



REPUBLIC OF KENYA



**Wangare v Kamau (Civil Appeal E068 of 2023)  
[2025] KEHC 18209 (KLR) (4 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18209 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIVASHA  
CIVIL APPEAL E068 OF 2023  
PJO OTIENO, J  
DECEMBER 4, 2025**

**BETWEEN**

**JOHN NJUGUNA WANGARE ..... APPELLANT**

**AND**

**SAMUEL MOKO KAMAU ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. J. Ndengeri (PM) delivered at Naivasha dated 27th July, 2023 in Naivasha Chief Magistrates Court Civil Case No. E426 of 2023)*

**RULING**

**Background**

1. The dispute leading to the instant Application and the appeal in which it is filed stems from Civil Case No. E426 of 2021 in the Chief Magistrate's Court at Naivasha.
2. The Appellant, John Njuguna, was the Plaintiff in the lower court with the respondent, Samuel Moko Kamau (now deceased), as the Defendant. The claim was pleaded to have involved a contractual agreement entered into on 21<sup>st</sup> January 2021, whereby the Plaintiff loaned the Defendant Kshs. 945,000/- which he the Defendant had failed to refund as agreed, having only paid Kshs. 40,000/-. The appellant thus sought the recovery of the balance of Kshs. 905,000/= plus costs and interests.
3. The Defendant, even though served, did not enter appearance, and the matter proceeded by way of formal proof. Consequently, the trial court delivered its judgment on 27<sup>th</sup> July 2023, dismissing the suit. The dismissal was premised on the Plaintiff's failure to discharge the burden of proof, as required under Sections 107, 108, and 109 of the *Evidence Act*. The trial court found that the Plaintiff had failed to furnish the court with the requisite loan agreement, making the case devoid of proof. That dismissal provoked the appeal yet to be heard.



4. During the pendency of the appeal, the appellant says he came to learn that the respondent died. He exhibited nothing to show the date of death. He asserted that he only came to know about the death from a process server who had gone to serve a mention notice. He equally asserted that the daughter to the respondent, Esther Wanjiru Moko, had always accepted service and was a witness to the agreement sued upon hence she was the personal representative. There was equally nothing to show that the proposed party was indeed the personal representative as known to Law.
5. The Application was expressed to have been brought under Sections 1A, 1B, 3A, and 3B of the *Civil Procedure Act*, Rule 99 of the Court of Appeal Rules, 2010, Article 159 of *the Constitution*.
6. The orders sought in the Application are that the Respondent herein be substituted with Esther Wanjiru Moko, his daughter and the legal representative of his estate, since the respondent passed on during the pendency of this appeal. Further, that upon substitution, the appeal herein be amended to reflect the substitution.
7. The application is grounded on the annexed affidavit of the Applicant, who states that he only came to know of the Respondent's death when he instructed a process server to serve a mention notice for the matter. He further asserts that Esther is the legal representative, has been accepting service of documents, and was a witness to the underlying loan agreement, making her well-versed with the facts. The Applicant urges the court to allow the application with costs.
8. The Application was opposed by the Grounds of Opposition by the proposed Legal Representative filed dated 24<sup>th</sup> January 2025. The core arguments raised therein are that the Application is fatally defective, was brought under the wrong provisions of the Law, that the Application offends provisions of Order 24 Rule 4(3) of the Civil Procedure Rules as the Respondent passed on 17<sup>th</sup> December 2022 during the pendency of the primary suit and before the appeal was filed. The Applicant lacks the locus standi to institute the instant Application and as such urges the court for its dismissal with costs. It is of note that those grounds are equally made bare without any material to support the alleged date of death.
9. Even though the court ordered that the appeal be canvassed by way of written submissions, only the applicant/appellant did so. When the matter was called out for hearing on the scheduled date, the respondents counsel announce that he would rely on the Grounds of opposition filed. To the court, directions given by the court are tools of achieving expeditious, just and proportionate administration of justice. It is not for the counsel and litigant to decide what directions to comply with and which one to ignore. In this matter therefore Mr Wairigi failed on his duty to court. That however does not stop the court from executing its mandate under the law.

### **Issues, Analysis and Determination**

10. Following a review of the application, the supporting affidavit, the grounds of opposition, and the submissions by the applicant, the Court isolates only one issues for its determination; whether the threshold for substitution has been made. In answering that broad issue, the court will confront what is the effect of proceedings taken after death and the resultant judgment and the validity of an appeal filed against the dead.
11. As said before, parties have treated the application rather casually. There ought to have been some positive averment in the Affidavit stating with precision when the death occurred because time is of essence in such applications and the fate of the matter. Both sides never deemed evidence of death important. The court, however, finds refuge on the verbal concession by both parties that the appellant died during the pendency of the suit and thus before this appeal was filed.



12. The court finds that the proceedings at trial and the judgment were conducted while the respondent was dead and thus were in vain. In vain because the matter proceeded against nobody. The result was a nullity incapable of conferring any rights or imposing obligations on any party.

13. More importantly, the appeal itself was filed against a dead person. An appeal or indeed any action instituted against the dead is nullity ab initio and untenable in all events. In *Japhet Nzila Muangi v Hamisi Juma Malee* [2022] KEELC 434 (KLR), the court in reiterating the position in the Indian Case of *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267 held as follows actions instituted against the dead:

“...if a suit is filed against a dead person, then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

14. On whether the suit can be imbued with any life by substitution, the court holds that given that the suit itself was a nullity from inception, a nullity cannot be rectified through amendments or substitution. This position was emphasized in the case of *Benjamin Leonard Mc foy Vs. United Africa Company Limited* [1961] All ER 1169 wherein the court held;

“If an Act is void, then it is in Law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

15. Further, in the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR, the court held as follows in line with the above;

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

16. In addition, a personal representative is one who has been appointed by the court and issued with a grant of letter of administration. Here there is no evidence that the proposed party is such a representative. The court in *Mary Nanjala Muhalya v Ambrose Kipruto* [2014] KEHC 2964 (KLR) in giving the interpretation of a personal representative held as follows;

“A legal representative as defined in the *Civil Procedure Act* is equivalent to the definition of a personal representative as defined under the Succession Act Cap 160 Laws of Kenya. Section 3 of the *Law of Succession Act* defines “Personal representative” as “the executor or administrator as the case may be of a deceased person”.



Administrator in the same section is defined as “a person to whom a grant of letters of administration has been made under this Act”. It is therefore clear that a legal representative is a person to whom a grant of letters of administration has been made under the Succession Act. As the applicant has not been granted letters of administration in respect of the estate of her deceased husband, she cannot be substituted in his place in this suit.”

17. In upshot, the court finds and holds that the application for substitution is incapable of being granted having been founded on an incompetent appeal. It is dismissed and the appeal itself being a nullity is equally struck out. It is struck out with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAIVASHA THIS 4<sup>TH</sup> DAY OF DECEMBER, 2025.**

**PATRICK J O OTIENO**

**JUDGE**

In the presence of;

Appellant/Applicant in person.

Ms. Karau for the Respondent

Ms. Hannah – Court Assistant.

