



IN THE COURT OF APPEAL

AT NYERI

[CORAM: SICHALE, JA: (IN CHAMBERS)]

CIVIL APPLICATION NO. 1 OF 2013

BETWEEN

EDWARD NJAGI MUGO.....1<sup>ST</sup> APPLICANT

GIDEON KIURA MUGO.....2<sup>ND</sup> APPLICANT

VERSUS

STEPHEN MUNA MUGO.....1<sup>ST</sup> RESPONDENT

MUGO NYAGA.....2<sup>ND</sup> RESPONDENT

ANTHONY MBIRI NDWIGA.....3<sup>RD</sup> RESPONDENT

-AND-

JAMES NDEGWA.....1<sup>ST</sup> INTRESTED PARTY

ANTHONY WAWERU NDAMBIRI.....2<sup>ND</sup> INTRESTED PARTY

*(Being an Application for Substitution and Enlargement of time to*

*substitute the deceased Respondents in Embu Civil Appeal No.27 of 2000)*

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RULING OF THE COURT

Before me is a motion dated 8<sup>th</sup> April 2019, said to be brought pursuant to Order 24 Rule 3 (2), Rule 4 & Rule 7 (2) of the Civil Procedure Rules, 2010 Section 3A and 3B of the Appellate Jurisdiction Act, CAP 9 of the Laws of Kenya and Rule 42 (1) and 43 (1) of the Court of Appeal Rules 2010 in which Edward Njagi Mugo and Gideon Kiura Mugo (*the applicants herein*) seek the following orders:

*“1. That the Honourable Court be pleased to grant the appellants/applicants enlargement of time within which to substitute the deceased respondents.*

*2. That the Honourable court be pleased to reinstate and/or revive this appeal.*

*3. That upon reviving and/or reinstating this suit, this Honourable Court be pleased to substitute all the Respondents herein being Stephen Muna Mugo, Mugo Nyaga and Anthony Mbiri Ndwiga (all deceased) with the interested parties being James Ndegwa and Anthony Waweru Ndambiri.*

*4. That costs of this Application be in the cause.”*

The motion is supported on the grounds on the face of the motion and an affidavit sworn by Alexander Peter Kariithi, the Advocate who

has the conduct of this matter on behalf of the Applicants who deponed *inter alia* that the respondents herein are all deceased and that they died after he had lodged the appeal in court in the year 2003; that the applicants herein have always been in occupation of the 2 suit lands being **Baragwi/ Thumaita/1587** and **1588** since the original suit was instituted in the year 1998 and that when the 3<sup>rd</sup> respondent passed on, his family lodged succession proceedings being Kerugoya High Court Succession Cause No. 24 of 2017 and that neither him nor the applicants knew that succession proceedings were filed in court and more so that one of the suit lands being **Baragwi/Thumaita/1587** was listed as forming part of the estate of the deceased; that, the interested parties herein have the *locus standi* to be substituted in place of the deceased respondents as one of the suit lands being **Baragwi/ Thumaita/1587** is registered in their names and the cause of action does in fact lie with them. He further deponed that they seek that the interested parties herein be substituted in place of the deceased respondents in this appeal since they were the current registered proprietors of Land Parcel No. **Baragwi/Thumaita/1587** and were quite fixated on trying to sell the land in a bid to defeat justice and that the prayers being sought would not be prejudicial to the interests of the parties herein and that further there was no inordinate delay in filing the instant application.

The application was opposed vide a replying affidavit filed in court on **7<sup>th</sup> June, 2019** by **James Ndegwa** the 1<sup>st</sup> interested party herein who deponed *inter alia* that under Order 24 Rules 3 (1) and 4 (1) of the Civil Procedure Rules, only the legal representative of a deceased party can substitute and proceed with the matter and that they have never been the legal representatives of any of the 3 deceased respondents and that the only reason advanced by the applicants was that they were the current registered owners of the suit land herein namely: Baragwi/Thumaita/1587, having purchased the said land from Kenneth Kariuki Mbiiri, the son of the now deceased 3<sup>rd</sup> respondent. He further deponed that it was clear that the parties were very close family members being father, mother and sons and that there was no way therefore that the applicants could have failed to learn about the deaths of the respondents and that as such there was no explanation given for the delay in filing the application for substitution.

The applicants did not file submissions despite having been given ample time to do so.

On the other hand, it was submitted for the interested parties that the applicants had only invoked the Order which governs substitution of deceased parties in a suit and had failed to invoke the critical orders to be sought first before embarking on substitution of the deceased respondents. It was further submitted that all the respondents died between the years 2014-2017 and that upon close look of the ruling delivered by the High Court on **16<sup>th</sup> January, 2019**, it was more than clear that the parties were very close family members being father, mother and sons and that there was no way that the applicants could have failed to learn about their deaths and there was no reasonable explanation given as to why the application for substitution was filed in the year 2019 despite the fact that the respondents died between the years 2014-2017.

Finally, it was submitted that for a party to be substituted in place of a deceased party, the intended substitute must have taken letters of administration of that estate and that the interested parties had never taken such letters and were not representatives of the estates of the two deceased respondents and thus could not act on their behalf. For this proposition, reliance was placed on the case of **Registered Trustees of Ruiru Sports Club & 3 others vs. Isaac Karuri Nyongo & 15 others [2014] eKLR**.

I have carefully considered the motion, the grounds thereof, the supporting affidavit, the replying affidavit, the interested parties' submissions and the law.

The applicants are seeking *inter alia* enlargement of time within which to substitute the deceased respondents. Rule 4 of this Court's Rules guides the court in applications for enlargement of time. In the instant case however the applicants have however not invoked that Rule. In **Daniel Kimani Njihia v. Francis Mwangi Kimani & Another [2015] eKLR**, the Supreme Court of Kenya stated thus:

**“Objections to the recourse to improper legal provisions did not come from the other parties. However, the extraordinary standing of this Court would demand that, in principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution.”** [Emphasis Added]

Be that as it may **Order 24 Rule 3 (2) of the Civil Procedure Rules** pursuant to which the instant application is premised provides as follows:

**“ 3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3.]**

***(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.*** (Emphasis supplied)

***(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time”***

The provisions of the above Rule are quite clear that only a legal representative of a deceased person can be made party to the suit for purposes of this Rule. In the instant case it is quite clear that the interested parties herein have never been the legal representatives of the 3 deceased respondents. It would appear that the gist of the applicants' application is that the interested parties are the current registered owners of the suit land herein namely: **Baragwi/ Thumaita/1587** having purchased the said land from Kenneth Kariuki Mbiiri, the son of the deceased 3<sup>rd</sup> respondent who was allocated the said land through a succession cause. That however cannot be a basis of substituting the deceased respondents with the interested parties herein as they are clearly not their legal representatives.

Taking into totality all the circumstances in this case, and having come to the conclusion that the interested parties are not legal representatives of the deceased respondents and having found that the applicants have invoked wrong provisions of the law, it is my considered opinion that the applicants' application is devoid of merit and the same must fail.

Accordingly, the applicants' motion dated **8<sup>th</sup> April 2019** is without merit and the same is accordingly dismissed in its entirety with no order as to costs

**DATED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JUNE 2021.**

**F. SICHALE**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**