



**Muriithi v Mohammed (as the executrix of the estate of Hon. Daniel Toroitich Arap Moi) & another (Petition 41 of 2018) [2022] KESC 9 (KLR) (9 May 2022) (Ruling)**

Neutral citation: [2022] KESC 9 (KLR)

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**  
**PETITION 41 OF 2018**  
**MK KOOME, CJ, PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU & W OUKO, SCJJ**  
**MAY 9, 2022**

**BETWEEN**

**MWANGI STEPHEN MURIITHI ..... PETITIONER**

**AND**

**ZEHRABANU JAN MOHAMMED (AS THE EXECUTRIX OF THE ESTATE OF HON. DANIEL TOROITICH ARAP MOI) ..... 1<sup>ST</sup> RESPONDENT**

**RAYMARK LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for substitution of the Petitioner (deceased) with the legal representative of his Estate)*

**Effect of failure to identify the proper legal framework while moving the Supreme Court.**

Reported by Kakai Toili

*Civil Practice and Procedure – suits – institution of suits – institution of suits at the Supreme Court - failure to identify the proper legal framework while moving the Supreme Court - what was the effect of failure to identify the proper legal framework while moving the Supreme Court?*

**Brief facts**

The instant application sought substitution of the deceased petitioner (deceased) with the applicant as the legal representative of the deceased's estate. The deceased passed away in June 2021 and had appointed the applicant as the sole executor of his written will hence in September 2021 the High Court issued a grant of probate in his favour being the legal representative of the deceased's estate. The applicant claimed that he was the proper person in law to substitute the deceased in the instant proceedings and that the substitution was necessary to enable continuation of the petition of appeal to its conclusion.

**Issues**

What was the effect of failure to identify the proper legal framework while moving the Supreme Court?



## Held

1. The sources of law that governed proceedings before the court were; the Constitution of Kenya, 2010, the Supreme Court Act, the Supreme Court Rules and any Practice Directions made by the court or the Chief Justice. The instant motion was erroneously anchored on the Civil Procedure Rules which were not applicable to proceedings before the court. A court of law had to be moved under the correct provisions of the law; and the failure to identify the proper legal framework rendered a motion, such as the instant one liable to be struck out.
2. The court in granting the deceased leave to file the appeal, not only certified but also framed two issues of general public importance arising from the appeal which warranted its consideration. The motion of substitution was lodged within 12 months of the deceased's demise and the respondents had not filed any response to indicate whether an order of substitution would cause them any prejudice.

*Application allowed; no orders as to costs.*

## Orders

*The deceased was substituted with the applicant as the legal representative of the deceased's estate in the appeal.*

## Citations

### Cases

1. Bookpoint Limited v Guardian Bank Limited & another (Application 4 (E006) of 2021; [2021] eKLR) — Mentioned
2. Njihia, Daniel Kimani v Francis Mwangi Kimani & another (Civil Application 3 of 2014; [2015] eKLR) — Mentioned
3. Steyn, Hermanus Philipus v Giovanni Gnechchi-Ruscone (Application No 4 of 2012; [2013] eKLR) — Explained

### Statutes

1. Civil Procedure Rules, 2010 (Cap. 21 Sub-Leg) — Order 24; Rule 3 — Interpreted
2. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — Rule 43(2) — Interpreted

### Advocates

None mentioned

## RULING

- [1] Upon examining the notice of motion dated 11<sup>th</sup> January 2022, filed on 22<sup>nd</sup> February 2022 which is erroneously anchored on order 24 rule 3 of the *Civil Procedure Rules* and all other enabling provisions of the law; the motion seeks substitution of the petitioner, Mwangi Stephen Muriithi (deceased), with Gitonga Mwangi Muriithi as the legal representative of the deceased's Estate.
- [2] Upon considering the affidavit sworn by Gitonga Mwangi Muriithi and the submissions in support of the motion to the effect that, the deceased passed away on 21<sup>st</sup> June, 2021; the deceased had appointed Gitonga Mwangi Muriithi as the sole executor of his written will hence on 30<sup>th</sup> September, 2021 the High Court issued a grant of probate in his favour; Gitonga Mwangi Muriithi being the legal representative of the deceased's Estate is therefore the proper person in law to substitute the deceased in the instant proceedings; and the substitution is necessary to enable continuation of the petition of appeal to its conclusion.
- [3] Noting also that the respondents did not file any response despite service of the motion; and
- [4] Further noting that this court has on various time without number pronounced itself on the sources of law that govern proceedings before it namely; the Constitution, Supreme Court Act, the Supreme



Court Rules and any Practice Directions made by the court or the Chief Justice; the instant motion is erroneously anchored on the Civil Procedure Rules which are not applicable to proceedings before this court. (See *Bookpoint Limited vs. Guardian Bank Limited & another*, SC Application No 4 (E006) of 2021; [2021] eKLR and *Daniel Kimani Njibia v Francis Mwangi Kimani & another*, SC Civil Application No 3 of 2014; [2015] eKLR; and

- [5] Whereas it goes without saying that, as we observed in *Hermanus Phillipus Steyn v Giovanni Gneccchi-Ruscone* SC Application No 4 of 2012; [2013] eKLR, a court of law has to be moved under the correct provisions of the law; and the failure to identify the proper legal framework renders a motion, such as the one at hand, liable to be struck out; however,
- [6] That error notwithstanding, and bearing in mind that this court in granting the deceased leave to file the appeal, not only certified but also framed two issues of general public importance arising from the said appeal which warrant its consideration; and that the motion of substitution was lodged within 12 months of the deceased's demise; moreover, noting the respondents have not filed any response to indicate whether an order of substitution would cause them any prejudice; for the aforesaid reasons, we are inclined to exercise our discretion under rule 43(2) of the *Supreme Court Rules, 2020* in the interest of justice and allow the substitution.
- [7] Consequently, we allow the notice of motion dated January 11, 2022 and make the following orders: -
- i. The petitioner, the late Mwangi Stephen Muriithi (deceased), is hereby substituted with Gitonga Mwangi Muriithi as the legal representative of the deceased's Estate in the appeal.
  - ii. There shall be no orders as to costs.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY, 2022.**

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**M.K. KOOME P. M. MWILU**

**CHIEF JUSTICE & PRESIDENT DEPUTY CHIEF JUSTICE & VICE**

**OF THE SUPREME COURT OF KENYA PRESIDENT OF THE SUPREME COURT OF KENYA**

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**S. C WANJALA NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT JUSTICE OF THE SUPREME COURT**

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**W. OUKO**

**JUSTICE OF THE SUPREME COURT**

