



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN BUSIA**  
**LAND & ENVIRONMENTAL DIVISION**  
**ELC NO. 196 OF 2014**

**JOHN JAMES BARASA.....PLAINTIFF**

**VERSUS**

**CHARLES OLOO ODWORI..... 1<sup>ST</sup> DEFENDANT**

**PAUL MURUNDU.....2<sup>ND</sup> DEFENDANT**

**WILLIAM SHIKUKU CHAIRO.....3<sup>RD</sup> DEFENDANT**

**JOSEPHAT KARANI ODUORI.....4<sup>TH</sup> DEFENDANT**

**SIMEON CHIBOLE ODUORI.....5<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The Respondents herein – **CHARELS OLOO ODWORI, PAUL MURUNDU, WILLIAM SHIKUKU CHAIRO, JOSEPHAT KARANI ODUORI and SIMEON CHIBOLE ODUORI** – filed a notice of Preliminary Objection on 22/5/2017. They filed it through Okutta, their Counsel. The preliminary objection came after an application has filed here on 2/5/2017 seeking to have the Plaintiff – **JOHN JAMES BARASA** – substituted with **FRANCISCA AWINO MIKA**. The Plaintiff is deceased, hence the application to substitute him. The application was filed by Juma, the Applicant’s Counsel.

2. The Respondents oppose the substitution on the ground that the suit has abated. The basis for the objection is that substitution is being sought after expiry of 12 months since the death of the Plaintiff yet the law, precisely Order 24 rule 3(2) of Civil Procedure Rules, enjoin that a suit abates where one year expires without an application for substitution being filed.

3. On 27/7/2017, it was directed that the preliminary objection be canvassed by way of written submissions. To that effect, the Respondents submissions were filed on 27/7/2017. The Respondents submitted that the dead Plaintiff is indicated in the application as the one applying. That was said to be wrong in law as a dead person cannot apply. It was submitted further that the suit had abated. It was pointed out further too that it is not true, as alleged by the Applicant, that an application was made timely at the High Court for grant but was rejected. The Respondents said that no such application was shown and the ruling of the court rejecting it was also not exhibited.

4. The Applicant's submissions were filed on 1/8/2017. It was submitted, *inter alia*, that indeed there was an application for grant made at the High Court with a view to having the Applicant join this case as a party in lieu of the dead Plaintiff. The application was said to be rejected because the Applicant was not the only wife of the deceased. By the time another application was made, time had already expired. The Applicant said that this is a land case and it would be inhuman to shut her out. The preliminary objection was also said to lack merit. According to the Applicant, the Respondents should have responded to the application for substitution instead.

5. On the issue of the dead Plaintiff appearing as the Applicant in the application, the Applicant admitted it as a curable error, not a fatal one as the Respondent would like the court to believe. The issues raised by the respondents were said to be technicalities which the court should overlook.

6. The Respondents decided to respond to the Applicant's submissions. Their response was filed on 3/8/2017. According to them, the issues raised are fundamental and serious and the application is bad in law.

7. I have considered the Preliminary objection and the rival submissions made. It is crucial to note that the notice given by the Respondent was about the abatement of suit. The other emerging issues look more or less like sideshows.

8. I have had a look at the suit as filed and the record of the various times this matter has come up in court. It has been intimated several times that the Plaintiff's side was waiting for a grant from the relevant court in order to move this matter forward. This is a land matter and I would hesitate to end it on technicalities. The Respondents seem to take the view that the Applicant can file a fresh suit even if this one is dismissed. I think the Respondents fail to reckon with provisions of Order 24 rule 7(1) of Civil Procedure Rules which enjoin that where a suit is dismissed under that order, a fresh suit cannot be filed.

9. It would have been useful too if the Respondents looked at the provisions of Order 24 rule 7(2) which mandates the court to revive a suit which has abated. More crucial however is the need to give justice on merits. It is no longer appropriate in this day and age to expect dismissal of a suit on the basis that a certain procedural step has been overlooked or not complied with on time. This is precisely what the Respondents are trying to do here.

10. As pointed out by the Applicant's counsel, Section 19(2) of the Environment and Land Court Act enjoin that proceedings be conducted without undue regard to procedural technicalities. Section 3A of Civil Procedure Act (cap 21) clothes the court with inherent power to ensure that real and substantive justice is done. Procedural concerns therefore should not be allowed to stand in the way of substantive justice. And the need to downplay or even disregard some procedural bottlenecks is to be found also in Section 1A and 1B of the same Act. The overarching concern of these two provisions is that the court should strive to deliver justice on the merits of a case. That is the overriding objective. The Sections enjoin that the ends of any decision or interpretation a court may make should have overall regard to justice on the merits as opposed to undue emphasis on procedural technicalities.

11. All this is what guides me in deciding this preliminary objection. I therefore decline to uphold the preliminary objection. Infact I dismiss it. But in doing so, I must appreciate that the points raised by the Respondent were procedurally sound to a large extent. The Respondents therefore deserve costs of the objection and I award costs to them.

**Dated, signed and delivered at Busia this 29<sup>th</sup> day of November, 2017.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: .....

Defendants: .....

Counsel of Plaintiff: .....

Counsel of Defendants: .....