



**REPUBLIC OF KENYA**

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

**ELC CASE NO.272 OF 2017**

STEPHEN MWANGI KARUKU.....1<sup>ST</sup> APPELLANT/APPLICANT

MARY WANJIKU KARUKU.....2<sup>ND</sup> APPELLANT/APPLICANT

JAMES NJENGA KARUKU.....3<sup>RD</sup> APPELLANT/APPLICANT

**-VERSUS-**

JULIUS KIRAGU GITHUTHA.....RESPONDENT/RESPONDENT

**RULING**

The Appellants/Applicants herein filed this *Chamber Summons* application dated **1<sup>st</sup> December 2017**, and sought for the following orders:-

- 1) That Appellants be granted leave to take out Letters of Grant for the Estate of the Respondent and substitute the name of the Respondent.**
- 2) That the cost of this application be provided for.**

The application is premised on the following grounds:-

- a) The Respondent Julius Kiragu Githutha herein passed on on 9<sup>th</sup> January 2016.**
- b) That this Appeal cannot proceed without the substitution of the Respondent.**
- c) The Respondent was survived by the following dependants**

- Hannan Njeri – Wife (widow)**
- John Mwangi Kiragu – Son**
- Margaret Nyambura Kiragu – Daughter**
- Gachungi Kiragu – Son**
- Kimani Kiragu – Son**

- d) The Dependants of the Respondent have failed to take out Letters of Grant despite frequent promises to do so.**
- e) The Dependants will not suffer any loss or prejudice if this application is granted.**

Further, the application is supported by the *affidavit* of **Stephen Mwangi Karuku** who averred that the Respondent herein **Julius Kiragu Githutha** passed on on **9<sup>th</sup> January 2016**, before the hearing and determination of this Appeal. However, the Dependants of the Respondent failed to take out **Letter of Administration**, despite frequent promises to do so. Therefore the Appeal cannot proceed without the substitution of the Respondent. He contended that it is in the interest of justice and fairness that the orders sought herein be granted.

The Respondent's Advocate filed a *Notice of Preliminary Objection* dated **19<sup>th</sup> February 2018**, in response to the instant *Notice of Motion*

wherein he averred that:-

- 1. That the Application is incurably defective, bad in law and does not lie.**
- 2. That the said application is misconceived, incompetent, defective and bad in law.**
- 3. That the said application is an abuse of the court process and ought to be dismissed with costs.**

The Court directed that both the **Preliminary Objection** and the **Notice of Motion** application dated **1<sup>st</sup> December 2017**, be canvassed by way of written submissions. The parties complied with the above directions and on **8<sup>th</sup> March 2018**, the **Law Firm of Gatitu Wang'oo & Co. Advocates** for the Respondent filed the **written submissions** and urged the Court to uphold the **Notice of Preliminary Objection** and strike out the **Notice of Motion** dated **1<sup>st</sup> December 2017**. It was submitted that this Court does not have jurisdiction to hear and determine the instant application. It was further submitted that the jurisdiction of this Court is stipulated in **Article 162 (2)(b)** of the **Constitution** and the Court was established to hear and determine disputes relating to **environment, use and occupation of and title to land**. The Respondent further submitted that the Appellants are seeking for Letters of Administration and the suit property and the suit property forms part of the estate of the deceased. To the Respondent, the prayer sought herein falls within the Jurisdiction of the High Court as stipulated by **Section 47** of the **Succession Act Cap 160 Laws of Kenya** but not the **Environment and Land Court**.

The Respondent also submitted that this Appeal abated in **January 2017** and there is no suit existing. The Court was referred to **Order 24 Rule 4** of the **Civil Procedure Rules**.

The **Law Firm of Kariuki Runo & Co. Advocates**, for the Appellants filed the submissions on **5<sup>th</sup> April 2018**, and submitted that the Court is bound by **Section 3** of the **Environment and Land Court Act**, to facilitate the observance of the principal objective of the Act which is to facilitate the **just, expeditious and proportionate** resolution of disputed before the court. It was also submitted that the Appellants are only seeking for leave to file the Letters of Administration and once that leave is granted, they will file the Petition for Letters of Administration in the appropriate court and then come back for substitution and other necessary orders.

The Court has now carefully considered the instant **Chamber Summons** application and the annexures thereto. The Court has also carefully considered the **Notice of Preliminary Objection** and the relevant provisions of law. The Court too has carefully read and considered the written submissions and the cited authorities and it makes the following orders:-

Indeed as submitted by the Respondent, jurisdiction is everything and once the court is found to have no jurisdiction, then it must down its tools and take no further step. See the case of **The Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

**“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

The Applicants/Appellants have sought for leave to be allowed to take out Letters of Administration to the Estate of **Julius Kiragu Githutha**, who allegedly died on **9<sup>th</sup> January 2016**. It is apparent that Grant of Letters of Administration is governed by the **Law of Succession Act Cap 160 Laws of Kenya**. It is also apparent that Section 47 of the said Act gives the High Court jurisdiction to deal with any matter arising under the above stated Act.

The Environment and Land Court is established under the **Environment and Land Court Act** as provided by Article 162 (2)(b) of the Constitution. The jurisdiction of Environment and Land Court is stated in Section 13 of the Environment and Land Court Act and the court has jurisdiction to deal with among other matters the ones related to **environment, land use, title tenure, boundaries** and other **natural** resources. The Environment and Land Court has no jurisdiction to deal with matters of Succession and specifically Grant of Letters of Administration. Therefore this Court concurs with the Respondent's submissions that the instant application has been brought to the wrong court and this Court finds that it has no jurisdiction to determine matters relating to Succession and/or Administration of the deceased estate. The proper forum would have been the High Court, Family division and/or Magistrates Courts that also hear and determine Succession Causes. This Court therefore has no jurisdiction to entertain the instant Chamber Summons as filed by the Appellants.

The Respondent also submitted that there is no appeal in existence as the suit has now abated. It was alleged that the Respondent died on **9<sup>th</sup> January 2016**. As provided by **Order 24 Rule 4(iii)**:-

**“Where within one year no application for substitution is made under Subrule(1), the suit shall abate against the deceased Defendants”.**

The Respondent died on **9<sup>th</sup> January 2016**, and apparently the suit against him abated in **January 2017**. Therefore there is no suit in existence against the Respondent herein. The suit abated by operation of law. See the case of **Titus Kiragu...Vs...Jackson Mugo Mathai (2015) eKLR**, where the Court held that:-

**“...it is not the act of the court declaring the suit as having abated that abates the suit but operation of law”.**

Therefore from the provisions of Order 24 Rule 4(iii) and the above findings of the Court, it is clear that the Appeal against the Respondent abated after one year from the date of his death. The Appeal herein abated on **9<sup>th</sup> January 2017**, and since there is not substitution of the

Respondent herein, there is no Appeal in existence.

The Court finds that the Appellants should file the instant application in the right court which has jurisdiction and if and when the said Letters of Administration are issued or granted, then the Appellants can file the relevant application for revival of the Appeal and substitution of the Respondent. As it is now, there is no Appeal against the Respondent as the same abated in **January 2017**.

Further, the instant **Chamber Summons** dated **1<sup>st</sup> December 2017** cannot be entertained by this Court as it has no jurisdiction.

Having now carefully considered the **Notice of Preliminary Objection**, filed by the Respondent's Advocate herein, the Court finds it merited and it is upheld entirely. Therefore the Court finds the instant **Chamber Summons** dated **1<sup>st</sup> December 2017** being bad in law and an abuse of the court process. As provided by **Section 3A** of the **Civil Procedure Act**, the necessary order herein is to dismiss the said **Chamber Summons** application dated **1<sup>st</sup> December 2017** entirely with costs to the Respondent.

It is so ordered.

**Dated, Signed and Delivered at Thika this 13<sup>th</sup> day of July 2018.**

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Kariuki for the Appellants/Applicants

Mr. Wairegi holding brief for Mr. Gatitu for Respondent/Respondent

Lucy – Court Clerk

**L. GACHERU**

**JUDGE**

**13/7/2018**