



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC JR NO. 13 OF 2016

(Formerly NYERI HC JR NO. 64 OF 2011)

CECILIA WACUKA KAROKO- Legal Representative of

JAMES KAROKO MAHUGU (Deceased) APPLICANT

-VERSUS-

STEPHEN JOSPHAT WAICHIGO WANGUKU

MATHIOYA DISTRICT LAND DISPUTE TRIBUNAL

SENIOR RESIDENT MAGISTRATE COURT AT KANGEMA

STANLEY KAGOTHO MUCHUNU RESPONDENTS

RULING

1. The applicant, **Cecilia Wacuka Karoko** (hereinafter referred to as the applicant) brought the Notice of Motion dated **12th July, 2016** seeking that she be substituted for James Karoko Mahugu, (deceased) the 3rd respondent who died on 9th March, 2011; that after the substitution is allowed, the court be pleased to amend the judgment dated **29th January, 2015** and delivered on **7th February, 2015** as well as costs of the application.
2. The application is premised on the grounds on its face and is supported by an affidavit sworn by the applicant on **12th July, 2016**. In that affidavit, the applicant depones that she was appointed administrator to the estate of James Karoko Mahugu (deceased) vide **Murang'a High Court Succession Cause No 382 of 2013** but court not extract the decree because the judgment had an error. That she filed the instant motion so that the error on page 1 paragraph 2 of the judgment could be corrected to read; "the Notice of Motion was dated 23rd December, 2011" and not 23rd November, 2011 and the decree thereafter extracted with the correct dates. It is her contention that no prejudice will be suffered by the respondents if the error is corrected.
3. None of the respondents filed any document opposing the application. When the application was heard on **17th January, 2017** **Mr Mbutia** appeared for the applicant, **Mr Ndirangu** for the 1st respondent, **Mr Muthui** for the 2nd and 3rd respondents, while the 4th respondent appeared in person. Mr Muthui and the 4th respondent did not oppose the application.

4. **Mr Mbuthia** sought leave to amend the provisions of the law under which the application was brought (**Section 74** of the Law of Succession Act and **Rule 73** of the Probate and Administration Rules) as this was not a succession cause, by having the same deleted and substituted with **Sections 1A, 1B, 3A and 100** of the Civil Procedure Act. The court allowed the verbal application and accordingly amended the provisions of the law. Regarding the motion, Mr Mbuthia submitted that the application is filed to enable the applicant substitute her deceased husband in the pleadings to enable her apply to court to correct an error in the judgment and thereafter extract the decree bearing the correct dates.

5. Mr Ndirangu opposed the motion on the grounds that the suit against the deceased had abated one year after his death and no substitution had been done during the pendency of the suit.

6. In reply, Mr Mbuthia stated that **Order 24** of the Civil Procedure Rules did not apply after judgment.

7. Regarding the prayer for substitution, the applicant seeks to be substituted in place of the late James Karoko Mahugu, (the 3rd respondent) who is also her late husband. The substitution if allowed, give her locus to apply for correction of errors in the judgment and thereafter extract the decree with the correct dates.

8. **Order 24** of the Civil Procedure Rules, 2010 outlines the procedure to be followed when parties are unable to proceed with the case owing to their death and bankruptcy by providing for substitution of the parties by their personal representatives and their trustees in bankruptcy as may be applicable. **Order 24 Rule 10** precludes the application of this Order with regards to the execution of a decree or order, which is applicable in this instant case. The instant motion was filed to substitute the 3rd respondent only for the purpose of correcting the error in the judgment so that the extracted decree is drawn correctly. Since the applicant must first have the capacity to enable her apply to have the error in the judgment corrected, I allow the prayer for substitution.

9. In making this determination, I am guided by the decision of **Kariuki J** in **Fidelity Commercial Bank Limited v Greenwoods Limited & 3 others [2015] eKLR** where he held as follows:

“The cases cited by the Defendant of Athman Omar Zuberi v Mamson Asol Apinde (supra) and Joseph Ng’ang’a Njoroge v Kabiri Mbiti (supra) are distinguished. They did not fall within the ambit of Order 24 Rule 10 of the Civil Procedure Rules, and in which the circumstances of the instant application fall. In this instance, what was pending was the execution process, whilst in the cited cases, the matters were still proceeding. In execution proceedings, the provisions of Order 24 Rules 3, 4 & 7 are precluded, and the Plaintiff, or Defendant or any other party as the case may be, is entitled to proceed with execution proceedings without substituting or making a party to the execution the legal representative of the deceased.”

10. On prayer 2, amendment of judgment to rectify the typing error is provided for in **Section 99** of the Civil Procedure Act as follows:

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

11. There is no doubt that there is an error in the judgment of my brother **Ombwayo J** dated 29th January, 2015 on page 1 paragraph 2 where the Notice of Motion is recorded as “23rd November, 2011” instead of “23rd December, 2011. This being an obvious mistake, I allow the amendment as prayed.

Dated, signed and delivered in open court at Nyeri this 20th day of February, 2017.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Ndirangu for the respondent

N/A for the applicant

Court clerk - Esther