



**Ng'ang'a Mungai Muhindi (Administrator of the Estate of Mungai Njoroge) v Njoroge & another
(Civil Appeal (Application) 119 of 2013) [2022] KECA 149 (KLR) (18 February 2022) (Ruling)**

Neutral citation: [2022] KECA 149 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 119 OF 2013
DK MUSINGA, JA
FEBRUARY 18, 2022**

BETWEEN

**NG'ANG'A MUNGAI MUHINDI (ADMINISTRATOR OF THE ESTATE OF
MUNGAI NJOROGE) APPELLANT**

AND

KIARIE NJOROGE 1ST RESPONDENT

MUNGAI MUHINDI 2ND RESPONDENT

*(An application for leave to substitute the 1st appellant herein and for review
of the Judgment of this Court delivered on the 7th day of August 2020)*

RULING

1. Before me is an application dated 8th February 2021 brought by Ng'ang'a Mungai, (the applicant) the administrator of the estate of Mungai Njoroge who intends to be joined in this matter in place of Mungai Njoroge (deceased). The application is said to be brought under the provisions of Articles 50 (1) and 159 of *the Constitution* of Kenya, 2010, section 80 of the *Civil Procedure Act* and Orders 1A, 1B, 3A and rule 1 (1) of the *Civil Procedure Rules, 2010*.
2. This is an omnibus application through which the applicant prays for a multiplicity of orders as follows:
 - a. That leave be granted for the firm of Odhiambo Ogutu & Co. Advocates to come on record for the appellant instead of Ngarega Waiyaki & Co. Advocates;
 - b. That the application herein be certified as urgent and be heard exparte in the first instance;



- c. That leave be granted for the personal representative of the 1st appellant, Ng'ang'a Mungai Muhindi, to be enjoined in this suit in his stead;
 - d. That this Court do stay the execution of its judgment delivered on 7th August 2020 as well as the decree emanating therefrom pending the hearing and determination of this application;
 - e. That this Court do review its judgment delivered on the 7th day of August 2020 to the effect that:
 - a. the portion of land awarded to the 2nd appellant be reduced from 2 acres to 1 acre.
 - b. the Court do find that by the time of writing the judgment in the High Court Case No. 92 of 1991, the Hon. Judge had ceased to have jurisdiction to write and render the said judgment and therefore set it aside.
 - f. That pursuant to the issuance of the Order in (d) above, the Court do order that the matter be heard and determined afresh or proceed in any other manner as the Court may deem fit;
 - g. Costs be provided for.
3. The background to this matter is a land dispute involving the deceased and the respondents, who are brothers, over a parcel of land known as Gatamaiyu/Nyanduma/203 (hereinafter referred to as "suit land") said to measure about 9.40 acres.
 4. The dispute was heard by the High Court at Nairobi vide Civil Suit No. 92 of 1991 and on 17th February 2012 Koome, J. (as she then was), delivered a judgment in the matter. The court noted in the judgment that the claim by the 2nd appellant had not been challenged and accordingly awarded him 2 acres of the suit land. Of the balance of 7.40 acres, the deceased was awarded 3.40 acres while the 1st and 2nd respondents were each awarded 2 acres.
 5. The deceased was dissatisfied with that judgment and filed Civil Appeal No. 119 of 2013. The appeal has since been dismissed vide a judgment of this Court dated 7th August 2020.
 6. The grounds in support of this application are set forth on the face of the application and also from the supporting affidavit sworn by the applicant on 8th February 2021. For starters, the applicant avers that the deceased died on 30th March 2018 and therefore he intends to replace him. The applicant further states that he obtained letters of administration of the deceased's estate on 9th November 2018 from the Githunguri Law Courts.
 7. The applicant states that he is aggrieved by the manner in which judgment in both the High Court and this Court were rendered and thus lodged the review application herein. The applicant specifically takes issue with the judgment of the High Court and the learned judge who delivered it, arguing that by the time she wrote and rendered the judgment she had already been appointed a judge of this Court and therefore she had no jurisdiction to render herself as she did.
 8. It is also the applicant's argument that there is a draft decree that has already been served upon him and he is therefore apprehensive that this Court might endorse it and the respondents may execute it to his detriment and that of the deceased's estate.



9. The application is opposed by way of a replying affidavit sworn by the 2nd respondent on 1st March 2021. The 2nd respondent acknowledges that indeed the deceased died on 30th March 2018. He also avers that litigation must at some point come to an end noting that the dispute between the parties has been before various courts for more than 30 years now. The 2nd respondent avers that he is elderly and the Court should therefore allow him to enjoy the fruits of his judgment by disallowing this application.
10. In his replying affidavit, the 2nd respondent annexed an application by the 1st respondent dated 17th May 2021 in which he is seeking orders, inter alia, that the Deputy Registrar of this Court be allowed to execute the transfer documents in accordance with the judgment of this Court. This application has already been served upon parties.
11. The Court directed that this application be heard by way of written submissions without the attendance of counsel. In urging this application, the applicant relies on his written submissions dated 16th April 2021. The applicant submits that he has withdrawn the claim on the award of 2 acres of land to the 2nd appellant via a Notice of Withdrawal filed before this Court.
12. On the question of jurisdiction, the applicant argues that the learned judge lacked jurisdiction to render the High Court judgment. The applicant has cited the cases of *Geoffrey M. Asanyo & 3 Others vs Attorney General [2018] eKLR* and *Owners of Motor Vessel Lilian vs Caltex Oil (Kenya) Ltd [1989] eKLR* in support of his argument.
13. In his further written submissions dated 4th June 2021 and filed pursuant to the directions of this Court issued on 3rd June 2021, the applicant submits that his application to substitute the deceased has anchorage on order 24 rule 3 of the Civil Procedure Rules, 2010.
14. The 2nd respondent vide his written submissions dated 8th June 2021 adopts the averments contained in his replying affidavit and urges the Court to dismiss the application with costs. On his part, the 1st respondent has put in written submissions which are dated 25th May 2021. Upon perusal of the submissions, I note that the same are in respect of the application dated 17th May 2021 and not relevant to the application under consideration.
15. Although the applicant argues that his application for substitution has anchorage on order 24 rule 3 of the Civil Procedure Rules, 2010, that is not correct. Order 24 rule 3 deals with the procedure in case of death of one of several plaintiffs or of a sole plaintiff in High Court matters. It is rule 99 of the Rules of this Court which deals with the procedure in case of death of a party in an appeal. The rule reads as follows:

“99. Death of party to appeal

1. An appeal shall not abate on the death of the appellant 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.
2. If no application is made under sub-rule (1) within twelve months from the date of death of the appellant or respondent, the appeal shall abate.
3. The person claiming to be the legal representative of a deceased 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



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.”

16. The applicant has not cited rule 99 in his application. According to the averments contained in the supporting affidavit of the applicant, the deceased passed away on 30th March 2018 and subsequently on 9th November 2018, the applicant obtained letters of administration in respect of the deceased’s estate.
17. Pursuant to rule 99 (2), if the application for substitution is not made within 12 months from the date of death of the appellant or the respondent, the appeal shall abate. The applicant has not told this Court why he did not apply to have the deceased substituted immediately he obtained letters of administration.
18. The applicant has not sought an order to revive the appeal or an order for extension of time to make the application to revive the appeal. The appeal having abated by dint of rule 99(2), and in the absence of an application for its revival, I have no jurisdiction to grant the order for substitution.
19. Having so held, it would be superfluous to make a determination in respect of the other orders sought by the applicant. In any case, some of the orders sought by the applicant do not fall within my jurisdiction as a single judge by dint of rule 53 of the Rules of this Court.
20. In the upshot, I find the application lacking in merit and accordingly dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

