



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 312 OF 2017**

**RAPHAEL MURIGI KARIUKI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN MWANGI NDIRANGU**

**(intended legal representative of**

**JOSEPH NDIRANGU MWANGI**

**(deceased).....1<sup>ST</sup> DEFENDANT/ APPLICANT**

**SAMUEL WARUI MWANGI**

**(legal representative of the estate of**

**MWANGI KARIEBU (deceased).....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**ELISHIPHA WANGARI NDIRANGU.....3<sup>RD</sup> DEFENDANT**

**JACKSON GICHOYA WAWERU (intended**

**legal representative of EVANSON**

**WAWERU GICHOYA (deceased).....4<sup>TH</sup> DEFENDANT/APPLICANT**

**RULING**

1. The Applicants moved the Court on the 12/3/19 under an application christened “Summons for substitution” brought under Rules 49, 40(1) and 73 of the Probate and administration Rules. In it the Applicants sought the following orders;

- a. This Court to appoint the 1<sup>st</sup> Applicant, John Mwangi Ndirangu as administrator of the estate of Joseph Ndirangu Mwangi, deceased.
- b. This Court to appoint the Applicant, Jackson Gichoya Waweru as the administrator of the estate of Evanson Waweru Gichoya, deceased.
- c. Costs of the application be in the cause.

2. The application is supported by the grounds adduced thereon and the affidavits of the Applicants. The Applicants stated that the 1<sup>st</sup> and 4<sup>th</sup> Defendants are deceased and they have been appointed legal representatives of their estates. They seek substitution in the current suits to enable them prosecute the Notice of motion pending in the suit.

3. John Mwangi Ndirangu deponed that his father Joseph Ndirangu Mwangi died on 27/8/18. He was issued with a limited grant ad litem on the 7/2/19. He has attached such grant ad litem in his name. Jackson Gichoya Waweru deponed that his father Evanson Waweru Gichoya died on the 5/1/2018. He too was issued with grant ad litem for purposes of prosecuting the current suit on the 15/1/19.

4. The application is opposed by the Plaintiff/Respondent. He deponed that Evanson Waweru Gichoya died on the 5/1/18 and as order 24

Rule 3 (2) the suit abated as against the deceased after one year of his demise. That no extension of time has been sought. He informed the Court that the dispute in this case was determined vide the judgment of the Court issued on the 26/2/09 and none of the Respondents have ever appealed the judgment. That the said Joseph Ndirangu Mwangi having not filed any application and the suit having been determined and a decree issued in 2009, there is no cause of action to warrant substitution.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents did not oppose the application.

6. The Applicants submitted and relied on the cases of **National Industrial Credit Bank Limited Vs Mutinda (2003) EARL 194** where the Court stated that as a matter of policy a respectable jurisdiction such as Kenya ought to cherish and place a very high premium on the right to defend, it is a right which ought not to be taken away lightly. The second case that the Applicants rely on in support of their application is the case of **Samuel Mathenge Ndiritu Vs Martha Wangare Wanjira & Anor (2017) EKLR** where the Court cited with approval the case of **Branco Arabe Espanol V Bank of Uganda (1999) 2 EA 22**;

“the administration of justice should normally require that the substance of all disputes should be investigated on their merits and that errors lapses should not necessarily debar a litigant from the pursuits of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation namely the hearing and determination of disputes should be fostered rather than hindered.”

7. The Applicants submitted that Order 24 Rule 3(2) is not relevant to their application. Further they argued that the suit has not abated as the judgement was delivered in 2009 and the statutory period of 12 years has not lapsed.

8. The 1<sup>st</sup> Respondent submitted and faulted the Applicants by moving the Court under the wrong provisions of the law. He submitted that the relevant provisions for substitution are found in order 24 of the Civil Procedure Rules and not the probate and administration rules whose mainstay are in succession causes. He argued that the judgement of the Court was issued in his favour in 2009 and by the time of the 1<sup>st</sup> Defendants demise in August 2018, there was no pending issue to warrant his substitution. In respect to the 2<sup>nd</sup> Applicant he argued that the suit against him has abated and there is nothing to substitute. He also argued that since the substitution is for purposes of prosecuting Notice of Motion dated the 2/11/2015 and after the demise of the 4<sup>th</sup> Defendant, the said motion has abated and therefore the need to substitute is defeated.

9. Order 24 Rule 4 provides as follows;

“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”.

10. Under Order 24 Rule 3(2) there must be an application for revival of the suit after abatement before substitution. An order for substitution before revival of the suit is a nullity. See the case of **Kenya Farmers Coop Union Limited Vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eklr**.

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

“Legal representative means a person who in law represents the state 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”

12. The definition of the legal representative above is similar to the definition of a personal representative as defined under section 3 of the Law of Succession Act. A legal representative therefore is a person to whom a grant of letters of administration in respect of the state of the deceased are issued.

13. It is on record that the 1<sup>st</sup> Defendant died on the 27/8/18, the suit has therefore not abated and as per the rules of procedure, the substitution has been done within 12 months. In respect to the 1<sup>st</sup> Applicant the Court hereby substitutes John Mwangi Ndirangu in place of Joseph Ndirangu Mwangi as the 1<sup>st</sup> Defendant in this case.

14. In respect to the 2<sup>nd</sup> Applicant, it is on record that Evanson Waweru Gichoya died on the 5/1/18 and according to the rules cited above the suit abated after the 5/1/19. There is no evidence that the Applicant sought extension of time and or revival of the suit. This Court therefore cannot substitute the Applicant in a suit that stands abated as against the 4<sup>th</sup> Defendant. This prayer is accordingly dismissed.

15. This Court agrees with the Respondent that the Applicants have brought this motion under the wrong provisions of the law. The motion is christened summons for substitution and have cited majorly the provisions of the succession causes in probate and administration. The Applicants however have been appointed legal representatives of the estates of their deceased fathers, albeit ad litem for limited purposes; which is to prosecute the current suit. Guided by Article 159, I shall determine this application as though the same was brought under the right provisions of the Civil Procedure Rules. I say so because the Respondent has responded to the application as such and am satisfied that he too understood the application to be for substitution under the Civil Procedure Rules and not probate and administration cause. Advocates being officers of the Court owe a duty to their clients and to the Court to prepare precise and proper pleadings. The Court may be restrained to treat a civilian litigant representing himself on grounds that they are not expected to be savvy with the rules of procedure, but not an officer of the Court who ought to know better. I say no more.

16. According to the record there is a pending Notice of Motion dated the 2/11/15. The judgement issued in this case in 2009 is still in force as far as enforcement is concerned. I disagree with the Respondent that there is no suit or cause of action that warrants substitution.

17. In the end the application partially succeeds.

a. John Mwangi Ndirangu be and is hereby substituted in place of Joseph Ndirangu Mwangi, deceased as the 1<sup>st</sup> Defendant.

b. The application in respect to the 4<sup>th</sup> Defendant is dismissed.

c. Costs in the cause.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 22<sup>ND</sup> DAY OF JULY, 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the Presence of:**

Rono HB for Ms Wangari for the Plaintiff

Defendant 1 – Present in person

2 – Absent

3 – Absent

4 – Present in person

Irene and Njeri, Court Assistants