



Case Number:	Environment & Land Case 221 of 2017
Date Delivered:	31 Jan 2018
Case Class:	Civil
Court:	Environment and Land Court at Muranga
Case Action:	Ruling
Judge:	Jemutai Grace Kemei
Citation:	Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others [2018] eKLR
Advocates:	-
Case Summary:	<p style="text-align: center;"><u>Substitution of a Deceased Party in a Suit with the Legal Representative of the Deceased's Estate</u></p> <p style="text-align: center;">Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others [2017] eKLR</p> <p style="text-align: center;">E.L.C No. 221 of 2017</p> <p style="text-align: center;">Environment and Land Court at Murang'a</p> <p style="text-align: center;">J.G. Kemei, J</p> <p style="text-align: center;">January 31, 2018</p> <p style="text-align: center;">Reported by Kakai Toili</p> <p><i>Law of Succession - grants of representation – powers of grants of representation – representation of a deceased's estate in a legal suit - whether one could represent an estate of a deceased without a grant of representation - Law of Succession Act, section 54</i></p>

Civil Practice and Procedure – suits - parties to a suit- substitution of parties to a suit – where one of the parties to a suit dies - procedure to be followed - what was the procedure to be followed in substituting a deceased party in a suit with the legal representative of his estate in a suit where the cause of action survived the Deceased person - Civil Procedure Act, section 2; Civil Procedure Rules, 2010, order 24 rule 4

Jurisdiction – jurisdiction of the Environment and Land Court - jurisdiction of the Environment and Land Court to order for substitution of parties where a suit had abated - whether the Environment and Land Court had jurisdiction to order for substitution of parties where a suit had abated

Civil Practice and Procedure – suits - revival of suits – where a suit had abated – procedure to be followed - how could a suit which had abated be revived –Civil Procedure Rules, 2010, order 24 rule 7 (2)

Jurisdiction- jurisdiction of the Environment and Land Court – jurisdiction to hear and determine succession matters- whether the Environment and Land Court had jurisdiction to hear and determine matters relating to succession- Constitution of Kenya, 2010- article 162(2)(b),Environment and Land Court Act.

Civil Practice and Procedure – suits - parties to a suit- substitution of parties to a suit – application of substitution of parties to a suit – service on the intended party - whether it was mandatory to serve an application for substitution of parties on the intended party – Constitution of Kenya, 2010, article 50; Civil Procedure Rules, 2010, order 51 rule 3

Brief Facts:

The Plaintiff filed a suit against the Defendants seeking declarations that the 1st and 2nd Defendants held the suit property in trust for him; that the suit property be transferred to him and that the Defendants be restrained from entering

the suit property. One month after the filing of the suit, the 1st Defendant died and the Plaintiff brought the instant Application seeking the substitution of the 1st Defendant with the Intended 1st Defendant on grounds that she was the 1st Defendant's wife and that she was not willing to file an application for substitution.

Issues:

- i. Whether one could represent an estate of a deceased person without a grant of representation.
- ii. What was the procedure to be followed in substituting a deceased party in a suit with the legal representative of his estate in a suit where the cause of action survived the Deceased party?
- iii. Whether the Environment and Land Court had jurisdiction to order for substitution of parties where a suit had already abated?
- iv. How could a suit which had abated be revived?
- v. Whether the Environment and Land Court had jurisdiction to hear and determine matters relating to succession.
- vi. Whether it was mandatory to serve an application for substitution of parties on the intended party.

Relevant Provisions of the law:

Constitution of Kenya, 2010

Article 50 - Fair hearing

1. *Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.*
2. *Every accused person has the right to a fair trial, which includes the right—*
 - a. *to be presumed innocent until the contrary is proved;*

- b. *to be informed of the charge, with sufficient detail to answer it;*
 - c. *to have adequate time and facilities to prepare a defence;*
 - d. *to a public trial before a court established under this Constitution;*
 - e. *to have the trial begin and conclude without unreasonable delay;*
 - f. *to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;*
 - g. *to choose, and be represented by, an advocate, and to be informed of this right promptly;*
 - h. *to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;*
 - i. *to remain silent, and not to testify during the proceedings;*
 - j. *to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;*
 - k. *to adduce and challenge evidence;*
 - l. *to refuse to give self-incriminating evidence;*
 - m. *to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;*
 - n. *not to be convicted for an act or omission that at the time it was committed or omitted was not—*
 - i. *an offence in Kenya; or*
 - ii. *a crime under international law;*
3. *not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;*
16. *to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and*

17. *if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.*
3. *If this Article requires information to be given to a person, the information shall be given in language that the person understands.*
4. *Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.*
5. *An accused person—*
 - a. *charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and*
 - b. *has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.*
6. *A person who is convicted of a criminal offence may petition the High Court for a new trial if—*
 - a. *the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and*
 - b. *new and compelling evidence has become available.*
7. *In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.*
8. *This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.*
9. *Parliament shall enact legislation providing for the protection, rights and welfare of*

victims of offences.

Article 162(2) (b)-Jurisdiction of the Environment and Land Court

- 2) *Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*
- a. *employment and labor relations; and*
 - b. *the environment and the use of occupation of ,and title to land*

Civil Procedure Act

Section 2- Interpretation

“legal representative” means a person who in law represents the estate of a 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;

Civil Procedure Rules, 2010

Order 24 - Death and Bankruptcy of Parties

4. Procedure in case of death of one of several defendants or of sole defendant Order 24, rule 4.]

- 1. Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.*
- 2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

3. *Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.*

Order 51- Applications

3. *Notice to parties [Order 51, rule 3.]*

No motion shall be made without notice to the parties affected thereby:

Provided, however, that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court seems just, and any party affected by such order may move to set it aside

Law of Succession Act

Section 54 - Limited Grants

A court may, to the circumstances of each case, limit any grant of representation which it has jurisdiction to make, in any of the forms described in the Fifth Schedule to this Act.

Held:

1. The law was clear on what happened when one of the Defendants died and the cause of action survived or continued. Upon an application being made, the Court had to cause the legal representative of the Deceased to be made a party or to be substituted in place of the Deceased party to proceed with the case.
2. Section 2 of the Civil Procedure Act defined who a legal representative was. Other than the mention of the Intended 1st Defendant being a wife of over 50 years to the 1st Defendant, no evidence had been tabled to show that she was indeed the legal representative of the estate of the 1st Defendant. The rule required substitution of a Defendant with a party clothed with

legal representation.

3. One could only represent the estate of a deceased person when a grant of representation had been made in respect of the estate of such deceased person under the Law of Succession Act. The Law of Successions Act provided the procedure to be followed in the application for such a grant and the various forms a grant could take including letters of administration. Section 54 of the Act provided that a Court could limit a grant of representation which it had jurisdiction to make in any of the forms described in the fifth schedule.
4. It was in doubt whether the Applicant had followed the procedure in seeking a legal representative of the Deceased 1st Defendant's estate. The Applicant was at liberty to cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to the Court that indeed the Intended 1st Defendant was a legal representative of the 1st Deceased Defendant or whether the Applicant had filed citation proceedings in that regard.
5. The provisions of the Succession Act had a cure for situations where the 1st Defendants dependants were unwilling to file letters of grant of administration solely to defeat the Applicants claim. The Court did not have jurisdiction to determine matters relating to succession. Its jurisdiction was limited to determining disputes on the environment and use, occupation of and title to land under article 162(2) (b) of the Constitution as well as the Environment & Land Act,
6. The Application had to be made within one year in default of which the suit would abate as against the Deceased Defendant. A court of law had no jurisdiction to order for substitution where the suit had already abated by operation of law or to hear and determine a suit that had already abated by operation of law.
7. The 1st Defendant died on March 18, 2012 and no substitution had been made. The instant Application was filed May 5, 2014,

	<p>a period in excess of two years from the death of the 1st Defendant. The cause of action against the 1st Defendant abated on the March 17, 2013. There was therefore no cause of action surviving against the 1st Defendant when the instant Application was filed. Substitution could not have been done unless the suit was revived.</p> <p>8. A party could apply for leave under the Civil Procedure Rules, 2010, order 24 rule 7(2) to revive a suit which had abated and if he proved to the Court that he had been prevented by any sufficient cause from continuing the suit, the Court had to revive the suit upon such terms as to costs or otherwise as it thought fit. There had to be a revival of suit after abatement before substitution. An order for substitution without revival would be a nullity in law and of no effect.</p> <p>9. The intended Defendant was not served with the Application and that offended the rules of natural justice and fairness as enshrined in article 50 of the Constitution. Order 51 of the Civil Procedure Rules provided the procedure to be followed in applications filed in Court and rule 3 required that every person who was affected by an application to be served with the same rule.</p> <p><i>Application dismissed, costs to the Respondent</i></p>
Court Division:	Land and Environment
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Dismissed
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

E.L.C NO. 221 OF 2017

MURIITHI NGWENYA.....PLAINTIFF

VS

GIKONYO MACHARIA MWANGI.....1ST DEFENDANT

RICHARD NYAGUTHA NGWENYA.....2ND DEFENDANT

LUCY WAMBUI GIKONYO.....INTENDED 1ST DEFENDANT

RULING

1. The Plaintiff/Applicant filed suit against the Defendants on 16/2/12, amended on the 3/8/2012 claiming a declaration that;

a) The 1st and 2nd Defendants hold 4.4 acres in trust for the plaintiff and an Order thereafter for transfer of 4.4 acres of land from land parcel LOC 14/KAIRO/2069 held by the 1st Defendant to the Plaintiff or alternatively transfer of land parcel LOC.14/KAIRO/20170 and LOC.14/KAIRO/2071 also measuring 4.4 acres held by the 1st and 2nd Defendants to the Plaintiff.

b) The 2nd Defendant himself, his servants and or agents be permanently restrained from entering or in any way interfering with the Plaintiff parcel of land occupied by the plaintiff.

The parties in this suit are blood relatives. The suit land is registered in the name of the 1st Defendant (deceased) allegedly in trust for himself and the Plaintiff.

2. It would appear that the 1st Defendant died on 18/3/2012 one month after the filling of the suit.

3. The Applicant has filed a Notice of Motion dated 10/4/13 seeking for substitution of the 1st Defendant with Lucy Wambui Gikonyo. The application is based on the grounds interalia;

a) The 1st Defendant is dead.

b) The intended 1st Defendant is his wife

c) The 1st Defendant may not be so willing to file application for substitution to their advantage to await this suit to abate as I continue to suffer.

4. The application is further supported by the Plaintiff in his affidavit where he deponed that the 1st Defendant passed away on 18/3/2012 soon after service of the summons without entering appearance. That the intended Defendant is a wife of the deceased Defendant of over 50 years. That the intended Defendant may not be willing to file an application for substitution to their advantage to await the suit to abate. That due to his old age and ill health he desires the land dispute to be settled.

5. The 2nd Defendant opposed the application on grounds that the Plaintiff Applicant has disregarded the law on substitution of

deceased persons, it being a matter of law and not based on the longitude of the years of marriage. That the intended substitute must be notified of the application.

6. On the 13/7/17 Mr. Kimwere, Counsel for the Plaintiff/Applicant withdrew his application filed under Notice of Motion dated 8/4/13. On the same day he informed the Court that he was ready to prosecute his application dated the 10/4/13 which was still pending on the Court record. Apparently, he had filed two applications which on examination relate to the same plea of substitution of the 1st Defendant. However, the Applicant has filed submissions in respect to the Notice of Motion dated 8/4/14 which as stated was withdrawn on 13/7/17. I find no reason to consider the said submissions since they are unrelated to the application under consideration.

7. The 2nd Defendant filed submissions and in opposition to the application stated that substitution is not possible without letters of grant of administration of the estate of the 1st Defendant. Relying on the case of **Registered Trustees of Ruiru Sports Club & 3 Others vs. Isaac Karuri Nyongo & 15 Others (2014) EKLR** wherein the Court dismissed the Notice of Motion on grounds that the intended legal representative did not have limited grant for purposes of being enjoined to the suit.

Analysis & Determination

8. I have considered the application herein, the rival affidavits and the submissions where appropriate and the issue that commends itself for determination is whether the Applicant merits the prayers sought in the application.

9. Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;

“4. (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2)

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant. (emphasis is mine).

The law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.

10. Section 2 of the Civil Procedure Act defines legal representative as follows;

“means a person who in law represents the estate of a 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”.

The Applicant is seeking to substitute Lucy Wambui Gikonyo in place of 1st Defendant. Other than the mention of her being a wife of over 50 years, no evidence has been tabled to show that she indeed is a person contemplated by the above definition, that is to say, the legal representative of the estate of the 1st Defendant. The rule requires substitution of a Defendant with a party clothed with legal representation.

11. Can this Court permit the substitution of the 1st Defendant by the said Lucy Wambui Gikonyo" In law one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the Law of Succession Act. The Law of Successions Act provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including letters of administration. Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the forms described in the Fifth Schedule. The Fifth Schedule provides as follows at paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis is mine)

12. It is in doubt whether the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased 1st Defendant’s estate. The Applicant is at liberty to so cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. No material has been presented to this Court that indeed the said Lucy Wambui Gikonyo is such legal representative of the 1st deceased Defendant nor whether the Applicant has filed citation proceedings in that regard.

13. The Applicant has explained that the 1st Defendants dependants (the intended substitute included) are unwilling to file the said letters of grant of administration solely to defeat the Applicants claim. The provisions of the Succession Act has a cure for the Applicants frustration. I must hasten to add that in any event this Court does not have jurisdiction to determine matters relating to succession. Its jurisdiction is limited to determining disputes on the environment, and use, occupation of and title to land under Article 162(2) (b) of the Constitution as well as the Environment & Land Act, .

14. The application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In **Kenya Farmers’ Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) Eklr** the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.

15. In the case at hand, the 1st Defendant died on 18/3/2012 and todate no substitution has been made. The application under consideration was filed in Court on the 5 /5/14, a period in excess of two years from the death of the 1st Defendants so much so that the cause of action against the 1st Defendant abated on the 17/3/13. There is therefore no cause of action surviving against the 1st Defendant as at 5/5/14 when the application was filed or at the time of rendering this ruling and for that reason I find and hold that substitution cannot be done until and unless the suit is revived.

16. It is however not lost on the Applicant that as a party can apply for leave under Order 24 rule 7(2) to revive a suit which has abated and if he proves to the Court that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. There must be a revival of suit after abatement before substitution. An Order for substitution without revival would be a nullity in law and of no effect. See **Kenya Farmers’ Cooperative Union Ltd** above.

17. I note that the intended substitute was not served with this application and this offends the rules of natural justice and fairness as enshrined in Article 50 of the Constitution. Order 51 of the Civil Procedure Rules provides the procedure to be followed in applications filed in Court, and rule 3 requires that every person who is affected by an application to be served with the same Rule. There is no material on record to show that the intended substitute was served with the application.

18. In the end the Court finds the application devoid of merit and is dismissed with costs to the Respondent (2nd Defendant).

DELIVERED, DATED AND SIGNED THIS 31ST JANUARY 2018

J.G. KEMEI

JUDGE



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