



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: WAKI, NAMBUYE & KIAGE, JJA)**

**CIVIL APPEAL NO. 323 OF 2009**

**BETWEEN**

**BEATRICE MICHERE MUGO .....APPELLANT**

**AND**

**JAMES MURIITHI GICHURA.....RESPONDENT**

*(Appeal from the decision of the High Court of Kenya at Nyeri (Kasango, J.) Dated 14<sup>th</sup> October, 2008*

in Nyeri H. C.C.A. NO. 104 of 2001)

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**RULING OF NAMBUYE, JA**

**Introduction and Background**

1. The applicant **Beatrice Michere Mugo** moved to this Court and presented appeal No. 323 of 2009 directed against the then respondent **James Muriithi Gichura** (now deceased), on which the applicant anchored a Notice of Motion dated and lodged in this Courts' Registry on the 24<sup>th</sup> June, 2010 seeking leave of court to file a supplementary record of appeal to include the documents mentioned in the body of the said application as having been in advertently left out by the applicant when compiling the record of appeal. The said application which had been grounded on the applicants supporting affidavit and opposed by a replying affidavit of **James Muriithi Gichura** (deceased) of 14<sup>th</sup> October, 2010 was dismissed by **Waki, JA** on the 25<sup>th</sup> day of October, 2010 for want of prosecution.
2. Undeterred the applicant moved to this same venue and presented a Notice of Motion under unspecified rules of this Court, lodged in this Court on the 9<sup>th</sup> day of June, 2011 substantively seeking leave of court to file an application for restoration of the application dated 24<sup>th</sup> June, 2010 which had been dismissed for want of prosecution. It was supported by the supporting affidavit of the applicant.
3. The said application came up for hearing before **Waki, JA** on the 27<sup>th</sup> day of October, 2011 when it transpired that one **James Muriithi Gichura** (deceased) had died on 30<sup>th</sup> day of August, 2011. A death certificate number 063601 issued on the 27<sup>th</sup> day of September, 2011 was produced to that effect. The matter was accordingly adjourned to pave the way for the substitution of the deceased

in accordance with this Courts Rules. On the 5<sup>th</sup> day of February, 2013 **Ouko, JA** adjourned the same application for the same reason of non-substitution of the deceased respondent.

4. It is against the above background information that the applicant has presented the Notice of Motion under review brought under **rules 54 and 96** of this Courts Rules and all enabling provisions of the law. Three substantive prayers are sought. These are:-
  1. ***That the Honourable court may be pleased to extend time within which to substitute the deceased respondent herein James Muriithi Guchura.***
  2. ***That this Honourable court may be pleased to substitute the deceased respondent herein James Muriithi Gichura with Jennifer Wangechi Muriithi and Mwangi Muriithi.***
  3. ***That in the alternative and without prejudice to prayer (2) above, this Honourable court do order the Public Trustee to be substituted the respondent forth with.***
  4. ***That costs of the application be provided for.***
5. The application is grounded on the grounds on the body of the application and a supporting affidavit deposed by the applicant. It has been opposed by a replying affidavit of one **Mwangi Muriithi** deposed on the 21<sup>st</sup> day of April, 2015 on his own behalf and on behalf of the co-respondent **Jennifer Wangechi Muriithi** and lodged in this Courts' Registry on the 13<sup>th</sup> day of May, 2015.

#### **Applicants submissions.**

6. In her oral submissions to court, the applicant **Beatrice Michere Mugo** appearing in person stated that this matter has been adjourned twice before, that is on the 27<sup>th</sup> October, 2011 and 5<sup>th</sup> February, 2013 on account of lack of substitution for the deceased respondent; that the 1<sup>st</sup> and 2<sup>nd</sup> respondents to this application who are a wife and son to the deceased have neglected to apply to be substituted in the place of the deceased respondent in order to pave the way for the merit disposal of both the pending application and the main appeal; that it is three years since the deceased passed on and yet the respondents have not taken any steps to regularize their position in this matter; that the respondents conduct is informed by the fact that they sold the land subject of the appeal and are now using the proceeds of the said sale to frustrate her quest for justice. It is therefore in the best interest of justice that the orders sought by her are granted in her favour. She added that failure to move promptly soon after the order of 17<sup>th</sup> October, 2011 and 5<sup>th</sup> February, 2013 were made was occasioned by a lack of funds on her part and secondly she had expected the respondents to apply to place themselves on the record for purposes of progressing this matter.

#### **Respondents submissions.**

7. In response to the applicants submissions, learned counsel **Wanjiru Wambugu** for both respondents has invited me to dismiss the applicant's application on the grounds that it does not lie on account of the intended respondents lack of legal capacity to be substituted in the place of the deceased respondent as they have no letters of representation granted to them respecting the deceased respondents' estate. Likewise, there is no way the public Trustee can be substituted in the place of the deceased respondent as he too lacks legal capacity to represent the interests of the estate of the deceased in the absence of a grant of letters of administration having been granted to the said Public Trustee in that regard.

#### **Analysis and Determination.**

8. I have given due consideration to the rival arguments set out above and find that **Rule 96** which has been cited as the main avenue of access for the relief sought has been cited in error as it was formerly numbered 96 but currently numbered 99. Failure to so cite the correct rule will not

disentitle the applicant to a merit decision on her application. The defect is curable under **Article 159(2) (d)** of the Kenya Constitution 2010.

9. Rule 99 of this Courts Rules provides *inter alia* thus:-

***“99 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 the 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 review an appeal which has abated; and if it is proved that the legal representative was 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”***

10.A **“legal representative”** is defined in **section 2** of the Civil Procedure Act Cap 21 Laws of Kenya as: ***“Means a person who in law represents the estate of deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”***

11.In the decision in the case of ***Morjaria versus Abdalla [1984] eKLR*** this Court ruled *inter alia* that a party gets vested with the title of **“legal representative”** under **section 53 and 54** of the law of Succession Act. **Section 53** of the Act makes provision for the granting of full letters of administration with will annexed ( to an executor) or intestate (to a personal representative); whereas a limited grant is provided for under **section 54** of the same Act:

12.Other relevant principles set out in the ***Morjaria*** case were that:-

- i. *Although rule 96 (now 99) uses the word “shall” nevertheless, it only enables this court to appoint a person who has been properly made a legal representative by the High Court in exercise of its powers under the Act. To hold otherwise would mean that an incompetent person might be appointed a party to the appeal.*
- ii. *Rule 14 of the 5<sup>th</sup> schedule of the law of Succession Act donates power to a court of law to make a personal representative of a deceased person a party to a pending suit.*
- iii. *Where the executor or a personal representative is unwilling to act, letters of administration may be granted to the nominee of a party in the suit limited for the purpose of representing the deceased therein.....*
- iv. *Under section 2 of the Civil Procedure Act (supra) “suit” means all civil proceedings commenced in any manner prescribed. An appeal is a suit in that it is a proceeding commenced in a manner prescribed and for this reason, there is jurisdiction under paragraph 14 of the 5<sup>th</sup> schedule to grant representation for purposes of a pending appeal.*
- v. *The appointment of a person ad colligenda bona does not bestow to any party the right to stand in the shoes of a deceased person as this type of grant is limited to the collection, bringing together and assembling of the property belonging to an estate.*

13.Applying the above principles to the rival arguments herein, I find that it was correctly deposed in the replying affidavit of ***Mwangi Muriithi*** and submitted by learned counsel ***Wanjuru Mbugua*** that the applicant stands non suited in the application under review because none of the intended respondents inclusive of the public trustee is a legal representative to the estate of the deceased as the applicant has not exhibited a grant of representation to the deceaseds’ estate granted to any of the intended respondents.

14.The applicant has alleged reluctance on the part of the intended respondents to apply for such a grant, place themselves on the record to facilitate the progression of the disposal of the pending

processes. If this is the case, then what the applicant ought to do is for her to approach the High Court under **section 47** of the Act by taking out a citation directed at the intended respondents and the Public Trustee, under **rule 22** of the Probate and Administration Rules asking the court to nominate any of the citees as legal representative for the deceased respondent limited to the proceedings in this appeal. It is only after such a nomination has been duly made by a court of law that the applicant can apply for an order for substitution of the person that the court may ultimately nominate as a personal representative of the deceased respondent. Until that process is undertaken, any purported move by the applicant in the manner done herein is premature and cannot stand.

15. For the reasons given above, the applicant's application is found premature and therefore declined. Costs of the application will be in the cause.

**Dated and delivered at Nyeri this 17<sup>TH</sup> day of June 2015.**

**PHILIP WAKI**

**JUDGE OF APPEAL**

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**PATRICK KIAGE**

**JUDGE OF APPEAL**

I certify that this is a

true copy to the original.

**DEPUTY REGISTRAR**