



Kessei v Kipkabus & 6 others; Muge (Applicant) (Environment & Land Case 888 of 2012) [2023] KEELC 19121 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 888 OF 2012**

JM ONYANGO, J

JULY 26, 2023

BETWEEN

JOH KIMUGE KESSEI PLAINTIFF

AND

RICHRD SITIENEI KIPKABUS 1ST DEFENDANT

JAPHETH SEREM 2ND DEFENDANT

MUSA KOMEN 3RD DEFENDANT

GRACE KOMEN 4TH DEFENDANT

PETER KIPNEGETICH 5TH DEFENDANT

SAMWEL BARNO 6TH DEFENDANT

KIPCHUMBA KOSGEI 7TH DEFENDANT

AND

BEATRICE JELAGAT MUGE APPLICANT

RULING

1. Beatrice Jelagat Muge, the Applicant herein filed a Notice of Motion dated March 23, 2023 pursuant to Order 12 Rule 7 Order 24 Rule 7(2) and Order 45 Rules 1 and 2 and Order 51 of the [Civil Procedure Rules](#) seeking the following orders:
 - a. That the deceased plaintiff John Kimuge Kessei be substituted by Beatrice Jelagat Muge, the Applicant herein.
 - b. That the Plaintiff's suit be reinstated.



- c. That this Honourable Court be pleased to review and set aside the orders issued herein on November 11, 2019.
 - d. The costs of this application be in the cause.
2. The application is based on the grounds stated on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on March 23, 2023.
3. In her supporting affidavit the Applicant has explained that she is one of the beneficiaries of the late John Kimuge Kessei who passed away on July 7, 2017. After his demise they applied for a Grant of Letters of Administration. However unbeknownst to her the suit was dismissed on November 11, 2019. She would therefore like to substitute him and revive the suit herein.
4. The application is opposed by the Respondents through the Replying affidavit of Japheth Serem sworn on the May 2, 2023 in which he avers that there has been inordinate delay in bringing the application and that there are no good grounds for reinstating the suit. He accuses the Applicant of casting aspersions on the plaintiff's advocate without any evidence and adds that that the matters deponed do not amount to an excusable mistake to warrant the application being granted.
5. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.
6. Having considered the application, rival submissions and the applicable law and authorities, the main issues for determination are:
 - i. Whether the order marking the suit as abated should be set aside and the suit reinstated.
 - ii. Whether the deceased plaintiff should be substituted by the Applicant

Analysis and determination

7. Order 24 Rule 4 of the [Civil Procedure Rules](#) provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

“ 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.”



Additionally Rule (7)(2) provides as follows;

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and if it is proved that he was prevented by any sufficient cause from continuing with the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit”

8. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing with the suit.

9. The Court of Appeal in the case of The Hon. Attorney General v The Law Society of Kenya & Another Civil Appeal (Application) No 133 of 2011 observed as follows as to the meaning of sufficient cause:

“Sufficient cause or good cause in law means:-

‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See Black’s Law Dictionary, 9th Edition, page 251.”

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

10. In the case of Joseph Kabonge Muthondu v John Macharia & Elizabeth Muthoni Kabonge (2019) eKLR the court faced with a similar application revived the suit and substituted the deceased plaintiff.

11. In the instant case, the case the Applicant has explained that her father died in 2017 in Mombasa and they obtained a grant of letters of administration in 2019. Before she could apply for substitution, the suit was marked as having abated without her knowledge. She has explained that part of the delay was occasioned by the Covid-19 Pandemic. I take judicial notice that in 2020 and part of 2021 the operations of the court slowed down due to the Covid-19 pandemic and therefore the delay is not inordinate.

12. In the circumstances, I find merit in the application and I grant it and make the following orders:

- a. The order marking the suit as having abated is hereby set aside and the suit is revived.
- b. The deceased plaintiff is hereby substituted with Beatrice Jelagat Muge.
- c. The Plaint shall be amended to reflect the name of the substituted plaintiff with 21 days from the date of this ruling.
- d. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY 2023.

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J.M ONYANGO

JUDGE

