



REPUBLIC OF KENYA



**Fryda v Njue & another (Civil Case 423 of 2012)  
[2024] KEHC 13508 (KLR) (Civ) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13508 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 423 OF 2012**

**AN ONGERI, J**

**OCTOBER 29, 2024**

**BETWEEN**

**WILLIAM CHARLES FRYDA ..... PLAINTIFF**

**AND**

**JOHN CARDINAL NJUE ..... 1<sup>ST</sup> DEFENDANT**

**MARIE THERESE GACAMBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application coming for consideration in this ruling is the one dated 24/1/2023 brought under Order 25 Rule 3 of the Civil Procedure Rules seeking the following orders;
  - i. That this Honourable court be pleased to certify this application urgent and, upon the said certification, to order the application be set down for hearing and heard on a priority basis.
  - ii. That this Honourable court be pleased to extend the time for this Application made out of time under Order 24 Rule 3(2).
  - iii. That this Honourable court be pleased to allow the substitution of the 2<sup>nd</sup> Defendant, Marie Therese Gacambi, with her personal representative Sr. Maria Felixe
  - iv. That costs of this application be provided for.
2. The application is based on the following grounds;
  - i. That the 2<sup>nd</sup> Defendant/Respondent passed away on the 17<sup>th</sup> Day of September 2021 while Domiciled in the Republic of Kenya.
  - ii. That the above-named Sr. Maria Felix is the personal representative of the deceased Defendant.



- iii. That the above-named Sr. Maria Felix was granted the Letters of Administration Ad litem on 22<sup>nd</sup> November 2022, over 1 year after the passing of the deceased.
  - iv. That I pray this honourable court exercise its discretion and grant the orders sought
  - v. That no prejudice will be suffered by any party if the orders sought are granted.
3. The plaintiff did not oppose the application.
  4. The applicant filed submissions stating that this Honourable court be pleased to extend the time for this Application made out of time under Order 24 Rule 3(2).
  5. That this Honourable court be pleased to allow the substitution of the 2<sup>nd</sup> Defendant, Marie Therese Gacambi, with her personal representative Sr. Maria Felix.
  6. That costs of this application be provided for.
  7. The said application is supported by the affidavit of Sr. Maria Felix sworn on 24<sup>th</sup> January, 2023 that despite the application being served upon the Plaintiff/ Respondent, he has not filed any replying affidavit to oppose the same.
  8. That this suit was dismissed on 27<sup>th</sup> March, 2019 for want of prosecution with costs granted to the defendants herein, and upon the same being dismissed the 2<sup>nd</sup> Defendant filed her party and party bill of costs dated 13<sup>th</sup> March, 2020.
  9. That the 2<sup>nd</sup> Defendant/Applicant passed away on the 17<sup>th</sup> Day of September 2021 while Domiciled in the Republic of Kenya before the party and party bill of costs was taxed.
  10. That the Applicant herein petitioned for grant of letters of administration ad litem for the deceased's estate in Nairobi P&A No. E3087 of 2022 to enable her proceed with this suit and the same was duly issued to her on 22<sup>nd</sup> November 2022.
  11. That this Honourable court do exercise its discretion and be pleased to extend the time for filing this application for substitution out of time as provided for under Order 24 Rule 3(2) and proceed to allow the substitution of the 2<sup>nd</sup> Defendant with Marie Therese Gacambi.
  12. The applicant relied on the case of *Silas Nieru Niiru & 2 others v Mugo Mukere; Leonard Nieru Mukera & another (Intended Defendants/ Respondents)* (2022) eKLR where the court stated that;

“...in view of the special circumstances of this case, I am inclined to exercise the courts inherent powers and allow for revival of the suit herein to ensure that the ends of justice are met.

The court went on to state;

“ “.....where a defendant dies and the cause of action survives the defendant, then such deceased person can only be substituted by the legal representative of his estate. In Embu Succession Cause No. 6 of 2017, the intended respondents were issued with letters of administration dated 11<sup>th</sup> January 2018 to the estate of the defendant. It is therefore not in dispute that they are the legal representatives of the estate of the defendant. It therefore follows that they are the right parties to be substituted in place of the defendant.....”



13. The sole issue for determination is whether time should be extended for substitution of a deceased person after time has abated.

14. In *Donald Mwangi Njoroge v Lucy Wanjiru Karanja (legal representative of the late John Mwangi Karanja)* [2017] eKLR the court held

“ 15. I have examined the application in the lower Court which is being appealed against. That application sought to substitute the Respondent herein in place of John Mwangi Karanja who died in 2001 as per the attached copy of the death certificate. It would appear that the Respondent obtained limited letters of grant of administration ad litem in 2010, 9 years after the death of the said John Mwangi Karanja. Given the nature of the claim in the suit being land and not of a personal nature, the suit survived the death of the Defendant. However, no application was made for substitution of the deceased Defendant with the legal representative within the stipulated period of one year. By the time of filing the application for substitution in 2012, the suit had abated in 2002, a period of over 10 years. It therefore follows that there was no suit in which substitution could be made since it had abated one year after the death of the Defendant. An order for substitution in those circumstances could only have been made in error.

16. In the case of *Kenya Farmers Cooperative Union Limited v Charles Murgor* HCCC No. 1671 of 1994 the Court held that there must first be an application for revival of the suit after abatement before substitution. An order for substitution before revival would be a nullity in law and would be of no effect as the matter goes to the jurisdiction of the Court since it would have no jurisdiction to hear and determine a matter that has abated by operation of law nor to hear and determine a suit that had already abated by operation of law. Though the Magistrate dismissed the application for other reasons, the said application in my view would have met the same fate but for the reason I have given above.”

15. I find that the suit already abated on 17/9/2022 since the 2<sup>nd</sup> defendant died on 17/9/2021.

16. In the case of *Janet Wangari Mwangi v James Muchoki Kariuki & Bidco Oil Refineries Ltd*[2004] eKLR, the court stated as follows;

“I do find that the Plaintiff has not shown sufficient cause why she was unable to make an application for the substitution of the deceased 1st Defendant within the period of one year as established by statute. The Plaintiff did not exercise due diligence to establish the identity of the administrator of the estate of the deceased 1st Defendant. Further the period of two years and nine months that the Plaintiff took before she applied for the substitution of the deceased 1st Defendant is inordinate. No reasonable explanation was given for the delay. In the circumstances therefore, I do find that the Plaintiff has not shown sufficient cause why the abated suit against the deceased 1st Defendant should be revived. The Application for enlargement of time is consequently dismissed with costs to the 2nd Defendant”.

17. This suit has abated against the 2<sup>nd</sup> defendant on 17/9/2022 and no sufficient cause has been shown why the abated suit against the 2<sup>nd</sup> defendant should be revived.



18. The 2<sup>nd</sup> defendant died on 17/9/2021 the applicant was granted the Letters of Administration Ad litem on 22<sup>nd</sup> November 2022, over 1 year after the passing of the deceased and the current application for substitution was made on 24/1/2023 over 2 years after the 2<sup>nd</sup> defendant died.
19. In the case of *Janet Wangari Mwangi v James Muchoki Kariuki*(*supra*), the court said that;
- “...the period of two years and nine months that the Plaintiff took before she applied for the substitution of the deceased 1st Defendant is inordinate. No reasonable explanation was given for the delay.”
20. The application dated 24/1/2023 is dismissed for want of merit with no orders as to costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

.....

**A. N. ONGERI**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

