



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO.150 OF 2014**

**MICHAEL WAFULA KHAEMBA.....PLAINTIFF**

**VERSUS**

**PATRICK CHEPKONDOLI MUSTUNI.....DEFENDANT**

**NICHOLAS WANYONYI WAFULA.....APPLICANT**

**RULING**

**MICHAEL WAFULA KHAEMBA** (the deceased herein) filed this Originating Summons on 15<sup>th</sup> August 2014 seeking the main order that he has acquired by adverse possession the land parcel NO. **ELGON/KAPKATENY/115** registered in the names of **PATRICK CHEPKONDOLI MUSTUNI** the Respondent herein.

The record shows that although the Respondent was served with the Originating Summons through his wife on 30<sup>th</sup> August 2014, he is yet to file any response to the same. Unfortunately, the deceased passed away on 20<sup>th</sup> August 2016 and it was not until 29<sup>th</sup> May 2017 that his son (**NICHOLAS WANYONYI WAFULA** the Applicant herein) obtained a Limited Grant of letters of Administration limited” only for purposes of this suit.

The Applicant has now moved to this Court by his Notice of Motion dated 12<sup>th</sup> July 2017 but filed herein on 14<sup>th</sup> February 2018 seeking the main prayer that he be substituted as the plaintiff in place of the deceased. The application is supported by his affidavit sworn on 12<sup>th</sup> July 2017.

The respondent has filed grounds of opposition dated 8<sup>th</sup> June 2018 in which he has pleaded that this suit has since abated and the application is therefore incompetent, frivolous, vexatious and bad in Law.

The application has been canvassed by way of written submissions which have been filed both by **Ms. NATWATI ADVOCATE** for the Applicant and **Mr. KO’OWINOH ADVOCATE** for the Respondent.

I have considered the application, the grounds of opposition and the submission by Counsel.

It is common ground that the deceased passed away on 20<sup>th</sup> August 2016 after filing this suit on 15<sup>th</sup> August 2014. By 20<sup>th</sup> August 2017 no application had been filed by the Administrator to his Estate to substitute him. It was not until 14<sup>th</sup> February 2018 that the Applicant filed this application to be substituted in place of the deceased. That was eighteen (18) months after the date on which the deceased passed away. It is provided under **Order 24 Rule 3(1) of the Civil Procedure Rules** that where a sole plaintiff dies and the cause of action survives, the Court shall cause the legal representative of the deceased plaintiff to be made a party to the suit. **Sub-rule (2)** of the said rule however provides as follows:

**“where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased plaintiff provided the Court may, for good reason by application extend the time.”** Emphasis added.

There is no doubt that the cause of action herein survives. However, the application for substitution ought to have been made within one year from the date of death of the deceased failure to which this suit abated by operation of the Law. This application was filed, as I have stated above, eighteen (18) months after the death of the deceased. This suit having abated. It is, in Law, dead and non-existent. There is no suit upon which the instant application can be founded, and in that regard, I agree entirely with the submissions by **Mr. KO’OWINOH** that

this application is incompetent.

In her submissions, **Mr. NATWATI** has given plausible reasons as to why this application was filed late. This includes the fact that the Applicant was not available to sign the supporting affidavit due to the insecurity in Mount Elgon area. Indeed I can see that the application itself is dated 12<sup>th</sup> July 2017 which was within the time provided for in Law but was filed on 14<sup>th</sup> February 2018. **Ms. NATWATI** has therefore urged me to invoke the provisions of **order 50 Rule 6 of the Civil Procedure Rules** and enlarge the time to allow for substitution. That sounds like a very attractive suggestion. However, in the absence of a suit, such an extension will be an academic exercise serving no purpose.

The Applicant is however not entirely without a remedy. **Order 24 Rule 7 (2) of the Civil Procedure Rules** provides him with an avenue to breathe life into the suit by way of an application for its revival. That is what he ought to have done first or simultaneously with this application. In the absence of a suit, there is nothing upon which the application for substitution can be anchored. The Applicant should first move to have this suit revived after which he can apply to be substituted in place of the deceased.

The up-shot of the above is that the Notice of Motion dated 12<sup>th</sup> July 2017 and filed herein on 14<sup>th</sup> February 2018 is incompetent and is struck out with costs.

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> OCTOBER 2018**

Ruling dated, delivered and signed in open Court this 18<sup>th</sup> day of October 2018.  
Mr. Amani for Ms. Natwati for Applicant present

Mr. K'Owino for Respondent – Absent

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> OCTOBER 2018**