

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ELC CASE NO. 58 OF 2021
(FORMERLY NYERI ELC CASE NO. 322 OF 2014)
(FORMERLY NYERI HIGH COURT CIVIL CASE NO. 72 OF
2012 O.S)
(CONSOLIDATED WITH NYERI H.C.C. NO. 90 OF 2013)

ANTONY MWANGI KIBURU.....1ST
PLAINTIFF

LYDIAH WAMBUI MWANGI.....2ND
PLAINTIFF

-VERSUS-

GEORGE MAINA BABU.....
.....DEFENDANT

RULING

1. Before me is a notice of motion application dated 2.8.2025, where the applicant seeks orders of stay of execution of the judgment delivered on 31.7.2025, that the same be set aside and that he be substituted in place of the defendant. The application is premised on grounds on the face of the application and on his supporting affidavit. The applicant

avers that the defendant died on 8.7.2025 and he has Grant of Letters of administration Ad Litem. He contends that the defendant had ill health for a long time and has availed a medical report to that effect. He adds that the defendant's mental health status could not enable him to apprehend what was going on for a long time and that no proper service was ever effected. He desires to file witness statements and list of documents in this case.

2. In opposition thereof, the plaintiff filed a replying affidavit dated 14.11.2025 where he avers that the applicant cannot be substituted at this stage as there is no suit since a decree in the matter has been issued and the court is now functus officio, that when the case was heard, the court was satisfied that the deceased was properly served and that the deceased was in good health, of which the process server even took photographs with the deceased at Osutua catholic church. The respondent is also challenging the medical report on the basis that the same is not authentic under the Mental Health Act, the same having been signed by a clinical officer.

3. In his submissions, the respondent reiterates that judgment having been delivered in this matter, there are no live proceedings in which a party can be joined into. The respondent cites the cases of **JM V MWM & Another (2015) eKLR** and **Njogu & 2 Others v Githinji & 2 Others (2025) KEELC 936 (KLR)** to buttress this point.
4. The respondent further argues that the applicant does not state what he wants to do once the judgment is set aside. He adds that the limited grant does not grant the applicant powers to bring the application at hand, thus he has no locus in this matter.
5. I have considered the rival arguments. The issues falling for determination are whether the applicant should be substituted in place of the defendant and whether the amended judgment dated 31.7.2025 should be set aside.
6. On substitution, it is trite law that an application to substitute a deceased person can only be made by his personal representative, See- **Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd [2018] eKLR** **Vesting of estate**. Under **Section 79** of the Law of Succession Act, all property of the deceased vests in his personal representative who steps into

the shoes of the deceased. While section 82 thereof provides that;

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers— (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death....” **Emphasize added**

7. I find that the applicant has availed a death certificate indicating that the defendant died on 8.8.2025. He has also availed a Grant Ad Litem *“limited to the purpose only of substituting the petitioner”*. This far, it is clear that the applicant has capacity to bring forth the current application and to step in the shoes of the deceased albeit in a fiduciary capacity. In that regard, the prayer for substitution is found to be merited and the same is allowed.
8. On setting aside the judgment, the applicant contends that the deceased was sickly for a long time. However, none of the ailments attributed to the deceased are mentioned in the death certificate where it is indicated that he died of Tetanus. There is also the detailed averments made by the

process server relating to service where he mentions the actual place in Narok where he met the deceased, they even took photographs. The applicant has not in any way made a rebuttal to the said averments.

9. That notwithstanding, I find that death is a very grave matter and in the case at hand, the court delivered its judgment on 16.7.2025 (amended on 31.7.2025) when the defendant was already dead. Even if the applicant has stepped onto the shoes of the deceased, the latin maxim '*Mortui non mordent*' would still be applicable which means '*dead men don't bite, dead men don't tell tales*'. Courts of law exist to do justice, that should be their main concern, See ***Patel V EA Cargo Handling Services Ltd (1974) EA., Dickson Muricho Muriuki v Timothy Kagondu Muriuki & 6 others [2013] eKLR.*** The fact that the defendant was deceased by the time the court was delivering its judgment is sufficient cause to warrant the setting aside of the judgment, the decree herein as well as the exparte hearing proceedings of 6.5.2025.

10. In the end, the application dated 20.8.2025 is hereby allowed. Each party is to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NANYUKI THIS
22ND DAY OF APRIL 2026 THROUGH MICROSOFT
TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:

James Murigu Maina - Applicant

M/s Njuguna h/b Wahome Gikonyo for Defendant

CA Nancy Mwangi