



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbindah & another v Mwende & 10 others (Environment & Land Case 32 of 2021) [2023] KEELC 20157 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20157 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT SIAYA**  
**ENVIRONMENT & LAND CASE 32 OF 2021**  
**AY KOROSS, J**  
**SEPTEMBER 28, 2023**

**BETWEEN**

**CHRISTOPHER MBINDAH ..... 1<sup>ST</sup> PLAINTIFF**

**PANCRAS MBINDAH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CLAUDE MWENDE ..... 1<sup>ST</sup> DEFENDANT**

**GEORGE OGINGA ..... 2<sup>ND</sup> DEFENDANT**

**ODHIAMBO OGORO ..... 3<sup>RD</sup> DEFENDANT**

**OTIENO OGORO ..... 4<sup>TH</sup> DEFENDANT**

**PHILEMON OMONDI ..... 5<sup>TH</sup> DEFENDANT**

**JOHN OMONDI ..... 6<sup>TH</sup> DEFENDANT**

**JOHN MARK OMONDI ..... 7<sup>TH</sup> DEFENDANT**

**REUBEN ONYANGO OHOLA ..... 8<sup>TH</sup> DEFENDANT**

**ODHIAMBO ORARE ..... 9<sup>TH</sup> DEFENDANT**

**OOKO OMWANDA ..... 10<sup>TH</sup> DEFENDANT**

**HENRY MOI MARANJE ..... 11<sup>TH</sup> DEFENDANT**



## RULING

### Plaintiff's Case

1. Pursuant to Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 24 Rule 3 of the [Civil Procedure Rules](#), the 1<sup>st</sup> plaintiff filed a notice of motion dated March 16, 2023 praying for the following orders:
  - a. Spent.
  - b. Spent.
  - c. The revival of the abated suit by the 2<sup>nd</sup> plaintiff (deceased) who died during the pendency of the suit.
  - d. The extension of time within which to substitute the 2<sup>nd</sup> plaintiff (deceased) with his legal representative Christopher Mbindah.
  - e. Upon granting prayer (d) above, the 2<sup>nd</sup> plaintiff (deceased) be substituted by his legal representative Christopher Mbindah.
  - f. Costs be in the cause.
2. The motion was premised on grounds enumerated on its face. It was supported by the supporting affidavit of the 1<sup>st</sup> plaintiff Christopher Mbindah sworn on March 16, 2023.
3. It was the 1<sup>st</sup> plaintiff's position the 2<sup>nd</sup> plaintiff who was his brother died on February 19, 2020 which was during the pendency of these proceedings and by operation of law, his suit had abated. He was unable to timely secure his brother's death certificate and when he did, he moved the appropriate court and obtained a limited grant.
4. Further, he contended the cause of action survived the deceased who was the registered owner of one of the suit properties known as North/Ugenya/Ndenga/591. The defendants would not be prejudiced and it would be in the interests of justice if the motion was allowed.

### Defendants' case

5. The 2<sup>nd</sup> defendant strenuously opposed the motion by filing a replying affidavit deposed on May 4, 2023. In summary, he asserted the 1<sup>st</sup> plaintiff was guilty of laches and had not proffered sufficient reason for the delay in filing the motion 3 years after the demise of the 2<sup>nd</sup> plaintiff.
6. Further, the motion ran afoul the provisions of Order 24 (1) and 3 (1) (2) of the [Civil Procedure Rules](#) because the 1<sup>st</sup> plaintiff had failed to 1<sup>st</sup> seek extension of time to revive the suit before seeking the prayers in the current motion. The 1<sup>st</sup> plaintiff would not be prejudiced if the motion was disallowed and the motion should be dismissed.

### 1<sup>st</sup> plaintiff's submissions

7. The 1<sup>st</sup> plaintiff's written submissions dated May 31, 2023 were filed by his counsel JA Guserwa & Co Advocates who identified one issue for determination; whether the motion was merited. Counsel submitted by the provisions of Order 24 Rule 3 of the [Civil Procedure Rules](#), the court could extend



time for a party to substitute a deceased plaintiff and by Rule 7 of the same Order, an abated suit could be revived.

8. Counsel placed reliance on the decision of *William Opondo Omalla v Gabriel Ochong Oriwa & another* [2021] eKLR and *Muburi v First Credit Exchange Development Limited* (Environment & Land Case 61 of 2017) [2023] KEELC 16642 (KLR) (28 March 2023) (Ruling) which allowed the substitution of a deceased plaintiff. The latter decision cited with approval the Court of Appeal decision of *Rebecca Mijide Mungole & another vs Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR which analyzed the legal framework for reviving an abated suit.

## 2<sup>nd</sup> Defendant's Submissions

9. His counsel, Mr Odhiambo Robin, filed written submissions dated May 9, 2023. Counsel rehashed the averments made in the 2<sup>nd</sup> defendant's replying affidavit.
10. Counsel asserted the discretion to enlarge time should be exercised in a judicious manner. Counsel asserted the principles were cemented in the Court of Appeal decision of *First American Bank of Kenya Ltd v Gulab P sbah & 2 Others* Nairobi (Milimani) HCCC No 2255 of 2000(2002) 1 EA 65 which set out the principles to be considered as follows: -

“..... the length of the delay, the explanation if any for the delay, the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is frivolous one which will only result in delay of the course of justice, whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.”

11. Counsel submitted the procedures laid down in Order 24 of the *Civil Procedure Rules* could not be short-circuited and a reading of the whole Order showed one had to seek extension of time to substitute a party and once leave had been granted, an applicant could seek certain orders. Counsel also relied on the case of *Rebecca Mijide Mungole & another vs. Kenya Power & Lighting Company (Supra)*.

## Analysis and Determination

12. Having carefully considered the motion, affidavits, rival submissions and well cited provisions of law and precedents, I shall adopt the 1<sup>st</sup> plaintiff's single issue as the issue for determination; whether the motion was merited.
13. First, it is undisputed the 2<sup>nd</sup> plaintiff is deceased and died on February 19, 2020 which was during the pendency of these proceedings and the 1<sup>st</sup> plaintiff is his legal administrator having obtained limited grant on February 13, 2023 in Nairobi HC Succession Cause No E3062 of 2022 and the cause of action survived the deceased.
14. The legal framework for substitution of a deceased plaintiff is captured in Order 24 Rules 3 (2) and 7(2) of the *Civil Procedure Rules*. These provisions of law provide as follows: -

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

- (1) .....
- (2) Where within one year no application is made under subrule (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.

Effect of abatement or dismissal [Order 24, rule 7.]

- (1) .....
- (2) 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 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.” Emphasis added.

15. The decision of Rebecca Mijide Mungole & another vs. Kenya Power & Lighting Company (*Supra*) that was cited by both counsels and which I hereby adopt was dealing with an appeal whereby the applicant had sought an application for revival of an abated suit without seeking a prayer for extension of time within which a plaintiff could be substituted and the court held thus: -

“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.”

16. My understanding of Mr Odhiambo’s argument was that the 1<sup>st</sup> plaintiff had to first file a separate application for extension of time and once that application had been allowed, only then, would the 1<sup>st</sup> plaintiff seek the prayers sought in the motion.
17. However, such an argument would go against the grain of Article 159 (2) (b) of the *Constitution* and Sections 1A and 1B of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act* which calls for expeditious disposal of cases.
18. The text of Order 24 of the *Civil Procedure Rules* does not prohibit omnibus prayers being sought in an application such as the one made by the 1<sup>st</sup> plaintiff; he has moved this court in seeking an extension of time to substitute the deceased plaintiff and revival of the abated suit. See Rebecca Mijide Mungole & another vs Kenya Power & Lighting Company (*Supra*).
19. I agree with Mr Odhiambo that the question of whether or not to extend time or grant an order for revival of an abated suit is essentially one of discretion. However, a reading of Order 24 Rules 3(2) and 7(2) of the *Civil Procedure Rules* demonstrates such discretion has to be exercised in a judicious manner anchored on “good reason” and “any sufficient cause”.



20. In my considered view, this court has been given a wide latitude. In the Court of Appeal decision of *Attorney General v Law Society of Kenya & another* [2013] eKLR, the court held sufficient cause has to be on certain principles when it stated: -

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

21. The 1<sup>st</sup> plaintiff contended he obtained the 2<sup>nd</sup> plaintiff’s death certificate late in the day. I have scrutinized the death certificate and indeed, it was issued on September 1, 2022 and no doubt, he filed the succession cause for him to be appointed a legal administrator of the deceased in 2022 which was the same year he obtained the death certificate.
22. Additionally, this court has also taken judicial notice the deceased died in 2020 which was when COVID 19 had ravaged the country and many government offices’ operations were affected.
23. The motion that is the subject of this ruling was filed close to one month from when the 1<sup>st</sup> plaintiff obtained limited grant which was issued on February 13, 2023.
24. I am therefore satisfied that the 1<sup>st</sup> plaintiff has demonstrated good reason and sufficient cause to warrant the grant of the prayers sought. Further, having considered the reliefs sought in the main suit, it would be in the interests of justice for the suit to be determined on merits. However, I must hasten to add that this matter has been pending in court for over 10 years and should be fast tracked for hearing without much ado.
25. Ultimately and in the circumstances, I find the notice of motion dated March 16, 2023 merited. Costs shall be in the cause and I hereby issue the following disposal orders: -
- a. That the 2<sup>nd</sup> plaintiff’s suit is hereby revived.
  - b. That the deceased 2<sup>nd</sup> plaintiff is hereby substituted with Christopher Mbindah.
  - c. That Christopher Mbindah as the 2<sup>nd</sup> plaintiff’s legal representative do file and serve an amended plaint to reflect the substitution within 14 days of delivery of this ruling.
  - d. That the defendants be at liberty to file amended defences within 14 days of service.
  - e. That matter shall be mentioned for directions on hearing of the main suit on October 31, 2023
  - f. That costs shall be in the cause.

**DELIVERED AND DATED AT SIAYA THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2023.**

**HON. A. Y. KOROSS**

**JUDGE**

