



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**HCC NO. 356 OF 2010**

**LEAH WANGUI MBURU.....PLAINTIFF**

**VERSUS**

**MICHAEL W. GITHUMBI.....1<sup>ST</sup> DEFENDANT**

**JOHN GITONGA.....2<sup>ND</sup> DEFENDANT**

**NUCLEAR INVESTMENTS COMPANY LIMITED....3<sup>RD</sup> DEFENDANT**

**RULING**

***(Application for substitution of a deceased defendant; applicant being a joint administrator ad litem; application allowed but deceased 2<sup>nd</sup> defendant be represented jointly by the two administrators and not solely by the applicant).***

1. The application before me is that dated 10 December 2015 filed by one Simon Peter Kihara, who wishes to be substituted for the deceased 2<sup>nd</sup> defendant. It is averred that the 2<sup>nd</sup> defendant died on 6 June 2013 and the applicant acknowledges that the suit has abated, although in this application he has also sought an extension of time in order to apply for substitution. The applicant has stated in his supporting affidavit that the 2<sup>nd</sup> defendant, John Gitonga Kihara, died on 6 June 2013 while this case was still pending. He has further deposed that he has acquired a grant of letters of administration ad litem which he annexed to his affidavit. He has explained that he was unable to file this application within the prescribed one year for the reason that the family of the deceased had not yet agreed, within the one year, who ought to substitute the deceased.

2. I have considered the application which is not opposed. I have seen from the Certificate of Death annexed that indeed, the 2<sup>nd</sup> defendant died on 6 June 2013. I have also seen a grant of letters of administration ad litem issued on 7 May 2014, jointly to the applicant and one David Kihara Gitonga.

3. I have gone through the pleadings which relate to a dispute over the ownership of land described as LR No. 6585/278. I have no doubt in my mind that the subject matter of the suit, survives the death of the 2<sup>nd</sup> defendant.

4. Strictly speaking, this application needed to have been filed within one year of death as provided for in Order 24 Rule 4 (3) and where no such application is filed, the suit abates as against the deceased person. However, this court has discretion to revive an abated suit under Order 24 Rule 7 (2), if the applicant adduces sufficient reason. I am persuaded by the reason given by the applicant they had not agreed who the administrator should be within one year of the death of the 2<sup>nd</sup> defendant.

5. The only point that I have not got an explanation, is why the applicant has by himself filed this application and not jointly with David Kihara Gitonga, who is noted to be a joint administrator ad litem with the applicant. I believe that the two persons should jointly come in place of the deceased 2<sup>nd</sup> defendant and not the applicant alone.

6. I therefore allow this application but order that the 2<sup>nd</sup> defendant will be substituted by the applicant and David Kihara Gitonga, jointly. The two persons henceforth, to be considered as joint 2<sup>nd</sup> defendants.

7. I make no orders as to the costs of this application.

8. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of September 2018.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of :-**

Ms. Chelangat holding brief for Mr. Matiri for the plaintiff.

No appearance on the part of M/s Kariuki Mwangi & Co. for the 2<sup>nd</sup> defendant/applicant.

No appearance on the part of M/s D.K Kaburu & Co. for the 1<sup>st</sup> defendant.

No appearance on the part of M/s Kabathi & Co. for the 3<sup>rd</sup> defendant.

Court Assistant: Nelima Janepher

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**