



Ndirangu v Magadi Soda Company Limited & 7 others; Ndirangu (Interested Party) (Civil Appeal (Application) E071 of 2021) [2021] KECA 199 (KLR) (5 November 2021) (Ruling)

Neutral citation: [2021] KECA 199 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E071 OF 2021
F SICHALE, JA
NOVEMBER 5, 2021**

BETWEEN

GLADYS WANJIKU NDIRANGU APPELLANT

AND

MAGADI SODA COMPANY LIMITED 1ST RESPONDENT

TOWN COUNCIL OF KAJIADO 2ND RESPONDENT

PATRICK KORES 3RD RESPONDENT

ALEX CHAU KAMAU 4TH RESPONDENT

DANIEL TIMAIYIO NKARU 5TH RESPONDENT

FRANCIS MUTUA KIMEU 6TH RESPONDENT

JUDITH K. WAMBUA 7TH RESPONDENT

DUNCAN NDIRANGU KIHUHA 8TH RESPONDENT

AND

ISAIAH GICHU NDIRANGU INTERESTED PARTY

(Being an Application for Substitution of the Applicant as the Personal Representative of the 8th Respondent herein Duncan Ndirangu Kibuha- Deceased in Civil Appeal No. E071 of 2021)

RULING

1. Before me is a motion dated 8th June 2021 and brought pursuant to the provisions of Order 42 Rule (1), Order 43 Rule (1), Order 45, Order 47, Order 49, 50, 53 and Order 54 and Order 85 (2) of the



Court of Appeal Rules, 2010, Article 159 of the Constitution and all other enabling provisions of the law in which Isaiah Gichu Ndirangu (the applicant herein) seeks the following orders:

1. Spent.
2. THAT the applicant be substituted for Duncan Ndirangu Kihuha (deceased) as the 8th respondent in civil appeal No. E071 of 2021 for the purpose of filling/defending the suit and filing submission as directed by the court during the case management.”
2. The motion is supported on the grounds on the face of the motion and an affidavit sworn by the applicant who deposed inter alia that he was one of the surviving sons of the Duncan Ndirangu Kihuha (deceased) who was the 8th respondent in Civil Appeal No. E071 of 2021 and that during delivery of judgment in ELC Civil Case No. 232 of 2006 (OS), delivered on 17th December 2020 by Okongo J, the 8th respondent (then 2nd plaintiff) had passed away having died on 21st November 2018.
3. He further deposed that he had obtained Letters of Administration (*Ad Litem*) dated 8th April 2021 to substitute and replace the aforesaid 8th respondent; Duncan Ndirangu Kihuha (deceased).
4. The application was opposed by the 1st respondent vide grounds of opposition dated 28th June 2021 in which it contends inter alia that the application is incompetent and materially defective having been brought nearly 3 years after the demise of the 8th respondent on 21st November 2018 and that further the suit abated on 21st November 2019 during the pendency of the case before the ELC court by virtue of Order 24 Rule 3 (2) of the Civil Procedure Rules.
5. It was submitted for the applicant that the 8th respondent died on 21st November 2018 and that as provided for under Rule 85 (2) of the Court of Appeal Rules, an appeal will not be incompetent by reason only that the respondent was dead at the time it was instituted and that applicant had adduced Letters of Administration Ad Litem dated 8th April 2021 clearly identifying him as the appointed administrator and therefore a proper party to substitute the 8th respondent.
6. It was further submitted that the judgment in the trial court was delivered on 17th December 2020, way before the Letters of Administration Ad Litem were taken out and as such the application, could not have been made at the trial court after delivery of judgment, since the court was *functus officio* and that in any event, a reading of Order 24 Rule 3 (2) of the Civil Procedure Rules, revealed that for a good reason on application, the one year limitation could be extended but cannot be extended by a court that was *functus officio*.
7. He further submitted that it was a requirement of Civil Procedure Rules that on the death of a plaintiff and where an application for substitution was not made within the stipulated time that the suit shall abate as far as the deceased plaintiff was concerned but that in the instant case, adverse orders were made against the 8th respondent which would justify the need to have a legal representative of the 8th respondent have an audience before court.
8. In support of the instant motion, it was submitted by the appellant that upon the demise of the 8th respondent while the matter was still pending at the trial court and the suit being premised on ownership of property that Order 24 Rule 2 of the Civil Procedure Rules dictates if the cause of action continues to the surviving plaintiff, the court shall cause an entry to that effect to be made on record and upon making of the entry, the suit should proceed at the instant of the surviving plaintiff and that in the instant case, the Court failed to appreciate this requirement of the law and went ahead and made adverse orders against the 8th respondent and that in view of the foregoing, the interests of justice



would require the 8th respondent's legal representative be allowed as a party to the suit for purposes of protecting the deceased's interests.

9. On the hand, the 1st respondent in opposing the application submitted inter alia that the suit in respect of the 8th respondent had abated and that the application ought to have been lodged before the High Court prior to delivery of judgment of 17th December 2020 and prior to its abatement and that as such, the application was not merited and ought to be dismissed in its entirety.
10. I have carefully considered the motion, the grounds thereof, the supporting affidavit, the grounds of opposition, the rival submissions by the parties, the cited authorities and the law. First of all, the provisions of the law upon which the application is premised namely; "Order 42 Rule (1), Order 43 Rule (1), Order 45, Order 47, Order 49, 50, 53 and Order 54 and Order 85 (2) of the Court of Appeal Rules, 2010" are non-existent in our laws since the Court of Appeal Rules 2010, provide for "rules" and not "orders."
11. Be that as it may, the applicant herein who is in person seeks to be substituted for Duncan Ndirangu Kihuha as the 8th respondent in Civil Appeal No. E071 of 2021. It is not in dispute that the judgment herein was delivered on 17th December 2020 way long after the 8th respondent; Duncan Ndirangu Kihuha had died on 21st November 2018. It is also not in dispute that the applicant obtained Letters of Administration Ad Litem on 8th April 2021, long way after the judgment had been pronounced. It is also not in dispute that the suit against the 8th respondent abated on 21st November 2019 one year after his demise.
12. Order 24 Rule 1 of the Civil Procedure Rules provides as follows:

No abatement by party's death if right survives [Order 24, rule 1.] The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues." (Emphasis added).

Rule 3 on the other hand provides:

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

Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiffs 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 added).

In the instant case the High Court inter alia made the following orders:

"4 the plaintiffs shall meet the costs of the subdivision**//

6 the plaintiffs claim against the interested parties is dismissed with costs."

13. It is clearly evident from the orders of the court that cause of action survives the deceased 8th respondent who was the 2nd plaintiff in the trial court. The judgment herein was delivered 17th December 2020, whereas the 8th respondent died on 21st November 2018 and the applicant obtained Grant of Letters Administration Ad Litem 8th April 2021 long after the judgment had been delivered and the trial court having become functus officio. It is therefore inconceivable that the applicant would have made an application for substitution before being issued with Grant of Letters of Administration Ad Litem and long after the court had become functus officio



14. Rule 85 (2) of the Court of Appeal Rules 2010, gives this Court wide discretion in applications of these nature. The same provides:
 - (2) An appeal shall not be incompetent by reason only that the respondent was dead at the time when it was instituted 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.”
15. In the instant case save for the 1st respondent who has opposed the applicant’s application, the other respondents have not opposed the same and it has not been demonstrated to this Court that the 1st respondent will suffer any prejudice if the instant application is allowed.
16. From the circumstances of this case, it would be in the interests of justice for the instant application to be allowed so that the applicant can take care the interests of his deceased father’s Estate (the 8th respondent herein).
17. Accordingly, I find the applicant’s motion dated 8th June 2021 to be merited and the same is accordingly allowed with an order that the applicant herein Isaiah Gichu Ndirangu be substituted for Duncan Ndirangu Kihuha (deceased) as the 8th respondent in Civil Appeal No. E071 of 2021.
18. There will be no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2021.

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

