

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki & Ouko, SCJJ)

PETITION NO. 41 OF 2018

BETWEEN

MWANGI STEPHEN MURIITHI PETITIONER

AND

ZEHRABANU JAN MOHAMMED

(as the executrix of the estate of

HON. DANIEL TOROITICH ARAP MOI) 1ST RESPONDENT

RAYMARK LIMITED 2ND RESPONDENT

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

RULING OF THE COURT

[1] UPON examining the Notice of Motion dated 11th January 2022, filed on 22nd 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 21st June, 2021; the deceased had appointed Gitonga Mwangi Muriithi as the

sole executor of his written will hence on 30th 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 Njihia vs. 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 vs. Giovanni Gneccchi-Ruscione*, 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 11th January, 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 **9th** day of **May, 2022**.

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M.K. KOOME
CHIEF JUSTICE & PRESIDENT
OF THE SUPREME COURT OF KENYA

.....
P. M. MWILU
DEPUTY CHIEF JUSTICE & VICE
PRESIDENT OF THE SUPREME
COURT OF KENYA

.....
S. C WANJALA
JUSTICE OF THE SUPREME COURT

.....
NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....
W. OUKO
JUSTICE OF THE SUPREME COURT