



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NYERI**  
**ELCA NO. 2 OF 2017**  
**(Formerly Nyeri HCCA No. 95 of 2001)**

**KABUI NJEBERE.....APPELLANT**

**-VERSUS-**

**PETER MAINA MURIUKI .....1<sup>ST</sup> RESPONDENT**

**MURIUKI KARIUNGI NJEBERE.....2<sup>ND</sup> RESPONDENT**

**MARGARET WAMBUI KUNG’U.....3<sup>RD</sup> RESPONDENT**

**AND**

**STEPHEN KARIUKI KABUI.....APPLICANT**

**RULING**

1. By a notice of motion dated **18<sup>th</sup> January, 2016** brought under **Order 24 Rule 7(2), 9** of the Civil Procedure Rules, the applicant herein moved this court for revival of the appeal which had been filed by his father Kabui Njebere which had abated following the demise of his father on 30<sup>th</sup> July, 2006.
2. Upon consideration of the reasons provided by the applicants for seeking the revival of the appeal, this court revived the appeal.
3. On 23<sup>rd</sup> February, 2017 directions were taken to the effect that the appeal be disposed of by way of written submissions.
4. During the pendency of the appeal, the applicant herein filed the notice of motion dated **12<sup>th</sup> June, 2017** seeking the following orders:
  - (i) **That he be substituted with the deceased appellant in these proceedings;**
  - (ii) **That the order sought in (i) above once made be deemed to have been made on 23<sup>rd</sup> February, 2017**
  - (iii) **That costs of the application be in cause.**

5. The application is premised on the grounds that:-

- (i) The appellant died on 30<sup>th</sup> July, 2006 leaving the applicant among other beneficiaries surviving him;
- (ii) The subject matter of the appeal was land parcel No. Magutu/Gaikuyu/561;
- (iii) The appeal was ordered revived on 17<sup>th</sup> October, 2016 pursuant to an application made by the applicant on 18<sup>th</sup> January, 2016;
- (iv) The proceedings and order of the court made on 23<sup>rd</sup> February, 2017 were made per incurium as there is no formal order of the court substituting the applicant in lieu of the deceased appellant;
- (v) It is mete and just that the orders sought be granted so as to regularise the court record.

6. The application is supported by the affidavit of the applicant on which the grounds on its face are reiterated.

7. When the application came up for hearing, counsel for the respondents stated that the issue of substitution of the appellant had been raised in their submissions in the application for revival of the appeal and pointed out that the court overruled their position on the issue. He left the matter to court.

### **Analysis and determination**

8. As pointed out above, this court revived the appeal that had been filed by the appellant and which had abated by operation of law following the death of the appellant without being substituted as by law required.

9. From the grounds urged in support of the application herein, it is clear that the applicant in the application for revival of the suit had not been substituted as the legal representative of the deceased as required under **Order 24 Rule 3(1)** of the Civil Procedure Rules which provides as follows:-

**“where one or two or more plaintiffs dies...or a 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 said plaintiff to be made a party and shall proceed with the suit.”**

10. From the above cited provision of the law, it is clear that before a legal representative of a deceased plaintiff can be made a party to the suit, there has to be an application for substitution of the deceased plaintiff/appellant.

11. In the circumstances of this case, the applicant moved this court for revival of the abated appeal yet he had not been made a party to the suit or appeal.

12. The issue arising from the above situation is whether the applicant had power to bring and prosecute the application for revival of the appeal.

13. My view of that issue is that the applicant had no power to do so. The orders issued in the applicant's favour were issued on the false understanding that he had been substituted in place of the appellant because, contrary to the respondent's advocate contention that the issue as to whether the applicant had power to bring and prosecute the application for revival of the appeal, that issue was not raised in the former application/proceedings.

14. The plaintiff has now moved this court to cure what he admits to have been an irregularity in the proceedings, a situation he was solely to blame for, as he failed to inform the court that he had not been substituted in place of the appellant. No explanation or reason has been given as to why leave was not

sought in the application for revival of the appeal or why the applicant did not seek to be substituted in place of the appellant before making the application for revival of the appeal.

15. Now the applicant who decided to put the cart before the horse by applying for revival of the appeal before he had been made a party to the appeal, and failed to inform the court that he had not been substituted in place of the appellant, now urges the court to substitute him in place of the appellant and deem the order of substitution, if granted, to have been issued in the proceeding in which the order for revival of the suit was granted yet in those proceedings there was no prayer upon which such an order could be made.

16. Being of the considered view that the order of revival of the appeal having been made pursuant to proceedings which were bad in law is incapable of being regularised through these proceedings, I decline to grant the orders sought and, in exercise of the inherent powers vested on this court to correct nullities, set aside the order for revival of the appeal herein.

17. The upshot of the foregoing is that parties shall revert to the position which obtained before the order for revival of the appeal was issued.

18. As this ruling has a bearing on the order for costs issued in the application for revival of the appeal, dated 18<sup>th</sup> January, 2016, I grant the respondent in that application the costs of that application. The respondent shall also have the costs of this application.

19. Orders accordingly.

**Dated, signed and delivered in open court at Nyeri this 9<sup>th</sup> day of May, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Mr. King'ori h/b for Mr. Muthigani for the applicant/appellant

Mr. Kebuka for the respondent

Court assistant - Esther