



**Mbochi v Karanja (Civil Appeal E393 of 2021)  
[2022] KECA 1075 (KLR) (7 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1075 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL E393 OF 2021  
GWN MACHARIA, JA  
OCTOBER 7, 2022**

**BETWEEN**

**PAUL WANDATI MBOCHI ..... APPELLANT**

**AND**

**STEPHEN KIMOTHO KARANJA ..... RESPONDENT**

**RULING**

**Brief Background**

1. The applicant herein was sued by the deceased respondent in the Environment and Land Court (ELC) Case No. 569 of 2008 vide a Complaint dated 19<sup>th</sup> November, 2008. The respondent sought a mandatory injunction for the appellant to remove all obstructions from the passage, a permanent injunction against the appellant from interfering with his parcel of land or from demolishing and pulling down any construction on his portion of land, general damages for trespass and costs of the suit. He averred that the appellant had pulled down his perimeter fence and wrongfully placed obstructive objects at his gate preventing him from using the access road or accessing his residence.
2. The appellant refers to an ELC judgment dated 30<sup>th</sup> April, 2019 which he is appealing against, though the same is not in his record of appeal so it is not clear to ascertain what the findings and reasoning of the lower court were. It is however evident that he lost and was dissatisfied with the said judgment.



## The application

3. Before me is a Notice of Motion dated 15<sup>th</sup> July, 2021 and brought under Order 24 Rules 1, 4, and 9, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all other provisions of the law by the appellant, seeking;
  - a. This Honorable Court be pleased to substitute the deceased Respondent Stephen Kimotho Karanja with his wife, Ann Wanja Kimotho as the 1<sup>st</sup> respondent in this suit.
  - b. This Court be pleased to join the deceased's mother, Rebecca Wambui Karanja to this suit as the 2<sup>nd</sup> Respondent.
  - c. This honorable Court be pleased to make such further or other Orders as it may deem just and expedient in the circumstances of this case.
  - d. The costs of this application be provided for.
4. The application is based on the grounds on the face of it and on the supporting affidavit of the appellant sworn on 15<sup>th</sup> July, 2021.
5. As earlier indicated, the appellant has appealed against the judgment of the Land and Environment Court at Nairobi of S. Okong'o, J. delivered on 30<sup>th</sup> April, 2019 in ELC Suit No. 569 of 2008. The Memorandum of Appeal is dated 15<sup>th</sup> July, 2021. The case for the appellant is that he is unable to pursue the appeal because he learnt through the media, more so the Nation Newspaper through a death announcement of 3<sup>rd</sup> May, 2021 (annexed to the supporting affidavit) that the respondent had passed on, on 29<sup>th</sup> April, 2021. He thus sought to find out who was the administrator of the deceased's estate or his legal representative but learnt that the family was yet to file any succession proceedings on the estate of the deceased. That while the family was making funeral arrangements, the deceased's wife one Ann Wanja Kimotho went to the suit property and became known to him. Further, one Rebecca Wambui Karanja is the deceased's mother who has been residing on the suit property and is in fact aware of the details of this case. That the two persons identified and named are some of the beneficiaries of the deceased's estate that are known to the applicant and as such ought to be substituted and included as parties to the appeal as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. The appellant adds that the appeal is meritorious and if the two persons named or either of them is not made a substitute of the deceased, he stands to suffer irreparable damage and thus prays that the application be allowed.
6. No submissions were filed.

## Determination

7. I have carefully considered the Motion, the grounds thereof, the supporting affidavit and the law.
8. The application is premised on Order 24 Rule 1, 4 and 9 of the Civil Procedure Rules which provide as follows;

“Rule 1: No abatement by party's death if right survives.

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

Rule 4: Procedure in case of death of one of several defendants or of sole defendant.



- i. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

Rule 9: Application of Order to appeals.

In the application of this Order to appeals, so far as may be, the word plaintiff shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.”

9. In his application, the appellant avers that the two persons named and sought to substitute for the deceased respondent are some of the beneficiaries known to him. However, the law is quite clear as who may be made a party to a suit, being the legal representative of the estate of the deceased respondent. No evidence has been placed before the court to establish that the two named persons are indeed the wife and mother of the deceased respondent respectively or more importantly, the legal representatives of the deceased’s estate. The appellant’s mere claim without proof that they are beneficiaries of the deceased cannot be the basis upon which a court allows substitution of deceased parties. The law speaks in no uncertain terms that a party sought to be substituted must be the legal representative of the deceased party. This threshold has not been met by the appellant herein.
10. The upshot of the above finding is that this application is devoid of merit and the same must fail. Accordingly, the applicant’s Notice of Motion dated 15<sup>th</sup> July, 2021 is hereby dismissed with no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER, 2022.**

**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

