



REPUBLIC OF KENYA



KENYA LAW
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**Mwangome & 5 others v Njuga & 14 others (Constitutional Petition
9 of 2014) [2024] KEHC 17248 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 17248 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 9 OF 2014**

FM NJOROGE, J

JULY 31, 2024

**IN THE MATTER OF: ARTICLES 20, 23(30, 40, 47, 232,
258 AND 259 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: PLOT NUMBER 438 PINGILIKANI ADJUDICATION
SECTION, CHONYI, KILIFI MEASURING APPROXIMATELY 32 ACRES.**

AND

**IN THE MATTER OF: THE ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS ENSHRINED IN THE BILL OF RIGHTS AND IN
PARTICULAR THE RIGHT TO ACQUIRE, POSSESS AND OWN PROPERTY**

BETWEEN

**SEBASTIAN MUYE MWANGOME 1ST PETITIONER
CYRIL SHUMAA MWANGOME 2ND PETITIONER
BARAWA JOSEPH SANGA 3RD PETITIONER
NICHOLAS NYAMAWI MWANGOME 4TH PETITIONER
MWANGANDI SHUMAA MWANGOME 5TH PETITIONER
WELLINGTON BENSON RIMBA 6TH PETITIONER**

AND

**NYAMAWI CHIMEGA NJUGA 1ST RESPONDENT
FRANCIS CHILENGELI 2ND RESPONDENT
BENSON MUNGA CHIMEGA 3RD RESPONDENT
SAMSON MWAMUYE 4TH RESPONDENT**



DONALD MWATATA CHIMEGA	5 TH RESPONDENT
ALEX PILI	6 TH RESPONDENT
KAI PILI CHIMEGA	7 TH RESPONDENT
AMBROSE M MWATATA	8 TH RESPONDENT
GABRIEL Z MWATATA	9 TH RESPONDENT
DISTRICT REGISTRAR, KILIFI	10 TH RESPONDENT
DISTRICT ADJUDICATION AND SETTLEMENT OFFICER, KILIFI	11 TH RESPONDENT
CABINET SECRETARY, MINISTRY OF LANDS AND SETTLEMENT	12 TH RESPONDENT
DIRECTOR, LAND ADJUDICATION AND SETTLEMENT	13 TH RESPONDENT
CHEIF LAND REGISTRAR	14 TH RESPONDENT
THE ATTORNEY GENERAL	15 TH RESPONDENT

RULING

1. This ruling is in respect of a chamber summons application dated 2/6/23 which was filed by Frederick Mwangandi Shumaa, Vincent Mwangandi, Shumaa Tunje Rima Shumaa and Charles Jira Rimba, the legal the representatives of the 3rd and 4th petitioners the latter two who are now deceased. It has been brought under Section 3A of the *Civil Procedure Act* and Order 23 Rules 3, 8 and 12 of the *Civil Procedure Rules* and it seeks orders that the petition be revived and that they be substituted for the deceased petitioners, and also that the petition be amended in terms of the draft amended petition.
2. The grounds upon which the application is premised are that the 3rd and 4th petitioners met their demise during the pendency of the suit on 25th November 2014 and 15th July 2021 respectively but the cause of action survived. The applicants now wish to be made parties so that they may proceed with the suit for the benefit of the deceased's respective estates.
3. The chamber summons was disposed of by way of written submissions with the applicants filing their submissions on 18/10/2023 and the 2nd, 3rd, 4th and 6th respondents filing theirs on 26/10/23. However, I have perused the court record and I have not found any replying affidavit or grounds of opposition filed by the 2nd, 3rd, 4th and 6th respondents though their submissions allude to some grounds of opposition which in my view must be elaborated in the submissions.
4. In their submissions the applicants relied on Order 24 Rule 3 *CPR, Ignatius Ndirangu v Njuguna Jesse Kuria* 2018 eKLR and *Silas Njeru Njiru & 2 others v Mugo Mukere & another* 2022 eKLR and urged the court to grant the orders sought in the application.
5. The respondents on the other hand urged that the application ought to be dismissed for reason of fatal defect and incompetence. They argue that according to Order 24 Rule 3 (1) of the *Civil Procedure Rules* such an application ought to be lodged within one year of the demise of a party intended to be substituted otherwise the suit abates and extension of time has to be sought to revive the abated suit



and join the legal representative, and yet the applicants have failed to seek extension of time and have not given a good reason as to why the application was not filed within one year of the demises and the orders sought can not hence be granted. They rely on Civil Appeal No 283 of 2015 *Rebecca Mijide Mungole & Another V Kenya Power & Lighting Co Ltd & 2 Others* 2017 eKLR.

6. The respondents also blame the applicants for delay in bringing the application and the dates of the demises of the original petitioners are relied on as evidence of such delay. They state that the other petitioners proceeded with the hearing of the petition and did not disclose to the Court the demise of the 3rd and 4th petitioners, and that the delay has not been explained hence there is no material upon which the court can exercise its discretion in the favour of the applicants. They allege that the delay was intentional.
7. The issues that arise in the present application are as follows:
 - a. Whether the application is fatally defective for failure to seek extension of time;
 - b. Whether the delay in bringing the application disentitles the applicants from the orders sought;
 - c. Who ought to bear the costs of the application.
8. Regarding the first issue it is undisputed that the 3rd and 4th petitioners' suit abated upon the expiry of one year after their respective demises, nor that extension of time has not been sought in the present application or prior to its filing. The respondents' contention is that an extension of time needs be sought first before revival and joinder orders can be granted. This position resonates well with the proviso to Order 24 Rule 3(2) whose provisions are set out hereunder:

“3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3]

- (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.
- (2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.”

9. In Civil Appeal No 283 of 2015 *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Co Ltd & 2 Others* 2017 eKLR the appellants obtained from the lower court orders of revival of suit and joinder as legal representatives and upon appeal to the High Court it was held that the grant of the said orders ought to have been preceded by an application for extension of time as per provisions of Order 24 Rule 3 (2).



10. In *Rebecca Mijide Mungole* (*supra*) the Court of Appeal, upholding the High Court’s decision, stated as follows:

“...Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (*supra*) was therefore right in dealing with that aspect of the application in the manner he did.”

11. In *Said Sweilem Gheithan Saannum v Commissioner of Lands & 5 Others* (2015) eKLR it was observed as follows by the Court of Appeal:

“There are three stages according to these provisions. As a general rule, the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit.”

12. In the *Ignatius case* (*supra*) the court observed as follows:

“17. Was there any good reason advanced by the Plaintiff /Respondent to warrant the exercise of the discretion on whether or not to extend time? The Plaintiff/ Applicant submitted in opposition of the application that due to family wrangles following the death of the plaintiff who had two families, the family members were not able to agree on who should bring probate proceedings



and therefore the application or the suit could not be defended for lack of an Administrator.

18. A look at the annexure to the Plaintiff's replying affidavit, the same is clear that the deceased plaintiff died on the 28th May 2012 wherein one Josephine petitioned for Grant of probate on the 28th May 2015, two years after the plaintiff's death. To date letters of administration to administer the estate of the plaintiff have not been granted. The court finds that although reason given for failure to substitute the plaintiff within the stipulated one year was a good reason yet the delay in substituting the Plaintiff for close to 5(years) was not only inordinate but also inexcusable.
19. For interest of justice, however this court shall exercise its discretion and show mercy upon the plaintiff by invoking the provisions under order 50 rule 6 of the Civil Procedure Code to extend time to the Plaintiff/Respondent."
13. It is evident that in the Ignatius case (*supra*) the applicants had sought extension of time and availed some grounds to justify the delay which enabled the court to exercise its discretion in their favour. This contrasts with the present case where no extension of time has been sought. The other case that the applicants rely on, Silas Njeru Njiru (*supra*) is not helpful on this particular issue.
14. The petitioners in the present case have skipped one of the stages enumerated by the Court of Appeal in the Said Sweilem Gheithan Saannum case (*supra*). The delay in lodging the application having been in excess of one year and the suit thus having abated they needed to properly invoke the jurisdiction of this court in a joinder application by first seeking and obtaining extension of time which they have failed to do. As such this court lacks jurisdiction to address the prayers sought in the application dated 2/6/23 and for that reason the said application is hereby struck out with costs to the 2nd, 3rd, 4th and 6th respondents only.
15. This matter shall be mentioned on 30th October 2024 for further directions including directions on the contempt application dated 18/3/2024.

RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 31ST DAY OF JULY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI

