



**Njuguna v Republic & 5 others; Mungai (5th Respondent) (Substitute) (Civil Appeal (Application) 23 of 2016) [2024] KECA 622 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 622 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAKURU  
CIVIL APPEAL (APPLICATION) 23 OF 2016  
FA OCHIENG, JA  
MAY 24, 2024**

**BETWEEN**

**JAMES MWANIKI NJUGUNA ..... APPLICANT**

**AND**

**REPUBLIC ..... 1<sup>ST</sup> RESPONDENT**

**LAND DISPUTES KIPIPIRI DIVISION ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR, NYANDARUA DISTRICT ..... 3<sup>RD</sup> RESPONDENT**

**NYAHURURU SENIOR PRINCIPAL MAGISTRATE'S COURT ... 4<sup>TH</sup>  
RESPONDENT**

**SAMUEL GACHAU MAINA (DECEASED) ..... 5<sup>TH</sup> RESPONDENT**

**GRACED WANJIKU NJAU ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**BENSON GACHAU MUNGAI ..... SUBSTITUTE**

*(An application for substitution in Nakuru Civil Appeal No. 181 of 2016 arising from the judgment of the Environment and Land Court at Nakuru (M. Sila, J.) delivered on 10th May 2016 in Judicial Review No. 102 of 2011)*

**RULING**

1. The application dated 13<sup>th</sup> November 2017 is for 2 substantive prayers namely;

“ a) That the appeal against the 5<sup>th</sup> respondent be revived; and



b) That the said 5<sup>th</sup> respondent be substituted with his legal representative, Benson Gachau Mungai.”

2. The applicant, James Mwaniki Njuguna is the appellant. He instituted the appeal herein on 14<sup>th</sup> July 2016.
3. Whilst the appeal was still pending, the 5<sup>th</sup> respondent, Samuel Gachau Maina passed away. The information which the applicant obtained in December 2016 was that the 5<sup>th</sup> respondent passed away on 30<sup>th</sup> July 2016.
4. Having obtained the said information concerning the 5<sup>th</sup> respondent, the applicant instructed his advocates to inquire from the advocates for the said 5<sup>th</sup> respondent, about the steps that were being taken to substitute him. A copy of the letter from M/s Gakuhi Chege & Co. Advocates, dated 13<sup>th</sup> December 2016, was annexed to the applicant’s supporting affidavit,
5. According to the applicant, there was no response to his advocates letter dated 13<sup>th</sup> December 2016.
6. On 5<sup>th</sup> October 2017, the applicant’s advocates were served with a replying affidavit which was filed before the High Court, Nyahururu, in the case of Benson Gachau Mungai (Substitute of Samuel Gachau Maina) v Land Disputes Tribunal, Kipipiri Division & 2 others, Judicial Review No 7 of 2017.
7. An annexure marked “GBM-2” was attached to the replying affidavit, and it is the Limited Grant of Letters of Administration *Ad Litem* issued to Benson Gachau Mungai, in respect to the estate of the 5<sup>th</sup> respondent herein.
8. By the time when the applicant first became aware that the 5<sup>th</sup> respondent had been substituted by Benson Gachau Mungai, a period of more than 12 months had lapsed, from the time when the appeal herein had been instituted.
9. Pursuant to the provisions of Rule 102(2) of the *Court of Appeal Rules*, an appeal shall abate if no application is made to replace the deceased appellant or deceased respondent within 12 months from the date of the death of the deceased.
10. Therefore, as the applicant readily conceded, the appeal against the 5<sup>th</sup> respondent abated, as no application was made to substitute him, within 12 months from 30<sup>th</sup> July 2016.
11. It is evident from the conduct of Benson Gachau Mungai, that he was aware of the need to substitute the 5<sup>th</sup> respondent, as that is what he did in Judicial Review No 7 of 2017.
12. Although Benson Gachau Mungai obtained letters of administration ad litem, he only used the same in the case wherein the 5<sup>th</sup> respondent was canvassing the case against the Land Disputes Tribunal, Kipipiri Division & 2 others.
13. Notwithstanding the enquiry made by the applicant’s advocates, concerning the substitution of the 5<sup>th</sup> respondent herein, the said Benson Gachau Mungai’s advocates remained mum.
14. In the circumstances, it was not until the applicant’s advocates were served with the replying affidavit lodged by Benson Gachau Mungai (in the Judicial Review No 7 of 2017) that the applicant became aware of the identity of the person who was the legal representative of the 5<sup>th</sup> respondent.
15. Rule 102 of the *Court of Appeal Rules* provides that:
  - “(1) An appeal shall not abate on the death of the appellant or respondent but the Court shall, on the application of any interested person, cause the legal



representative of the deceased person to be made a party in place of the deceased.

2. If no application is made under sub-rule (1) within twelve months from the date of the death of the appellant or respondent, the appeal shall abate.
  3. The person claiming to be the legal representative of a deceased party or an interested party to an appeal may apply for an order to revive an appeal which has abated and, if it is proved that the legal representative was prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.
  4. An application under sub rule (3) may be made before a single judge.”
16. I am satisfied that the applicant demonstrated a desire to pursue the appeal herein, as he got his lawyers to inquire about substituting the 5<sup>th</sup> respondent, soon after becoming aware that the said 5<sup>th</sup> respondent had passed away.
17. Thereafter, the applicant filed this application soon after becoming aware that the 5<sup>th</sup> respondent’s legal representative was Benson Gachau Mungai on 5<sup>th</sup> October 2017. This Court in the *John Mugambi & 21 others v Kenya National Assurance Co. (2001) Limited* [2016] eKLR case, stated that:
- “The restoration of dismissed appeals is an exceptional relief, for cause, granted to an appellant who would otherwise have no recourse under the general tenet that there has to be an end to litigation. For precisely that reason, such appellant must move the court with expedition. He must move with speed and within a specified time set out in Sub-rule 3;
18. In the face of the application herein, the respondents filed neither a replying affidavit nor submissions. In any event, the evidence which the applicant placed before me persuaded me that it was in the interest of justice and fairness that the appeal be revived.
19. If the court had been called upon to order the revival of the appeal before it became known who was to substitute the 5<sup>th</sup> respondent, it may have been an order in vain.
20. Meanwhile, it would have been unseemly for the applicant to purport to impose a legal representative upon the estate of the 5<sup>th</sup> respondent, considering that the said respondent was one of the six persons against whom he was canvassing the appeal.
21. But now that there is a legal representative who sought and was granted that mandate, justice will be best served by an order that Benson Gachau Mungai do substitute the 5<sup>th</sup> respondent herein.
22. In the result, the appeal against the 5<sup>th</sup> respondent is hereby revived, and the said 5<sup>th</sup> respondent is hereby substituted by his legal representative, Benson Gachau Mungai.
23. The costs of the application shall be paid by the 5<sup>th</sup> respondent.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**F. OCHIENG**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed



**DEPUTY REGISTRAR**

