



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 139 OF 2012**

**GEORGE J.K. KABUGI.....PLAINTIFF**

**VERSUS**

**NORAH ATIENO OLWENY.....1<sup>ST</sup> DEFENDANT**

**WASHINGTON OLWENY t/a OLWENY ASSOCIATES.....2<sup>ND</sup> DEFENDANT**

**SAMWEL NDUNGU MUNGAI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 17<sup>th</sup> April 2018, the plaintiff urges the court to order substitution of the 2<sup>nd</sup> defendant with his wives Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny. The application is brought inter alia under Order 24 of the Civil Procedure Rules and is supported by an affidavit sworn by the plaintiff. He deposed that the 2<sup>nd</sup> defendant is deceased and that Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny were the deceased's wives.

2. The 1<sup>st</sup> defendant neither responded to the application nor participated in its hearing. On his part, the 3<sup>rd</sup> defendant filed a replying affidavit in which he stated that the applicant has not shown any proof that the 2<sup>nd</sup> defendant is deceased or that Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny are his legal representatives.

3. The application was heard through written submissions which parties duly filed and exchanged. I have considered the application, the affidavits filed and the submissions.

4. From the onset, it must be noted that the present application is brought by the plaintiff and not by Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny. The ground upon which the application is brought is that the 2<sup>nd</sup> defendant is deceased. No certificate of death or some other acceptable evidence of death is annexed. The applicant does not even state how he became aware of the 2<sup>nd</sup> defendant's death. In such circumstances, I am not persuaded that the 2<sup>nd</sup> defendant is deceased. I would dismiss the application on that score alone.

5. Even if it was established that the 2<sup>nd</sup> defendant is deceased, the next question would be the date when the death occurred. That detail is important since under **Order 24 rule 3(2)** of the **Civil Procedure Rules**, an application for substitution has to be made within one year of death, failing which the suit abates. The present application is for substitution only yet we do not know whether the claim against the 2<sup>nd</sup> defendant abated.

6. Assuming that the claim against the 2<sup>nd</sup> defendant has not abated, the applicant would need to satisfy the court that Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny are legal representatives of the 2<sup>nd</sup> defendant's estate. The phrase "legal representative" is defined at **Section 2** of the **Civil Procedure Act** as follows:

***"legal representative" means 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.***

7. There are many authorities which reiterate that to sue or to be sued on behalf of the estate of a deceased person one must first obtain grant of letters of administration. See **Trouistik Union International & another v Jane Mbeyu & another [1993] eKLR**. The applicant herein has not stated that Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny hold any grant of letters of administration in respect of the 2<sup>nd</sup> defendant's estate. Indeed, he has not annexed any letters of administration. There is thus no proof that Phelesiah Akoth Olweny and Anne Lenah Wanjiru Olweny are legal representatives of the 2<sup>nd</sup> defendant's estate.

8. In view of the foregoing discussion, the orders sought cannot issue. Notice of Motion dated 17<sup>th</sup> April 2018 is dismissed with costs to the

3<sup>rd</sup> defendant.

9. Ruling herein was to be delivered on 20<sup>th</sup> February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of July 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff/ applicant

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents

Mr Karanja Mbugua for the 3<sup>rd</sup> defendant/respondent

Court Assistants: Beatrice & Lotkomoi