



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC NO.135 OF 2010**

**PETER AKENG'O ADHOLA**

**(Suing as the Personal Representative of**

**LEAH ATIENO ADHOLLA.....PLAINTIFF**

**VERSUS**

**CITY COUNTY OF NAIROBI.....1<sup>ST</sup> DEFENDANT**

**RICHARD MUREITHI GICHIMBA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The application dated 9/2/2018 seeks orders for the substitution of the 2<sup>nd</sup> Defendant with his administrator, one James Wachira Muita and also seeks to set aside the judgment delivered by this court on 25/1/2018. It is based on grounds that the 2<sup>nd</sup> Defendant's administrator was never informed of the hearing date by its then advocate on record, hence the matter was heard *ex parte* without the participation of the 2<sup>nd</sup> Defendant's administrator. The 2<sup>nd</sup> Defendant died while the matter was still in court and was not substituted.

The application was supported by the affidavit of James Wachira Muita, sworn on 9/2/2018. He deponed that the 2<sup>nd</sup> Defendant, who was his father, died on 12/3/2012 and annexed the death certificate. He also deponed that his late father had instructed the firm of Peter Mutisya & Company Advocates to act on his behalf, but the said firm did not attend court on numerous hearing dates and did not substitute the 2<sup>nd</sup> Defendant despite having knowledge of his demise. He further deponed that on 9/11/2017 when this suit was slated for hearing, he was in the Chief Magistrate's court at Kerugoya taking out letters of administration *ad litem* in respect of his father's estate. He annexed a copy of the limited grant of letters of administration *ad litem* dated 15/9/2017.

The Plaintiff filed the preliminary objection dated 18<sup>th</sup> June 2018, objecting to the hearing of the 2<sup>nd</sup> Defendant's application dated 9/2/2018, on the basis that the Notice of Appointment filed by Kabaiku & Co. Advocates offended Order 9 Rule 9 of the Civil Procedure Rules; that the suit against the 2<sup>nd</sup> Defendant has abated by operation of the law and that this court is *functus officio* in this matter. The other ground taken up is that the limited grant given to the Applicant on 15/9/2017 was limited to filing suit and not taking over this matter that was already in existence and which should have been specifically mentioned in the grant and that the judgment crystallised when no appeal was preferred by any of the Defendants.

The 1<sup>st</sup> Defendant opposed the application, and associated itself with the Plaintiff's preliminary objection and submissions.

The court has considered the application, preliminary objection, affidavit together with the annexures and the submissions made by counsel. The first issue in the preliminary objection is whether the Applicant has locus to bring this application. Judgment in this case was delivered on 25/1/2018. The Applicant can only get audience if he is made party to this suit pursuant to Order 23 rule 4 (3) of the Civil Procedure Rules. The Applicant made the application 6 years after the death of the 2<sup>nd</sup> Defendant. A consent was filed in court on 27/9/2018 allowing the firm of Kabaiku & Co. Advocates to take over conduct of this matter from Peter Mutisya and Company Advocates.

The Applicant relied on the case of **Joseph Gachuhi Muthanji v Mary Wambui Njuguna [2014] eKLR**, in which the Court of Appeal reiterated that substitution is to be sought within the time stipulated by statute, and if sought out of time, then sufficient cause must be shown and the Applicant must seek leave to substitute out of time.

The Applicant applied for letters of administration *ad litem* five years after the 2<sup>nd</sup> Defendant's death. There is no explanation for the delay. He has not sought the extension of the time within which to seek substitution. The Applicant submitted that the Plaintiff in this case applied for substitution three years after the Plaintiff's death and that the application was allowed by the court, hence this application should also be allowed. An order for the substitution the Plaintiff was made by the court on 11/5/2015. That order has not been appealed against or

reviewed. It remains a valid decision of the court. It cannot be used as a ground to justify the Applicant's position.

The court declines to grant the prayers for the substitution of the 2<sup>nd</sup> Defendant and for setting aside the judgement. The application dated 9/2/2018 is dismissed. Each party will bear its own costs.

Dated and delivered at Nairobi this 26<sup>th</sup> day of March 2019

K.BOR

**JUDGE**

**In the presence of:-**

Mr. N. Hasea holding brief for Mr. Opiyo for the Plaintiff

Ms. J. Ondari holding brief for Ms. E. Arati for the 1<sup>st</sup> Defendant

Mr. V. Owuor- Court Assistant

No appearance for the 2<sup>nd</sup> Defendant