



**Nduyo v St Martin’s Girls Secondary School (Cause 1920 of 2017)  
[2023] KEELRC 1740 (KLR) (11 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1740 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1920 OF 2017**

**JK GAKERI, J  
JULY 11, 2023**

**BETWEEN**

**AMOS MUTEGI MUCHUNKU NDUYO ..... CLAIMANT**

**AND**

**ST MARTIN’S GIRLS SECONDARY SCHOOL ..... RESPONDENT**

**RULING**

1. Before the court for determination is a Notice of Motion Application dated March 21, 2023 for Orders That;
  1. The court be pleased to grant leave for the Applicant/Intended Claimant to be substitute the Claimant.
  2. The court be pleased to substitute the name of the Claimant herein Amos Mutegi Muchunku (now deceased) with the name of Lucy Kagendo Mwithi being the legal representative/Administrator of the estate of the aforesaid deceased.
  3. Upon prayer 2 being granted the Claimant be granted leave to amend the Memorandum of Claim.
  4. The costs of this Application be in the cause.
2. The Application is expressed under the provisions of the *Civil Procedure Act* and the *Civil Procedure Rules, 2010* and other enabling provisions of law and is based on the grounds set forth on its face and the Supporting Affidavit of Lucy Kagendo Mwithi sworn on March 17, 2023.
3. The affiant depones that she is the wife of the late Amos Mutegi Muchunku (who died on May 8, 2022 as confirmed by a copy of the death certificate on record.



4. That the deceased instituted the current suit on September 26, 2017.
5. The affiant states that she applied and was granted Limited Grant of Letters of Administration on February 24, 2023 as evidenced by the copy of the Grant on record.
6. The affiant expresses her desire to be substituted and proceed with conduct of the matter for the benefit of the estate of the deceased.
7. That it is in the interest of justice that the court grants leave for the substitution of the deceased's name with that of the applicant herein as his legal representative/administrator of his estate.

### **Response**

8. By a Replying Affidavit sworn by Sister Maria Felix on April 4, 2023, the affiant states that she was aware that the Claimant died on May 8, 2022.
9. That the reliefs sought by the Claimant are personal in nature and cannot be pursued by the legal representative of his estate and as such the cause of action did not survive the deceased and the matter had not been heard as at the date of death of the Claimant and no determination had been made in his favour.
10. That the issues for determination are highly contested and can only be proved or disproved by the Claimant as opposed to his personal representative.
11. The affiant reiterated that the suit had abated and the application herein has not met the threshold to be merited.
12. The affiant prays for dismissal of the Application with costs.

### **Applicant's Submissions**

13. On substitution, counsel for the applicant relied on Order 24 Rule 1 and 3(2) of the *Civil Procedure Rules, 2010* as well as the decision in *Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others* and *Karl Webner Claasen v Commissioner of Lands & 4 others* (*supra*) to urge that the applicant had fulfilled the legal requirements for the substitution of the Claimant's name with hers to pursue the claim for the benefit of the deceased's estate since the cause of action herein survived his demise.
14. Counsel urged that continuation of the suit would not be prejudicial to the Respondent.

### **Respondent's Submissions**

15. Counsel for the Respondent submitted although the court had discretion to grant leave for the substitution sought, the cause of action herein did not survive the deceased and the application warrants dismissal. Moreover, the suit abated and any orders made would be in vain.
16. Reliance was made on the decision in *B v Attorney General* [2004] 1 KLR to emphasize on the futility of making orders in vain.

### **Determination**

17. Having found in the previous application that the deceased's suit has not abated by virtue of Section 2(1) of the *Law Reform Act* and Order 24 Rule 3(1) and (2) of the *Civil Procedure Rules, 2010* and substitution of parties in suits is governed by law, specifically Order 24 above, the only peripheral issue for determination is whether the nature of contestation of issues is sufficient to deny the personal



representative of a deceased person to be granted leave to pursue the claim before the court. That only the Claimant (deceased) would be in a position to pursue the claim.

18. To adopt such a position would in the court's view be tantamount to rendering the provisions of Section 2(1) of the [Law Reform Act](#) and Order 24 Rule 3 (1) and (2) of the [Civil Procedure Rules, 2010](#) ineffectual.
19. It would also beg the question as to what level of degree of contestation would keep off personal representatives and who makes the determination on the level or degree of contestation of issues and at what point.
20. The court is persuaded that [James Mwangi Kamau v Barclays Bank of Kenya Ltd](#) [2022] eKLR was decided on the basis of the facts before the court and a decision was rendered.
21. In the court's view, the hotness or otherwise of the contestation of the facts ought not to be the basis on which the court should exercise its discretion in favour or against the personal representative on whether to pursue a cause of action vested on the deceased.
22. In the court's view, the provisions of Section 2(1) of the [Law Reform Act](#) and Order 24 Rule 3(1) and (2) of the [Civil Procedure Rules, 2010](#) safeguard the cause of action vested in deceased persons as opposed to the court's determination of the attendant rights after the hearing.
23. This position comports with the provisions of Article 22(1) of the [Constitution of Kenya, 2010](#) as held in [Karl Webner Claasen v Commissioner of Lands & others](#) [2019] eKLR.
24. The right to institute legal proceedings is thus a constitutional imperative whether it is by way of a petition or otherwise.
25. Further, Section 24(2) of the [Employment Act](#) recognises the right of a legal representative of a deceased employee as the person entitled to be paid wages and other remuneration and property due to a deceased employee as at the date of death.
26. For the foregoing reasons, the court is satisfied and finds that the Notice of Motion dated March 21, 2023 is merited and is hereby granted as prayed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 11TH DAY OF JULY 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.



**DR. JACOB GAKERI**  
**JUDGE**

