



**Government of the United States of America v Githongo (Deceased);
Githongo & 3 others (Intended Respondent) (Civil Appeal (Application)
27 of 1999) [2023] KECA 179 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KECA 179 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 27 OF 1999
HM OKWENGU, JA
FEBRUARY 17, 2023**

BETWEEN

GOVERNMENT OF THE UNITED STATES OF AMERICA APPELLANT

AND

JOSEPH MUIRURI GITHONGO (DECEASED) RESPONDENT

AND

MARY WAIRIMU GITHONGO INTENDED RESPONDENT

JOHN MARK GITHONGO INTENDED RESPONDENT

PETER GITAU GITHONGO INTENDED RESPONDENT

JAMES MUGO GITHONGO INTENDED RESPONDENT

*(Being an application by the applicant/appellant for an order to
substitute the respondent (deceased) in Civil Appeal No. 27 of 1999
with his legal representatives. in Civil Appeal No. 27 of 1999)*

RULING

1. This matter was listed before me as a single Judge for hearing of the applicant's notice of motion dated November 15, 2022. The notice of motion is said to be brought under section 3A, 3B and 4 of the *Appellate Jurisdiction Act*, section 37(1), 38(a) and (f) and 98 of the *Civil Procedure Act*, Rule 42(1) of the *Court of Appeal Rules* Order 22, Rule 28(5) of the *Civil Procedure Rules* and all other enabling provisions of the law.
2. The applicant seeks orders as follows:



- i. The Legal representatives of the Estate of Jose Joseph Muiruri Githongo namely Mary Wairmu, John Mark Githogo, Peter Gitau Githongo and James Mugo Githongo be substituted for Joseph Muiruri Githongo.
 - ii. The Registrar of this Honourable Court do execute the transfer documents and any other relevant documents in respect of the properties known as LR. No. 7158/281, LR. No. 7185/282, LR No. 7158/283 and LR. No. 7158/284 Spring Valley Road Nairobi (“The suit property”) to effect the transfer of the suit properties in favour of the appellant.
 - iii. In the alternative the Alternative to 2 above the Chief Land Registrar or such other person authorized by him do execute the transfer documents and any other relevant documents in respect of the properties known as LR. No. 7158/281, LR. No. 7185/282, LR No. 7158/283 and LR. No. 7158/284 Spring Valley Road Nairobi (“The suit property”) to effect the transfer of the suit properties in favour of the appellant.
 - iv. The Chief Lands Registrar or such other person authorized by him do register the transfer instruments under (2) above in respect of the properties known as LR. No. 7158/281, LR. No. 7185/282, LR No. 7158/283 and LR. No. 7158/284 Spring Valley Road Nairobi.
 - v. The Chief Lands Registrar or such other person authorized by him do issue new certificates of lease to the appellant in respect of properties known as LR No. 7158/281, LR. No. 7185/282, LR No. 7158/283 and LR. No. 7158/284 Spring Valley Road Nairobi.
 - vii. Such other orders that this Honourable Court may deem reasonable to grant.
3. In support of the motion, the applicant has filed written submissions and a further affidavit sworn Bert C. Ubamadu. The applicant explains that the citation of Rule 42(1) of *Court of Appeal Rules* in the motion, was an honest but non-fatal mistake and was premised on the previous Court of Appeal Rules 2010; that the correct Rule should now read Rules 44(1) of the *Court of Appeal Rules* 2022. The applicant maintains that the orders it seeks are in no way converse to, but are complementary to and aligned with the objective and spirit of the judgment of this court dated July 14, 2000.
 4. In the written submissions, the applicant explains that it seeks to substitute the deceased respondent with the intended respondents who are administrators of his estate. This is with a view to continuing execution proceedings that were commenced against the deceased respondent. The applicant seeks additional orders directing the Registrar of Lands to execute the property transfer instruments, register the same and issue fresh title deeds to the applicant. This is necessitated by the refusal of the deceased respondent and the Registrar of this Court to execute the transfer as ordered by the court on July 14, 2000.
 5. Due to the orders that I propose to make that I shall shortly explain, I do not find it is necessary to go deeply into the intended respondents’ position, suffice to state that they oppose the motion and have filed written submissions in which they raise three issues. First is whether the applicant’s notice of motion is defective for invoking the Civil Procedure Rules; second, is whether the cause of action survived the deceased respondent, and thirdly, is whether the execution order sought is time barred.
 6. From the court record, it is apparent that the applicant’s appeal was heard by this court (Omollo, Akiwumi & Tunoi, JJ.A) and a judgment delivered on July 14, 2000. The orders arising from this judgment that is now subject of the application before me, were as follows:
 - “(i) This appeal be and is hereby allowed with costs.
 - ii. The Judgment of the superior court be and is hereby set aside.



- iii. The Respondent do transfer to the Appellant within ninety days from 14th July, 2000, the Spring Valley Properties namely L.R. 7138/281, L.R. 7138/282, L.R. 7138/283 and L.R. 7138/284.
 - iv. The appellant do deposit with the Deputy Registrar of the Court of Appeal for the benefit of the respondent, any sums that upon the exercise of the appellant's option to purchase on the dates already identified may be certified by the Deputy Registrar of the Court of Appeal as due to the respondent under the lease purchase agreement.
 - v. All sums that have been paid by the appellant to the respondent in respect of the respondent's said four Spring Valley properties by way of rent shall be taken into account.
 - vi. The Deputy Registrar of the Court of Appeal do transfer the said properties to the Appellant if the Respondent fails to do so upon the deposit of such sums with the Deputy Registrar by the Appellant.
 - vii. Costs of this Appeal to the appellant.”
7. Pursuant to the judgment of the Court, execution proceedings were commenced and the applicant paid the monies due to the deceased respondent into court on September 29, 2000 and October 12, 2000. The deceased respondent was thereafter given an opportunity to comply with the orders of the court but not only refused, failed, or neglected to surrender the title deeds but also failed to execute the transfer instruments despite the applicant being in possession of the suit property, and having been there, from December 7, 1987.
8. Rule 55 of the *Court of Appeal Rules*, 2022 states as follows:
- “(1) each application other than applications specified in sub rule (2) shall be heard by a single judge:
Provided that such application may be adjourned by the judge for determination by the Court.
 - 2. This rule shall not apply to –
 - a. an application for leave to appeal;
 - b. an application for stay of execution, injunction, or stay of further proceedings;
 - c. an application to strike out a notice of appeal or an appeal; or
 - d. an application made as ancillary to an application under paragraph (a) or (b) or made informally in the cause of a hearing.”
9. The substantive prayers in the applicant's motion as reproduced in paragraph 2 of this Ruling, are substitution of the deceased respondent in prayer (i), whilst prayers (ii) (iii) (iv) and (v) are all prayers dealing with the issue of execution of the judgment of this court. It is evident from the affidavit filed in support and the grounds stated in the motion that the substitution of the deceased respondent is also sought for the purposes of execution of the orders of July 14, 2000. Although the prayers are not prayers for stay of execution, which under Rule 55(2) would be outside my jurisdiction as a single judge, the prayers sought are anchored on orders that were made by a full bench of this court, and prayers (iv)



& (v) of the applicant's motion effectively seek to vary the orders that were made by the full bench. It would not therefore be appropriate for me as a single Judge to deal with the application.

10. It is for the above reasons that I invoke the proviso to Rule 55(1) of the *Court of Appeal Rules, 2022* and refer the application dated November 15, 2022, to a full bench which shall be empaneled by the President of the Court. In light of the circumstances of this matter, the orders sought to be executed having been made on July 14, 2000, I direct that this matter be urgently placed before the President of the court for appropriate action.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

