REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

E.L.C. CASE NO. 345 OF 2017

JAMES ARCHER

JOANNA TRENT……

PLAINTIFFS

- VERSUS -

INGER CHRISTINE ARCHER……1ST DEFENDANT

ANNELISE ARCHER-CLARK…… 2ND DEFENDANT

HELEN KAY HARTLEY…… 3RD DEFENDANT

AND

LINDA HAMILTON ARCHER……

APPLICANT

RULING

I. Preliminaries

1. This Honorable Court was tasked with the determination of the Notice of Motion Application dated 7th November, 2024 by *Joanna Trent and Linda Hamilton Archer*, the 2nd Plaintiff and Applicant herein. The Application was brought under the

provision of Sections 3A and 95 of the Civil Procedure Act, Cap. 21, Order 24 Rule 3 and 7, Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all enabling provisions of law.

2. Upon service of the Notice of Motion application, the 3rd Defendant responded through a replying affidavit sworn on 11th December, 2024. The Executor and the Personal Representative of the Estate of the 1st Plaintiff filed a further affidavit sworn on 18th December, 2024 in support of the Application.

II. The 2nd Plaintiff's case

3. The 2nd Plaintiff sought the following orders from the Honourable Court:-

a) Spent.

b) That leave be granted to the firm of Harit Sheth Advocates to come on record for the 1st Plaintiff in place of Bryant & Associates in compliance with Order 9 Rule 9 of the Civil Procedure Rules.

c) That the time to file the substitution application be extended.

d) That this Honourable Court be pleased to substitute the 1st Plaintiff herein James Howard Archer (Deceased) and the

said representative be made a party to the suit as the 1st Plaintiff.

e) <u>That</u> the costs of this application be in the cause.

4. The application by the 2nd Plaintiff/ Applicant herein was premised on the grounds, testimonial facts and averments made out under the 13th paragraphed Supporting Affidavit of – EDWIN C. KOECH, the Advocate for the Applicant and the 2nd Plaintiff herein sworn and dated the same day with the application. The Deponent averred that: -

   a) The Affiant is an advocate of the High Court of Kenya practicing in the firm of Messrs. Harit Sheth Advocates, which has had the conduct of thus matter on behalf of the Applicant and the 2nd Plaintiff.
   b) The Applicant sought leave for its law firm of choice, Messrs. Harit Sheth Advocates, to come on record for the Plaintiff, in place of Bryant & Associates Advocates as per Order 9 Rule 9 of the Civil Procedure Rules, 2010 and further sought an extension of time to file the substitution application out of time.
   c) In the interests of justice and in line with the provision of Articles 48 and 50 of the Constitution of Kenya, 2010 which guarantees access to justice, it was only fair and just that this Honourable Court granted leave for substitution out of time.

d) The previous application for substitution dated 8th March, 2024 filed within time was struck out on a technicality on 22nd October, 2004 for having been erroneously anchored on a consent from Law firm of Messrs. Bryant Law LLP instead of Bryant & Associates Advocates. Attached in the affidavit and identified as "ECK – 01" a reproduced copy of the Ruling dated 22nd October, 2024.
e) The 1st Plaintiff herein, James Howard Archer, now deceased, breathed his last on the 14th March, 2023, while domiciled with the Republic of Kenya.
f) Following the demise of the 1st Plaintiff, Linda Hamilton Archer, applied for and was duly issued the Grant of Probate in High Court Succession Cause No. E50 of 2023 in the matter of the Estate of James Howard Archer. Attached in the affidavit and marked as "ECK – 02" a reproduced copy of the Grant, officially issued on the 7th November, 2023.
g) The Application sought substitution in lieu of the 1st Plaintiff in the present matter.
h) The Applicant had secured the necessary consent from Messrs. Bryant & Associates Advocates, the Predecessor firm. Attached in the affidavit and marked as "ECK – 03" a reproduced Consent from the Law firm of Messrs. Bryant & Associates.
i) The Applicant had acted diligently and in good faith, having initially filed the substitution application within

the time prescribed by law, but the application was struck out on a technical ground relating to the issue of consent between the previous advocates on record.

j) It was in the interests of justice that this Honourable Court granted the Applicant leave to come on record and leave to file a fresh substitution application out of time, as the procedural issue that led to the dismissal had been addressed and rectified.

k) The Defendant would not suffer any prejudice if the orders sought herein were granted and it was just and fair that the Applicant be allowed to substitute the deceased Plaintiff's legal representative and proceed with the suit.

l) The Affidavit was in support of the Applicant's application for leave to come on record and for extension of time to file the substitution application.

III. The response by the 3rd Defendant

5. The 3rd Defendant responded through a 9 paragraphed replying Affidavit sworn by HELENN KAY HARTLEY, the 3rd Defendant who was also authorized by the 1st and 2nd Defendants on 11th December, 2024 who averred that: -

a. The Applicants primarily sought the following orders: -

i. Firstly, leave be granted to the firm of Harit Sheth Advocates to come on record for the Is Plaintiff in place of Bryant & Associates post judgement.

ii. Secondly, the extension of time to file the substitution application.

iii. Thirdly, the substitution of the 1" Plaintiff, James H. Archer, since deceased, with the executrix of his estate, Linda Hamilton Archer.

b. As a preliminary matter they opposed the Application under reply on the basis that it was incurably incompetent and should be struck out with costs without a merit consideration by the Court for the following reasons:-

i. The Application under reply has been presented by the law firm of Messrs. Harit Sheth Advocates, which firm was not on record and has never been on record for the Applicants.

ii. In the proceedings before this Court that culminated in the Judgment delivered on 26th November, 2019 as well as the subsequent proceedings before the Court of Appeal that culminated in the Judgment delivered on 17th March, 2023, the Law firm of Messrs. Bryant & Associates Advocates was on record for the Applicants.

iii. By a Consent Letter dated 23rd October, 2024, which was never served upon the Defendants, the law firm of Messrs. Bryant & Associates purportedly provided their irrevocable consent to the Law firm of Messrs. Harit Sheth Advocates to come on record for the Applicants in these proceedings, post judgment.

iv. The Court record is clear that the said Consent Letter dated 23rd October, 2024 between the law firm of Messrs. Bryant & Associates and the Law firm of Messrs. Harit Sheth Advocates has never been adopted as an order of the Court to effect the change of advocates post Judgment. As a consequence, thereof, the law firm of Messers. Harit Sheth Advocates is improperly on record.

v. The Law firm of Messrs. Harit Sheth Advocates ought to have first sought leave of the Court to come on record for the Applicants prior to filing the application under reply, which purports to seek substantive reliefs *inter alia*, extension of time to file the substitution application and the substitution of the 1st Plaintiff, since deceased, with Linda Hamilton Archer.

vi. To the extent that the Application under reply purports to seek substantive reliefs, without a court order to effect the Change of advocates post judgment, the application under reply is to this extent, incompetent and for striking out without a merit consideration.

c. They further also opposed the Application under reply on the grounds that the 1st Plaintiff passed away on 14th March, 2023 while the Application under reply by which the Applicants now seek to substitute him was filed on 7th November, 2024. The suit abated by the operation of the

law on 14th March, 2024, a year after the death of the 1st Plaintiff. The Applicants did not seek to revive the suit but opted to file an application for substitution. An application for substitution by the legal representatives of the deceased has to be preceded by an application for revival of an abated suit. In the premises, the application under reply is fatally defective and should be struck out with costs.

d. In addition, they further also strenuously opposed the Application under reply for the reasons stated in the paragraph below:
    a) The Plaintiffs instituted this suit by way of an Originating Summons dated 5th December, 2012. As a central claim in the Originating Summons, the Plaintiffs claimed that by virtue of a certain loan or financial advance in the sum of Kenya Pounds five thousand (5,000.00) made solely to their sibling, the late Christopher J. Archer, by their late father, Howard J. Archer, to have acquired a constructive or resulting trust in the properties then known as Land Reference Numbers Kwale/Diani Beach Block/806,807 and 808.
    b) The Defendants in response to the said Originating Summons and in their capacities as the beneficiaries of the Estate of the Late Christopher J. Archer, filed two Replying Affidavits respectively sworn on 23rd October, 2012 and on 26th March, 2019 by Helen Hartley by

which they firmly maintained that in the year 1966, their father Christopher J. Archer personally identified the suit property and thereafter borrowed the sum of 5,000 pounds from his father, the late Howard Archer to enable him to pay the purchase price to the vendor and that no constructive trust had arisen as between him and his siblings in respect of the suit property as claimed by the Plaintiffs.

c) By a Judgment delivered on 26th November, 2019, this Court, Hon. Yano, J. dismissed the Plaintiffs' suit with costs and held that the Plaintiffs claim for a constructive trust interest in the suit property had not been established on a balance of probabilities.

   Produced as an annexure marked as "HKH – 1" was a copy of the Judgment of this Court delivered on 26th November, 2019.

d) Aggrieved by the decision of this Court, the Plaintiffs subsequently lodged an appeal against the entire Judgment, being Civil Appeal 39 of 2020.

e) Ultimately, the Appeal was heard and determined by the Judgment of the Court of Appeal delivered on 17th March, 2023. Produced as an annexture marked as "HKH – 2" a copy of the Judgment of the Court of Appeal delivered on 17th March, 2023.

f) By the said Judgment, the Court of Appeal, whilst finding for the Plaintiffs set aside in its entirety the

Judgment of this Court and declared that part of the suit properties was trust property and was consequently held in trust by the Respondents on behalf the Appellants.

g) Further, the Court of Appeal also found and held that the suit properties had already been disposed of or dealt with and that there were third parties who were registered as the proprietors thereof, who were not before the Court and whose already vested interests would be affected and prejudiced if an order for restitution of the 1st and 2nd Plaintiffs back to the property was made (see paragraphs 62-66 of the Judgement).

h) In the interests of justice, the Court of Appeal, at paragraph 67 (iv) of the said Judgment, remitted the suit back to this Court for taking of accounts in respect of the proceeds from the sale of the suit properties and entry of the Judgment on quantum in favor of the Plaintiffs.

i) The Affiant was aware that by a Notice of Motion Application dated 8th March, 2024 filed on 11th March, 2024 the Plaintiffs, primarily, seek to move the Court of Appeal to grant an order of review of the aforesaid Judgment delivered on 17th March, 2023 by setting aside Paragraph 67 (iv)only of the Judgment. Produced as an annexure marked as “HKH – 3” a copy of the

Notice of Motion Application dated 8th March, 2024 but without the Supporting Affidavit and the annexures in the affidavit.

j) The Application for review of the Judgment was vehemently opposed by the Defendants, the Respondents therein, on, "*inter alia*", the basis that; [all the issues raised by the Applicants have been raised before, have been litigated upon before at great length and have been decided with finality in past proceedings, [ii] there are already existing third party interests who are not before the Court and whose registered interests would therefore be adversely affected by and prejudiced by any orders issued by this Court and,[iii] the Court of Appeal, by remitting the suit back to this Court, had, in the interests of justice, already afforded the Applicants an effective remedy. ***Produced as an annexture marked as "HKH – 4" a copy of the Replying Affidavit dated 5th April, 2024***.

k) The Application for review now pends hearing and determination by the Court of Appeal. In the premises, judicial time is the only resource that the Courts have at their disposal. There is therefore no need for parallel proceedings before this Court and the Appellate Court. To save on precious judicial time, the Application under reply should abide by the outcome of the Application for review.

l) Further, the Applicants seem to be blowing hot and cold. It was a fact that the Applicants, whilst seeking to move this Court to substitute the 1st Plaintiff on the basis that they need to progress the prosecution of the suit, were also before the Court of Appeal complaining that this Court does not have jurisdiction to conduct the further proceedings ordered by the Court of Appeal vide the Judgment delivered on 17th March, 2023. ***Produced as an annexture marked as "HKH – 5" a copy of the Applicant's written submissions***.

e. In the premises the Applicant under reply, was misconceived, incompetent, completing lacking in merits in all respects and the only order that should commend itself to this Court was that the said Application under reply should be struck out without merit consideration or dismissed for a clear and patent lack of merit.

IV. The Further Affidavit of the 1st Plaintiff

6. The 1st Plaintiff further responded to the Replying Affidavit by the Defendants filed on 11th December, 2024 through a 12th further Affidavit sworn by LINDA HAMILTON ARCHER, the Executor of the estate of the 1st Plaintiff on 18th December, 2024 where in the Affiant averred that: -

a) Paragraph 5(a) of the Defendant's Replying Affidavit is misconceived, unfounded and devoid of merit. Prayer 2

of the Applicant's Motion on Notice sought leave for the Law firm of Messrs. Harit Sheth Advocates to come on record. Upon the said prayer being granted, the other prayers will also be considered. It would be a wasteful and unwarranted exercise to segregate the prayers into multiple applications, which would serve no purpose other than to needlessly burden this Honourable Court.

b) The allegations raised in Prayers 5(c) and (d)concerning the purported consent letter dated October 2024 are baseless. There is no legal requirement mandating the adoption of the consent letter. In any event, the consent letter forms the substantive basis for Prayer 2 of the Applicant's Notice of Motion application seeking for the Affiant Advocates' firm to come on record from the outgoing consenting Law firm of Messrs. Bryant & Associates, and any contentions to the contrary were misplaced and devoid of legal foundation.

c) The Affiant had a constitutional right to choose Counsel, including the right to substitution of counsel. The previous Advocate, Mr. Timothy Bryant, had acted as their Counsel since the inception of this suit under the Law firm of Messrs. Bryant & Associates and Bryant's Law LLP until 2023. Mr. Bryant had granted his consent for the Law firm of Messrs. Harit Sheth Advocates to come on record and act in this case. The Defendants' opposition to the application for substitution is therefore

baseless and constitutes a waste of this Honourable Court's time, especially given the 7 - 8 months already wasted addressing the same issue.

d) In response to paragraph 6 of the Defendant's replying affidavit it was averred that the suit herein had not abated and could not abate given that judgment had already been delivered by this Honourable Court.

e) Save for any orders relating to post-judgment proceedings emanating from the Court of Appeal or execution proceedings, the suit remains valid, subsisting, and unimpaired. The 2nd Plaintiff is also actively pursuing their interests in this suit as a party. As such, there existed no basis in law or fact necessitating the revival of the suit as alleged by the Defendant.

f) In response to Paragraph 7J and 7K of the Defendant's Replying Affidavit, it is contended that the application pending before the Court of Appeal for review bears no nexus, direct or indirect, with the present application before this Honourable Court. The present application was solely and strictly confined to the substitution of the deceased with herself as the executor of his estate. The purported claim of parallel proceedings is therefore fallacious, as the two courts are exercising distinct, constitutionally mandated jurisdictions.

g) The Defendants, by serving documents on the Law firm of Messers. Harit Sheth Advocates instead of Bryant &

Associates, had themselves acquiesced to the fact that the law firm of Messrs. Harit Sheth Advocates were the counsel on record in this matter. This conduct demonstrates that the Defendants themselves recognize and believe the firm to be the Plaintiff's advocates on record, further invalidating their objections and rendering their opposition to the substitution application both contradictory and devoid of merit.

h) The Defendants would suffer no prejudice whatsoever should the orders sought herein be granted. The opposition to the application was clearly calculated to unjustly exploit the demise of a party to this suit and was therefore made in bad faith, with no legitimate basis in law or equity.

i) They reiterated and respond upon the full grounds advanced in the application and the supporting affidavit filed herewith, which remain uncontroverted in substance

V. Submissions

7. While the Parties were present in Court, they were directed to have the Notice of Motion Applicant dated 7th November, 2024 be disposed of by way of written submissions. Pursuant to that on a ruling date was reserved on notice by Court accordingly.

A. The Written Submissions by the Plaintiffs/Applicants

8. The Plaintiffs/ Applicants through the firm of Messrs. Harit Sheth Advocates filed their written submissions dated 22nd January, 2025. Mr. Koech Advocate submitted that the Application sought that leave be granted to the Law firm of Messrs. Harit Sheth Advocates to come on record for the first Plaintiff in place of the law firm of Messrs. Bryant & Associates in compliance with Order 9 Rule 9 of the Civil Procedure Rules, 2010. They also sought that the time to file the substitution application be extended. In light of the above the Applicant further sought that the 1st Plaintiff James Howard Archer, since deceased be substituted with Linda Hamilton Archer the Applicant herein, the legal representative of the Estate of James Howard Archer (Deceased),and said representative be made a party to this suit as the 1st Plaintiff.

9. The 1st Plaintiff died on 14th March, 2023 and this cause of action continued, which necessitated that the 1st Plaintiff be substituted with the Applicant, his personal representative, by virtue of the Grant of Probate granted by the High Court

on 7th December 2023 in High Court Succession Cause No. E50 of 2023. Attached to the Application is a copy of the grant labelled as 'ECK-02'. The Applicant made an application for substitution dated 8th March 2024, which was within the prescribed one year under the Civil Procedure Rules, 2010. The said application was struck out on the 22nd October 2024 on the grounds that the Law firm of Messrs. Harit Sheth Advocates was deemed a stranger to the suit due to a lack of consent from the Law firm of Messrs. of Bryant& Associates Advocates previously on record for the Plaintiffs. Attached to the Application a copy of the Ruling labelled as "ECK-01".

10. The Learned Counsel submitted that the Applicant had since regularized the position and obtained the requisite consent from the Law firm of Messrs. Bryant & Associates Advocates, the former advocates on record. Attached to the Application a copy of the consent identified as "ECK-03". Previously, the Applicant had sought the consent from Bryant's Law Advocates LLP, which was deemed insufficient and not on record for the Plaintiff by the Court.

11. The Learned Counsel averred that the mistakes of counsel ought not be visited upon the client. The Applicant should not suffer because the Law firm of Messrs. Harit Sheth Advocates failed to obtain a consent from the right Counsel. To buttress on this point, the Counsel referred Court to the case of:- ***"Belinda Muras & 6 Others – Versus - Amos Wainaina [1978]KLR"*** Hon. Madan JIA (as) he then was defined what constitutes a mistake as follows: -

> ***"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."***

12. The Learned Counsel urged the Court not to visit the mistake of failing to obtain the correct consent on the Applicant, who had made a proper application for substitution. They strongly opposed the Respondents' claim that the failure to obtain the necessary consent, and consequently to make an

application for substitution on time should be grounds for dismissal of this application. As evidenced above, the Applicant made an application for substitution within time but was dismissed because the counsel failed to obtain consent.

13. Therefore, the Learned Counsel submitted that the Applicant was constitutionally entitled to the right to representation by an advocate or law firm of their own choosing; access to justice and a fair hearing as enshrined under Articles 48 and 50 of the Constitution of Kenya. It was in the interests of justice that this Honourable Court granted the Applicant's advocates Harit Sheth Advocates leave to come on record. The Applicant now sought substitution of the deceased, the 1st Plaintiff, out of time having remedied the procedural defect, and seeks an extension to do so. The Applicant had acted diligently and in good faith, having initially filed the substitution within the time prescribed in law, but the application was struck out on a technical ground relating to the issue of consent from the previous advocates on record. It was in the interests of justice that this Honourable Court

grants the Applicant leave to file a fresh substitution application out of time, as the procedural issue that led to the dismissal had been addressed and rectified.

14. Further the Learned Counsel submitted that the 3rd Defendant averred in their replying affidavit dated 11th December, 2024 that this suit had abated. They argued that this application was brought on time, as evidenced above, but was dismissed on a procedural technicality of failure to obtain the consent of the previous advocates on record. Further, that there had been judgment given and therefore no abatement had occurred.

15. They argued that an application for substitution should be preceded by an application for revival and therefore this application is fatally defective and must be dismissed. Had the first instance application been brought after 14th March 2024, then the suit would have stood abated, and therefore necessitated revival by the personal representative, the Applicant. This was not the case however, and on this ground alone, their argument was without merit and unsubstantiated.

16. The Learned Counsel argued that there was no need for revival as the application for substitution was brought within the one – year duration on 8th March, 2024, but was dismissed on the ground that the Law firm of Messrs. Harit Sheth Advocates was improperly on record. The Defendants opposition to the Application for substitution was baseless and constituted a waste of this Court's Honourable time, as eight months had already been wasted addressing the same issue. They further submitted that, save for any post-judgement proceedings emanating from the Court of Appeal or execution proceedings, the suit remains valid, subsisting and unimpaired. The 2nd Plaintiff was also actively pursuing their interests in the suit as a party, as such there was no basis necessitating the revival of this suit as alleged by the defendant. At paragraph 5(a) of their Replying Affidavit, the Defendants request this Honourable Court to dismiss this application on the basis that no consent had been recorded with the Court on the change of advocates.

17. By virtue of accepting service of this application, and giving their Replying Affidavit to the Application, the Defendants

acquiesced to the authority of Harit Sheth Advocates as the advocates for the Plaintiffs/Applicant, and coming after the fact to claim they do not recognize Harit Sheth Advocates as acting for the Plaintiffs/ Applicant is insufficient. They should have raised this bone of contention earlier before replying to the Application. In their Notice of Motion application dated 7th November, 2024, one of the Applicant's prayers was that leave be granted to enable the firm of Harit Sheth Advocates to come on record as consent has been obtained from Law firm of Messrs. Bryant & Associates Advocates as was pointed by this Honourable Court on 22nd October 2024.

18. They further submitted that segregating their prayers into multiple applications for substitution and for leave to come on record as new advocates would be a wasteful and unwarranted exercise, which would serve no purpose other than to needlessly burden this court. It was on this ground that these two prayers were within the same application. The Defendants had attempted to bring up the history of the case, and issues that have since been determined at both The High Court and the Court of Appeal, which have already

been determined, and have no relation to the current application of substitution and is therefore res judicata. Their entire argument was irrelevant and had no bearing on their present application and was an attempted to distract the court, waste its time and focus from the quick and effective determination of this matter.

19. The Learned Counsel held that the application pending before the Court of Appeal for review has no direct or indirect bearing on the present application before this Honourable Court. The present application was strictly limited to substitution and entry into record as new advocates of the 1st Plaintiff with the Applicant. The purported claim of parallel proceedings was therefore fallacious and baseless. The Defendants would not suffer any prejudice as a consequence of the orders sought herein. Their opposition was clearly calculated to unjustly exploit the demise of a party to this suit and was therefore made in bad faith with no legitimate basis in law or equity.

20. In conclusion, the Learned Counsel submitted that it was inn the interests of justice that this Honourable Court allowed this application to prevent further delay in the matter.

B. <u>The Written Submissions by the 1st, 2nd and 3rd Defendants</u>

21. The 1st, 2nd and 3rd Defendants through the Law firm of Messrs. Munyao Muthama and Kashindi Advocates filed their written submissions dated 5th February, 2025. The Learned Counsel submitted that for consideration was the Plaintiff's Notice of Motion application dated 7th November, 2024 hereinafter "the application under consideration" by which they sought the following reliefs: -

a. Firstly, leave be granted to the firm of Harit Sheth Advocates to come on record for the 1st Plaintiff in place of Bryant & Associates post judgement.
b. Secondly, the extension of time to file the substitution application.
c. Thirdly, the substitution of the 1st Plaintiff, James H. Archer, since deceased, with the executrix of his estate, Linda Hamilton Archer, since deceased with the executrix of his estate, Linda Hamilton Archer.

22. The Learned Counsel opined that the Defendants strenuously opposed the Application under consideration vide a Replying Affidavit dated 11th December, 2024. The Learned Counsel relied on the following (two) issues for determination. Firstly, on whether the Law firm of Messrs. Harit Sheth had the locus standi to represent the Plaintiffs post Judgment. The Learned Counsel submitted that the Application under consideration was fatally defective as it offended the provisions of Order 9 Rule 9 of the Civil Procedure Rules, 2010.

23. The Application under consideration was filed by the firm of Harit Sheth Advocates, which firm was not on record and had never been on record for the Applicants. In the proceedings before this Court that culminated in the Judgment delivered on 26th November, 2019 as well as the subsequent proceedings before the Court of Appeal that culminated in the judgment delivered on 17th March, 2023, the Law firm of Messrs. Bryant & Associates Advocates was on record for the Applicants.

24. By a consent letter dated 23rd October, 2024 which was never served upon the Defendants, the law firm of Bryant & Associates purportedly provided their irrevocable consent to the Law firm of Messrs. Harit Sheth Advocates to come on record for the Applicants in these proceedings, post Judgment.

25. The Court record was clear that the said consent letter dated 23rd October, 2024 between the law firm of Bryant & Associates and the Law firm of Messrs. Harit Sheth Advocates had never been adopted as an order of the Court to effect the Change of advocates post Judgment. As a consequence, thereof, the law firm of Harit Sheth Advocates was improperly on record. A mere consent could not effect change of advocates 'without an order of the Court' or leave of Court when coming on record post Judgment. In elaborating on the provisions of Order 9 Rule 9 of the Civil Procedure Rules, the Court in ***"John Langat – Versus - Kipkemoi Terer & 2 Others (2013) eKLR"*** stated as follows in relation to a consent entered into between an outgoing firm and incoming firm: -

"There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the Respondents were put in the picture. But more important, the consent could not effect the change of advocates "without an order of the court." No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent".

26. The provision of Order 9 Rule 9 sets out the procedure to be followed where a firm of advocates seeks to come on record after Judgment had been delivered. It is our humble submission that the firm of Harit Sheth Advocates ought to have first sought leave of the Court to come on record for the Applicants prior to filing the application under reply, which purports to seek substantive reliefs *inter alia*, extension of time to file the substitution application and the substitution of the 1st Plaintiff, since deceased, with Linda Hamilton Archer.

27. For this proposition, they were guided by the decision of the Court in the case of:- ***"James Ndonyu Njogu – Versus – Muriuki Macharia [2020] eKLR"*** where the Court observed as follows: -

"As per the provision of Order 9 Rule 9, the correct procedure that was to be followed in the present case where the Applicant's Appeal had been dismissed, was that counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court."

28. It was also the Applicants' contention that the Applicant was entitled to the right to legal representation by an advocate and therefore it was in the interests of justice that this Honorable Court grants the firm of Messrs. Harit Sheth leave to come on record. It is our humble submission that Order 9 Rule 9 did not impede a party's right to legal representation. Instead, it outlined the procedure to be followed where a party changes advocates after the judgement has been delivered. To buttress their submissions, they relied on the decision of ***"James Ndonyu Njogu – Versus - Muriuki Macharia [supra]"*** where the Court stated as follows: -

"It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus, a party

so wishing to change his counsel must notify the Court and other parties. Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality".

29. According to the Learned Counsel, the Law firm of Harit Sheth lacked the locus standi to move the Court on behalf of the Applicants. To the extent that the Application under consideration purported to seek substantive reliefs, without a court order to effect the Change of advocates post judgment, the applicatin is to this extent, incompetent and for striking out without a merit consideration.

30. Secondly, on the issue of substantive submissions in respect of whether the suit herein abated by operation of the law. The Learned Counsel submitted that pursuant to the provision of Order 24 Rule 3 of the Civil Procedure Rules, an application for substitution must be made within one year from the date of death of the deceased Plaintiff failure to which the suit shall abate. Precisely, Order 24 Rule 3 stated as follows: -

(1)Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2)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:

Provided the court may, for good reason on application, extend the time.

31. The Learned Counsel informed the Court that the 1st Plaintiff passed away on 14th March, 2023 while the Application under consideration by which the Applicants now seek to substitute the 1st Plaintiff was filed on 7th November, 2024. It was their humble submission that the suit abated by operation of the law on 14th March, 2024, a year after the death of the 1st Plaintiff. The Applicants did not seek to revive the suit but opted to file an application for substitution. An application for substitution by the legal representatives of the deceased had to be preceded by an

application for revival of an abated suit. The suit having abated, it was in law dead and non – existent. The Application under consideration by which the Applicants now seek to substitute the 1st Plaintiff was filed on 7th November, 2024. It was their humble submission that the suit abated by operation of the law on 14th March, 2024, a year after the death of the 1st Plaintiff. The Applicants did not seek to revive the suit but opted to file an application for substitution. An application for substitution by the legal representatives of the deceased has to be preceded by an application for revival of an abated suit. The suit having abated, it was, in law dead and non-existent. The application under consideration is based on a non-existent suit.

32. For this proposition, the Learned Counsel was guided by the Court of Appeal decision in ***"John Chege Mwangi & 3 Others – Versus - Obadiah Kiritu Methu [2012] eKLR"*** where the Court stated as follows: -

> ***"The law regarding substitution of a deceased Plaintiff with his personal representative is found in Order 24 rule 3 of the Civil Procedure Rules, under which the court has power, on application for substitution by the legal representatives***

of the deceased, where the cause of action survives the deceased, to cause the representative of the deceased to be made a party to the suit in place of the deceased Plaintiff".

Under Sub-rule 2 of rule 3 the application for substitution must be made within one year from the date of death of the deceased failing which the suit shall abate so far as the deceased plaintiff is concerned by operation of the law.

The remedy available upon the suit abating is to apply for the revival of the suit before any other application can be made. See Order 24 rule 7:

"The person claiming to be the legal representative of a deceased may apply for an order to revive a suit which has abated and if proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit."

The suit herein abated on 30th June 2010, a year after the death of the Plaintiff as no application for substitution of the Plaintiff was made by the applicants or any other person. The suit therefore, abated. The suit having abated it is, in law, dead and none existent. The only way to breath life into it is by way of an application for its revival under Order 24 rule 7 (2) aforesaid

No such application has been made before this court or any other court. The application before me is therefore premature and fatally defective as the same is based on a none existent suit.

33. Pursuing this line of submission further, the Court of Appeal while considering a similar question in the case of:- ***"Rebecca Mijide Mungole & another – Versus - Kenya Power & Lighting Company Limited & 2 others [2017] eKLR"*** set forth the sequence of steps an applicant ought to take while contemplating an application to the application under consideration. It was observed as follows: -

> ***"……it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action.***

34. In sum, it was the Court's position that where a year has without an application to substitute the deceased is made, then the suit abates by operation of the law. Consequently, the sequence of steps to be taken by the legal representative was first begin by applying to Court for leave to extend time for the legal representative to be enjoined in the suit. Further, it was the effluxion of time that causes the suit to abate. In the foregoing premises, it was that time that must first be extended, only then could the Applicant be allowed to make an application to be enjoined as a representative.

35. The Learned Counsel submitted that in the case of ***"John Mutai Mwangi & 26 Others – Versus - Mwenja Ngure & 4 Others [2016] eKLR"*** the need to observe timelines was given emphasis in the following terms that: -

> ***"That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner."***

36. According to the Learned Counsel, the sheer ease with which the Applicants had failed to observe clear timelines

provided by law and in the absent of cogent reasons to justify the delay, lays credence to the fact that the Application under consideration was bereft of merit and should be dismissed with costs to the Defendants.

37. In conclusion, the Learned Counsel averred that it was in view of the foregoing, the Notice of Motion application dated 7th November, 2024 was incurably defective, incompetent and misconceived and that the only other befitting to be issued by this Court was that the said Application be struck with costs.

V. Analysis and Determination

38. The Honourable Court has keenly considered the application by the Plaintiffs, the replies, the written submissions, the plethora of cited authorities by parties, the relevant provision of the Constitution of Kenya, 2010 and the statutes. For the Honourable Court to reach a reasonable, fair and just decision it has identified the following five (5) issues for determination:-

a) Whether Law firm of Messrs. Harit Sheth Advocates were properly on record post - Judgment.

b) Whether the suit abated by operation of law.

c) Whether the Applicant was entitled to extension of time and substitution.

d) Whether the application was merited in law and equity?

e) Who bears the Costs of the Notice of Motion application dated 7th November, 2024?

ISSUE No. a). Whether the Law firm of Messrs. Harit Sheth Advocates are properly on record Post - Judgment.

39. Under this sub heading, the main substratum for the Honourable Court is to examine the legal requirement for a change of advocates post – Judgment. The law governing change of advocates after Judgment is well stated out under the provision of Order 9 Rule 9 of the Civil Procedure Rules, 2010 which is unequivocal: -

> **"When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—**
>
> **(a) upon an application with notice to all the parties; or**
> **(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."**

40. The Court of Appeal and various High Court decisions have consistently interpreted this rule to mean that a consent between advocates, while a necessary first step, is not sufficient to effect a change post-judgment. The mandatory language “shall not be effected without an order of the court” means that a formal court order is the indispensable final step.

41. The Law firm of Messrs. Harit Sheth Advocates filed the present application without first obtaining leave to come on record. Although a consent from the law firm of Messrs. Bryant & Associates was annexed, it was not adopted as an order of the Court. As held in the case of ***“John Langat – Versus - Kipkemoi Terer & 2 Others (Supra)”***, already cited by the Learned Counsel for the Respondents a mere consent is insufficient without a court order.

> ***“There was no application made to change advocates... the consent could not effect the change of advocates 'without an order of the court.' No such order was sought or obtained. It follows... that [the new advocates] are not properly on record... and therefore the appeal and the application are incompetent.”***

42. Similarly, in the case of:- ***"James Ndungu Njogu – Versus - Muriuki Macharia [2020] eKLR"***, the Court stated: -

> ***"The correct procedure... where the Applicant's Appeal had been dismissed, was that counsel coming on record ought to have sought leave of the Court to come on record, then file and serve the notice of change of Advocates before filing the application to set aside the orders of the Court."***

43. In the present case, it is uncontroverted that the consent from the law firm of Messrs. Bryant & Associates Advocates, though now in hand, has not been adopted as an order of this Court. No separate application for leave to come on record post -Judgment was ever filed. Harit Sheth Advocates simply filed the present omnibus Application which includes, amongst other substantive prayers, a prayer for leave to come on record.

44. The Defendants' objection on this point is not a mere technicality. As held in the case of ***"James Ndungu Njogu (Supra)"***, the procedure in Order 9 Rule 9 is mandatory and is designed to prevent chaos and ensure all parties and the court are formally notified of representation changes at a critical post-judgment stage. The Applicants' argument that

the Defendants have acquiesced by serving documents on Harit Sheth Advocates is unpersuasive; service on a law firm does not confer upon it a legal status it does not have. The court record is paramount.

45. In the present case, the Applicants have annexed a consent from the Law firm of Messrs. Bryant & Associates dated 23rd October 2024. However, the record shows it has not yet been adopted as an order of the Court. The Applicants have, however, included in the present motion a prayer for leave to come on record. This Court is persuaded that the defect can be cured within the same application, as held in the case of:- ***"Lalji Bhimji Sanghani Builders & Contractors – Versus - City Council of Nairobi [2012] eKLR"***, where the Court allowed regularisation in the interests of justice.

46. Accordingly, I find that the prayer for leave to come on record is properly before me and can be determined on its merits.

ISSUE No. b). Whether the suit abated by operation of law

47. Under this sub title, the Court shall examined whether or not the suit was abated by operation of law. Even if I were to overlook the first defect (which I cannot), the Application fails on the second, more substantive ground. The law on substitution and abatement is governed by the provision of Order 24 Rule 3 of the Civil Procedure Rules, 2010 which provides: -

> **"(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned...**
> **Provided the court may, for good reason on application, extend the time."**

48. The 1st Plaintiff died on 14th March 2023. The first substitution application was filed on 8th March 2024, within the one-year limit, but was struck out on 22nd October 2024 for a procedural defect (wrong consent). The present application was filed on 7th November 2024.

49. The timeline of one year is strict. It is statutory. The 1st Plaintiff died on 14th March 2023. Ideally, the deadline for filing a substitution application was 14th March 2024. Nonetheless, it is true that the Applicants filed an

application within time on 8th March 2024. However, that application was struck out in its entirety on 22nd October 2024. The legal effect of striking out a pleading is that the application is removed from the court record and is deemed never to have been filed. Therefore, as of 15th March 2024, there was no valid application for substitution on the court record. The suit, by the explicit operation of Order 24 Rule 3(2), abated automatically on 14th March 2024.

50. Indeed, the Respondents contend that the suit abated on 14th March 2024 and that no revival application has been made. They rely on the case of:- ***"John Chege Mwangi & 3 Others – Versus - Obadiah Kiritu Methu [Supra]"*** and ***"Rebecca Mijide Mungole – Versus - KPLC [Supra]"***, which stress that once a suit abates, revival must precede substitution.

51. The Applicants argue that because the initial substitution application was filed within time, the suit did not abate, and the current application merely seeks to cure a procedural defect. The Court of Appeal in ***"John Chege***

Mwangi & 3 Others – Versus - Obadiah Kiritu Methu [Supra]" provided a crystal - clear roadmap: -

> ***"The suit herein abated... a year after the death of the Plaintiff as no application for substitution... was made... The suit having abated it is, in law, dead and non-existent. The only way to breath life into it is by way of an application for its revival under Order 24 rule 7(2)... No such application has been made... The application before me is therefore premature and fatally defective as the same is based on a non-existent suit." (Emphasis added)***

52. The sequence of applications is not a matter of discretion but of law. In the case of ***"Rebecca Mijide Mungole [Supra]"***, the Court of Appeal emphasized this sequence: -

> ***"Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it…… without time being extended, no application for revival or joinder can be made... it is only after the legal representative has been joined as a party that he can apply for the revival of the action."***

53. Thus, the suit abated on 14th March, 2024. The Applicant must first seek revival under the provision of Order 24 Rule 7(2), which provides: -

> **"The person claiming to be the legal representative… may apply for an order to revive a suit which has abated…"**

54. The Applicants' contention that the suit could not abate because Judgment had been entered is misconceived. The Court of Appeal Judgment created a new cause of action for the taking of accounts, which is a continuation of the suit. The deceased 1st Plaintiff remained a necessary party to those proceedings until formally substituted. Order 24 applies. The Applicants' recourse, after the abatement, was not to file a fresh substitution application. Their only path was to:

a. First, apply for extension of time to apply for substitution (under the proviso to Order 24 Rule 3(2)); and
b. Second, upon grant of extension, apply for revival of the abated suit (under Order 24 Rule 7(2)); and only then
c. Apply for **substitution**.

55. The present Application attempts to combine these distinct steps and, critically, omits the crucial prayer for revival. It is founded on a suit that, in the eyes of the law, no longer exists. The Applicants argue that because the initial substitution application was filed within time, the suit did not abate, and the current application merely seeks to cure a procedural defect.

56. Be that as it may, I agree with the reasoning in the case of:- ***"Said Sweilem Gheithan Saanum – Versus - Commissioner of Lands [2015] eKLR"***, where the Court held that a timely but defective application can be a basis for extension of time under the proviso to Order 24 Rule 3(2). The Applicants acted within time initially, and the defect was procedural, not substantive. In the interests of justice, and guided by the provision of Article 159(2)(d) of the Constitution, I find that the suit did not abate.

ISSUE No. c). Whether the Applicant is entitled to extension of time and substitution

57. Under this sub title, the Honourable Court notes that despite the procedural lapse, the Court is guided by Article 159(2)(d) of the Constitution, which mandates: -

> **"Justice shall be administered without undue regard to procedural technicalities."**

58. The Court has discretion under Order 50 Rules 6 & 7 Civil Procedure Rules, 2010 and Section 95 Civil Procedure Act, Cap. 21 to enlarge time. The guiding principles are set out in ***"Nicholas Kiptoo Arap Korir Salat – Versus - IEBC & 7 Others [2014] eKLR"*** – extension is not a right, but a judicial

discretion exercised to avoid injustice. The Applicant had filed the initial substitution application within time, and the delay was occasioned by a procedural misstep in obtaining consent from the correct advocate. In the case of:- ***"Belinda Murai & 6 Others – Versus - Amos Wainaina [1978] KLR"***, Madan JA stated:-

> ***"A mistake is a mistake. The door of justice is not closed because a mistake has been made…"***

59. Here, the delay between the striking out of the first application (22nd October 2024) and the filing of the present one (7th November 2024) is minimal. It is neither unreasonable nor inordinate. The Applicants have remedied the defect by obtaining the correct consent. The Respondents have not demonstrated prejudice that cannot be compensated by costs.

60. The Court finds that the Applicant acted diligently and in good faith. The procedural error should not defeat substantive justice. Given that the Court of Appeal remitted the matter for taking of accounts, it is in the interest of

natural Justice, Equity and Conscience to allow substitution so that the proceedings can be concluded on their merits.

ISSUE D: Whether the Application is merited in law and equity?

61. Under this subtitle, the Honourable Court is to examine the merits of this Application. On the substitution, I take note that it is necessary to proceed with post-judgment proceedings, including the taking of accounts as directed by the Court of Appeal in Civil Appeal No. 39 of 2020. The Defendants will suffer no prejudice, and the interests of justice favor allowing the substitution.

ISSUE No. e). Who bears the Costs of the Notice of Motion application dated 7th November, 2024

62. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases

of ***"Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR*** and ***"Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***"Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

63. In the present case, the Honourable Court reserves the discretion to have the costs in the Cause.

VI. Conclusion and Disposition.

64. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, the Court arrives at the following decision and make below orders: -

a) **<u>THAT</u> the Notice of Motion Application dated 7th November, 2024 be and is hereby found to have merit and the same is allowed with costs to be in the cause.**

b) **<u>THAT</u> Leave be and is hereby granted to the firm of Harit Sheth Advocates to come on record for the 1st Plaintiff in place of Bryant & Associates Advocates in compliance with Order 9 Rule 9 of the Civil Procedure Rules. The consent dated 23rd October 2024 is hereby adopted as an order of the Court.**

c) **<u>THAT</u> time be and is hereby extended for filing of the substitution application.**

d) **<u>THAT</u> this Honourable Court be and is hereby pleased to substitute the deceased 1st Plaintiff, <u>James Howard Archer</u>, with <u>Linda Hamilton Archer</u>, the executrix of his estate, as the 1st Plaintiff.**

e) **<u>THAT</u> there be an order for the Plaintiff to amend and serve the Amended Plaint within the next 14 days from todate.**

f) **<u>THAT</u> upon service of the Amended Plaint, the Defendants granted 21 days leave to fully comply**

with the provision of Orders 7 and 11 of the Civil Procedure Rules, 2010.

g) <u>THAT</u> for expediency sake there be a Pre – Trial Conference to be conducted on 14th May, 2016 in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010 and further directions before Hon. Justice Olola, ELC No. 3, Mombasa.

h) <u>THAT</u> the costs of this application shall be in the cause.

<u>IT IS SO ORDERED ACORDINGLY.</u>
RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS …….13TH ……DAY OF ……..MARCH…….. 2026

……
HON. MR. JUSTICE L. L. NAIKUNI
ENVIRONMENT AND LAND COURT
<u>AT MOMBASA</u>

<u>Ruling delivered in the presence of:</u>

a) M/s. Firdaus Mbula, the Court Assistant.
b) M/s. Kitungi Advocate holding brief for Mr. Koech Advocate for the Applicant.
c) No appearance for the Respondents.