



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC NO. 722 OF 2014**

STEPHEN NJAU NJOROGE.....1<sup>ST</sup> PLAINTIFF  
RICHARD GICHINI NJOROGE.....2<sup>ND</sup> PLAINTIFF  
JAMES NJOROGE NJAU.....3<sup>RD</sup> PLAINTIFF  
JANE NYAMBURA KINYANJUI.....4<sup>TH</sup> PLAINTIFF  
JOSEPH MUCHEKE.....5<sup>TH</sup> PLAINTIFF  
MUCHENE NJOROGE.....6<sup>TH</sup> PLAINTIFF  
CECILIA NDURUKA NJAU.....7<sup>TH</sup> PLAINTIFF  
FRED NJUKU NJAU.....8<sup>TH</sup> PLAINTIFF

-VERSUS-

LILIAN WAIRIMU NGATHO.....1<sup>ST</sup> DEFENDANT  
ELIZABETH MURUNGARI NJOROGE.....2<sup>ND</sup> DEFENDANT

**RULING**

1. Before me is an application seeking to substitute the 5<sup>th</sup> Plaintiff who is deceased with his widow one Grace Wambui Ragacha. The application is stated to be supported by the affidavit of the advocate, Fredrick Okeyo. It was filed on 24<sup>th</sup> July, 2013, though dated 29<sup>th</sup> January, 2013. The affidavit in support of the application is however sworn by the widow Grace Wambui Ragacha. It was sworn on 3<sup>rd</sup> June, 2013.

2. The application is predicated on the fact that the 5<sup>th</sup> Plaintiff's demise occurred on 31<sup>st</sup> August, 2010. The Supporting Affidavit then states that the widow obtained the Grant ad Litem on 26<sup>th</sup> June, 2012. A copy of the death certificate is annexed as is a copy of the Limited Grant ad Litem issued on the 26<sup>th</sup> day of June, 2012 in succession cause No. 880 of 2012 at Nairobi under Section 54 of the Law of

Succession Act (Cap 160) Laws of Kenya. It was also stated that it was just and fit to allow the application for substitution in the circumstances.

3. The application is opposed through a notice of preliminary objection filed on 6<sup>th</sup> October, 2013. It is stated that the application is an abuse of the process, frivolous and vexatious and only geared towards holding the case in abeyance. It is also stated that the application has been brought outside the stipulated time frame without the leave of the court.

4. The application was slated to be orally urged before me on 3<sup>rd</sup> February, 2015 but only Counsel for the Defendants Mr. Matwere made submissions. Even though the court had directed the parties to argue the application as well as the objections orally, the Applicant's Counsel opted to file written submission and did not appear in court on 3<sup>rd</sup> February, 2015. The court is however obliged to consider the submissions made by the Plaintiff's Counsel as well as the Defendant's counsel. This is in the spirit of the overriding objectives of the process of administering justice which dictates that equal opportunity and fairness be the lead consideration.

5. The brief background to the application herein is that the deceased 5<sup>th</sup> Plaintiff together with several other person filed the instant suit in March, 2006 seeking orders inter alia that they be registered as the proprietors of all that parcel of land known as Kiambaa/Waguthu/385. The suit was then Originating Summons No. 317 of 2006. It was later to be consolidated with Originating Summons No. 972 of 2006. A Replying affidavit was filed on 26<sup>th</sup> March, 2008 and directions were subsequently given that the hearing do proceed by way of viva voce evidence as well as affidavit evidence. Thereafter the suit does not appear to have been actively prosecuted until the filing of the application now under consideration.

6. Two issues can be isolated for consideration. Is the application hopelessly time barred? If not, should the court grant the orders for substitution sought?

7. It is not disputed that the 5<sup>th</sup> Plaintiff is deceased. It is also not in dispute that where one of two or more plaintiffs dies and the cause of action survives then on an application by the legal representative of the deceased the court is to cause such legal representative to be made a party to the suit. Finally, it is not in dispute too that where no application is made within twelve months following the Plaintiff's demise the suit, as so far as the deceased Plaintiff is concerned, abates unless the court extends the time: see **Order 24 Rules 2 & 3** of the **Civil Procedure Rules**.

8. The Applicant submits that the facts outlined in both the application as well as the affidavit in support are unchallenged as there has not been filed a Replying Affidavit. The Applicant further submits that the delay in filing the application was occasioned by the matters beyond her reach. In particular, she points at the delay in obtaining the Grant of letters ad litem. The Applicant is finally of the view that allowing the application will not in any way prejudice the Defendants.

9. The Defendants brief retort is that the application has been filed outside the prescribed time and further that the suit has abated in so far as the 5<sup>th</sup> Plaintiff is concerned.

10. The law and the facts in this matter if juxtapositioned, will lead to a simple and obvious conclusion. The suit herein pursuant to the provisions of **Order 24 Rule 3** of the **Civil Procedure Rules** abated in so far as the 5<sup>th</sup> Plaintiff was concerned on 31<sup>st</sup> August, 2011. Thereafter there was no suit the applicant could seek to enjoin as far as the 5<sup>th</sup> Plaintiff's claim was concerned. The applicant could only have been enjoined if the instant application had been filed prior to 31<sup>st</sup> August, 2011. The applicant could also have been enjoined if the court had extended time for the filing of the application for joinder. As it were the suit abated. As it were too there was never made any application either for extension of time under the proviso to **Order 24 Rule 3(2)** of the **Civil Procedure Rules** or even an application for the revival of the suit which had abated. In the result, there is no suit as far as the 5<sup>th</sup> Plaintiff is concerned to which the 5<sup>th</sup> Plaintiff's legal representative can be made a party to.

11. In the absence of an application for extension of time or revival of the abated suit, can the court on its own motion act and extend such time or revive the suit in the interest of justice? Foremost, it is to be noted that the applicant has not made any application for extension of time. Neither has the applicant sought the court's discretion in the revival of the suit. Even if the court has the powers to extend time or revive the suit in the absence of an application by the concerned Plaintiff's legal representative, I do not hold the view that in the circumstances of this case and on the facts laid before the court, such discretion could be exercised in favour of the applicant. There has been in my view an inexplicable delay. The 5<sup>th</sup> Plaintiff died on 31<sup>st</sup> August, 2010. The applicant did not obtain the grant of letters of administration until June, 2012. By then the suit had long abated. No explanation has been advanced for the delay. Thereafter (after July, 2012), the applicant waited another whole year before filing the application for joinder. Again, no reason was offered for the delay. In such circumstances the court's discretion ought not be positively exercised in favour of the applicant even if there was a formal application for extension of time or revival of suit or if the court decided to act suo moto.

12. The obvious result is that I uphold the Preliminary objection and dismiss the application dated 29<sup>th</sup> January, 2013 with costs to the Defendants.

13. Orders accordingly.

Dated, signed and delivered at Nairobi this 10<sup>th</sup> day of March 2015.

**J. L. ONGUTO**

**JUDGE**

**In the presence of:-**

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent