



**Chiponda (Deceased) & another (As legal representative the Estate of  
Martin Chiponda) v Bandari Investment Co Limited & 15 others (Civil  
Application E033 of 2021) [2024] KECA 225 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 225 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E033 OF 2021  
AK MURGOR, JA  
MARCH 8, 2024**

**BETWEEN**

**MARTIN CHIPONDA (DECEASED) AND FRANCIS RANDUGU  
MWABUNI (AS LEGAL REPRESENTATIVE THE ESTATE OF MARTIN  
CHIPONDA) ..... APPLICANT**

**AND**

**BANDARI INVESTMENT CO LIMITED ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL POLICE SERVICE ..... 2<sup>ND</sup> RESPONDENT  
REGIONAL COORDINATOR, COAST ..... 3<sup>RD</sup> RESPONDENT  
THE HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
COUNTY GOVERNMENT OF MOMBASA ..... 5<sup>TH</sup> RESPONDENT  
ORIOLE INVESTMENT LIMITED ..... 6<sup>TH</sup> RESPONDENT  
MARTIN CHIPONDA ..... 7<sup>TH</sup> RESPONDENT  
HASHIM LOMA MAKAZI ..... 8<sup>TH</sup> RESPONDENT  
OMAR JUMA SALIM CHIVASI ..... 9<sup>TH</sup> RESPONDENT  
MOHAMED MAKAZI ..... 10<sup>TH</sup> RESPONDENT  
CAROLINE OCHIENG ..... 11<sup>TH</sup> RESPONDENT  
MAMA DAMARIS ..... 12<sup>TH</sup> RESPONDENT  
SHIDA CHARO ..... 13<sup>TH</sup> RESPONDENT  
SALIM JUMA ..... 14<sup>TH</sup> RESPONDENT  
RASHID JUMA ..... 15<sup>TH</sup> RESPONDENT**



*(An appeal from the judgment of the Environment and land Court at Mombasa (Sila Munyao, J.) delivered on 28th January 2021 in Mombasa Constitutional Petition No. 15 of 2017)*

## RULING

1. By a Notice of motion dated 30<sup>th</sup> June 2023, brought pursuant to rule 53 of the Court of Appeal rules, 2022, the applicant, Francis Randugu Mwabuni, seeks to be appointed legal representative of the estate of Martin Chiponda (deceased) who died on 18<sup>th</sup> February 2023 and to replace him as the 1<sup>st</sup> applicant in Mombasa Court of Appeal Civil Application No. E033 of 2021 and Mombasa Court of Appeal Civil Application No. E034 of 2021 to avoid them abating.
2. The Notice is brought pursuant to the grounds on its face and an affidavit in support sworn by the applicant in which he contends that he is the brother to the deceased, who died on 18<sup>th</sup> February 2023, and that he was appointed as a legal representative of the estate of Martin Chiponda on 24<sup>th</sup> May 2023; that he is familiar with matters concerning this and related applications, as well as relevant cases and the judgment of the court below. He claimed to be a respondent in Mombasa Court of Appeal Civil Application No. E034 of 2021, and was also the 1<sup>st</sup> defendant in Mombasa ELC No. 15 of 2017 *Bandari Investment Company Limited vs Martin Chiponda and 21 Others*, that was dismissed on 28<sup>th</sup> January 2021 and gave rise to this application, and one concerning pre-emption rights filed by Bandari Investment Co. Limited; that the order of the court in Mombasa Court of Appeal Civil Application No. E034 of 2021 was the genesis of the applicants' request for the empaneling of a larger bench of this Court to address the doctrine of pre-emption under the sub judice rule in civil law in Kenya; that the directions of the President of this Court that granted the empaneling of a larger bench under rule 29 may be rendered nugatory unless he is joined in this application to replace the deceased applicant, and thereafter expeditiously prosecute the applications now pending before the Court; that grave prejudice will be occasioned to the parties and public, if this Court does not set out the law on the rights of pre-emption in the civil law; that it is therefore proper for the applicant to be granted the order to replace the deceased as prayed.
3. The 1<sup>st</sup> respondent filed a replying affidavit in response, sworn by Ken Tobias Odero Sungu, on 21<sup>st</sup> October 2023 where he contended that in a letter dated 12<sup>th</sup> May, 2023, the Deputy County Commissioner, Kisauni stated that the estate of Martin Chiponda (deceased) comprised of 14 beneficiaries, and that an application for a grant of letters of administration was filed by the deceased's father, sister, brothers and wife; that other than the deceased's wife and father, 12 out of 14 of beneficiaries did not sign the consent, relied upon by the applicant to support the application for Grant of Letters of Administration Ad-litem before the lower court; that had the lower court considered this legal issue, it would not have issued the Limited Grant of Letters of Administration Ad-litem dated 24<sup>th</sup> May 2023; that the effect of this anomaly is that the Letters of Administration Ad-litem dated 24<sup>th</sup> May, 2023, are a nullity and should this Court accept that they are a nullity, then it should not rely on them to substitute the deceased with the applicant.
4. During the virtual hearing, learned counsel for the applicant, Mr. Kimani relied on the applicant's written submissions and in highlighting them, counsel stated that the applicant had obtained the necessary letters for substitution of the deceased; that it is in the interest of justice, this Court should allow the application, as it will expedite the hearing of a pending application before this Court. Counsel



further submitted that any objection to the Letters of Limited Grant Ad litem cannot be considered by this Court and that the 1<sup>st</sup> respondent had raised the objection too late in the day.

5. In rebuttal, learned counsel for the 1<sup>st</sup> respondent Mr. Munyithya objected to the application on the basis that the Letters of Limited Grant Ad Litem were a nullity and ought not to be relied on as the basis of the substitution.
6. On behalf of the 2<sup>nd</sup> to 6<sup>th</sup> respondents, learned counsel for the State, Mr. Mkan did not oppose the application for substitution.
7. In so far as an application for substitution is concerned, rule 53 (2) of this Court's rules, 2022 provides that:

“A civil application shall not abate on the death of the applicant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.”

8. The tenets of this provision were emphasized by this Court in the case of *Susan Wamaitiba & another vs Mary Njeri Kimani & another* [2015] eKLR where the Court observed that:

“By dint of Rule 51 (2) of the *Rules* of this court, applications in this Court do not abate on the death of the applicant or the respondent and the Court is enjoined, on the application of any interested person, to cause the legal representative of the deceased to be made a party in place of the deceased. If no application is made within 12 months, the application abates.”

9. From the above, it is clear that upon the application of any interested person, the Court is enjoined to cause the legal representative of the deceased to be made a party in place of the deceased. If no application is made within 12 months, the application abates. In the instant application, the applicant has established the death of the deceased through a death certificate. To validate his appointment as a legal representative, the applicant has also produced Limited Grant of Letters of Administration Ad-litem dated 24<sup>th</sup> May 2023 issued in his favour. The 1<sup>st</sup> respondent opposed the application because he alleges that the Letters of Limited Grant Ad Litem are a nullity as they were obtained without the consent of other beneficiaries. In my view, such assertion is misplaced as it ought to have been made before the court that issued the grant. The record does not disclose that there are any court orders prohibiting their utilization or revoking the Limited Grant Ad-litem issued to the applicant. And neither is there any order declaring them a nullity.
10. As such, the Notice of motion dated 30<sup>th</sup> June 2023 is merited and is allowed. The applicant, Francis Randugu Mwabuni, the legal representative of the Estate of Martin Chiponda Mwabuni hereby substitutes Martin Chiponda (deceased) as the 1<sup>st</sup> applicant in Mombasa Court of Appeal Civil Application No. E034 of 2021. Costs in the appeal.
11. It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MARCH, 2024**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed



**DEPUTY REGISTRAR**

