judgment stage.

28. The rationale for this requirement was explained in **Temple Point Resort Limited vs Salama Beach Hotel Limited [2022] KEHC 15341 (KLR)**, where the Court observed that the purpose of **Order 9 Rule 9** is to safeguard advocates from abrupt removal by clients after judgment has been rendered. The Rule is not intended to impede or prejudice the substantive rights of a litigant, but to guarantee fairness and professional accountability between the client and the advocate who has conducted the matter to finality.
29. Similarly, in **Johnson M.S. Njoguri vs Samuel Makindu Gachegu [2021] eKLR**, the Court affirmed that the key consideration in applications under **Order 9 Rule 9** is whether any prejudice would be occasioned to the outgoing advocate or to the opposing parties.
30. In the present case, the application seeking leave to effect the change of advocates was duly served upon all parties, thereby meeting the procedural threshold under **Order 9 Rule 9**. There is no evidence to show that the outgoing firm will suffer prejudice by the substitution, and nothing has been placed before the Court to suggest that the change will impede or delay the execution proceedings. The outgoing advocate, should any fees be outstanding, retains the statutory remedy of pursuing a bill of costs under the **Advocates Act**.
31. The Court is therefore satisfied that the Applicant has complied with the requirements of **Order 9 Rule 9** of the **Civil Procedure Rules**, and that leave to effect the change of

advocates is properly grantable. In view of the foregoing, this court finds that the application dated 30th June 2025 is meritorious.

32. Accordingly, the Court makes the following orders:

- a. The firm of Sonal Raval Advocate is hereby granted leave to come on record for the 2nd Applicant, in place of the firm of Ibrahim Issack & Company Advocates.**
- b. Bhavin Jayantilal Borkhataria is hereby substituted as the legal representative of the estate of the late Jayantilal Dhanji Borkhataria.**
- c. Costs of this application shall be in the cause.**

Dated, signed and delivered virtually in Nairobi this 27th day of November, 2025.

**O. A. Angote
Judge**

In the presence of;

Ms Ngatia for Applicant

Mr. Wachira holding brief for Kariuki for 3rd and 4th Applicant

Court Assistant: Tracy

ORIGINAL