



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**MISC. APPLICATION NO. 57 OF 2016**  
**RACHEL GAKENIA MUYA KARIUKI ..... CLAIMANT**  
*VERSUS*  
**THE ATTORNEY GENERAL..... RESPONDENT**

Odukenya for the Attorney General - Objector

Mr. Agina for applicants

**RULING**

1. The applicant Rachel Gakenia Muya Kariuki seeks to substitute Antony Mbiu Kariuki, the deceased with herself, being the administrator of the deceased's estate.
2. The main suit, **Cause number 2212 of 2012** has been concluded and Judgment entered in favour of the claimants including the deceased Antony Mbiu Kariuki. Kariuki filed this suit in 1995, upon his arrest and discharge from the Kenya Air force on 1<sup>st</sup> August 1982.
3. The deceased died on 12<sup>th</sup> September 2005 before the case was heard and determined. The applicant is the widow and administrator of his estate by deduct of a grant of letters of administration dated 3<sup>rd</sup> April 2014.
4. The applicant states that she was until now unaware of the need to be enjoined on her husband's behalf and prays that the application be granted to allow justice to prevail.

**Objection**

5. The Attorney General has raised preliminary objection to the application for substitution on grounds that:
  - i. The matter has abated on the part of the applicant.
  - ii. The notice of motion is defective as order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010 and section 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya as relied upon by the applicant cannot apply to the respondent in his capacity as the Attorney General.

iii. The applicant has not demonstrated that she has obtained letters of administration ad litem to represent the estate of the deceased.

## **Determination**

6. Starting with the last objection, the applicant has attached grant of letters of administration intestate of all the estate of Antony Mbiu Kariuki the deceased by the W. Musyoka, Judge of the High Court dated 3<sup>rd</sup> April 2014 to Rachel Gakenia Muya Kariuki and Moses Njoroge Kariuki jointly.

7. This is prima facie evidence of such grant. The objection is therefore miss-conceived.

8. The second objection regarding Order 40 Rules 1, 2, 3 and 4 of the Civil Procedure Rules 2010 and Section 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya lack clarity.

9. The application before court seeks substitution of the deceased claimant in **ELRC cause No. 2212 of 2012** with the administrators of the estate of the deceased.

10. Order 40 rule 1, 2, 3 and 4 deals with temporary injunctions and interlocutory orders and the court does not appreciate how this provision is relevant to the application at hand.

11. The objector did not produce any of the cases, it purports to rely on, on this point to assist the court appreciate the objection. Accordingly, the objection lacks merit and is dismissed.

12. The court however appreciates the need for the deceased to be substituted by the joint administrators of the estate of the deceased to avoid further legal difficulties in this matter.

13. The 1<sup>st</sup> objection is again raised in very vague terms that- *“The matter has abated on the part of the applicant.”*

14. A preliminary objection must be a pure point of law, that does not require embellishment by oral evidence. The objection must be self speaking and a pure point of law within the meaning of **Mukisa Biscuit** case. The first preliminary objection is vague and does not meet this threshold.

15. Furthermore, in terms of the proviso to order 24 rule 3 (2), where an application for substitution of a deceased plaintiff has not been brought within one year of the death of the deceased, *“the court may, for good reason on application, extend the time.”*

16. In the present application, the applicant has stated in the grounds set out on the face of the notice of motion and the supporting affidavit that she was totally unaware of the need to be enjoined on her husband’s behalf.

17. Judgment in this suit has not yet been executed. The applicant is the mother of three daughters who were wholly dependent on their deceased father and it would be a great injustice to deny them their father’s compensation on a technicality or ignorance of their mother. That justice dictates that the estate of the deceased be allowed to pursue this cause on behalf of their father.

18. The court notes that, no replying affidavit was filed by the respondents to the substantive issues raised by the applicant. The time within which such replying affidavit may be filed without leave of court has expired. The respondents opted, at their own peril, to only raise preliminary objection.

19. This is a proper case, where the court finds it just and meet to allow the joint administrators of the estate of the deceased to substitute the deceased unless for sound reasons, the co-administrator Moses Njoroge Kariuki does not wish to be joined in the suit.

20. The court notes that a joint grant is inseparable unless variation is done by a court with competent jurisdiction on such matters.

21. Accordingly, the deceased Antony Mbiu Kariuki is substituted in this suit by the co-administrators of the estate of the deceased in terms of the grant dated 3<sup>rd</sup> April 2014. Costs to follow the outcome.

22. As agreed by the parties, the outcome of this application to apply to other similar pending applications in **Cause No. 2212** and other consolidated cases.

**Dated and delivered at Nairobi this 2<sup>nd</sup> day of December 2016**

**MATHEWS NDERI NDUMA**

**PRINCIPAL JUDGE**