



**Ali (Administrator to the Estate of Mohammed Ali Abdala - Deceased) v Mohammed & 2 others
(Environment & Land Case 218 of 2014) [2025] KEELC 3033 (KLR) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 3033 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 218 OF 2014**

**AK BOR, J
MARCH 13, 2025**

BETWEEN

**FAUD MOHAMMED ALI (ADMINISTRATOR TO THE ESTATE OF
MOHAMMED ALI ABDALA - DECEASED) PLAINTIFF**

AND

MARY NJERI MOHAMMED 1ST DEFENDANT

EMBU COLLEGE 2ND DEFENDANT

JOSIAH NJUE GICHOBI 3RD DEFENDANT

RULING

1. The Plaintiff brought the application dated 20/2/2024 seeking to substitute the 1st Defendant Mary Njeri Mohammed who died, with her administrator Feisal Mohammed. In the alternative, he sought to join or substitute the late Mary Njeri Mohammed with the administrator to her estate, Feisal Mohammed pursuant to Order 1 Rule 10(2) of the Civil Procedure Rules. He also sought that the costs of the application be in the cause.
2. The application was made on the grounds that the 1st Defendant died on 13/9/2017 and that Feisal Mohammed is the administrator of the Estate of the 1st Defendant pursuant to a limited grant ad litem issued in Embu CMCC Misc Succession Cause No. 68 of 2017 (Estate of Mary Njeri Mohammed). The Plaintiff added that the law requires a deceased person to be substituted failing which the suit abates. He urged that the administrator was an important party to be joined in this suit and that no prejudice would be caused to any party if the orders sought were granted and that it was in the interest of justice for the application to be allowed.
3. The Plaintiff swore the affidavit in support of the application and attached a copy of the 1st Defendant's death certificate together with a copy of the grant of letters of administration ad litem.



4. The application was opposed by Feisal Mohammed through grounds of opposition, mainly that he cannot be substituted in the suit which abated on 13/9/2018. He added that the Plaintiff filed a similar application dated 28/2/2019 which he amended on 26/6/2019. That when he filed grounds of opposition to that application, the Plaintiff abandoned the prayer for substitution but the other prayers were granted hence the present application was res judicata. He argued that the application was frivolous, malicious, vexatious and an abuse of the court.
5. The court directed parties to file and exchange submissions, which it has considered. The Plaintiff submitted that the counsel that was holding brief for his advocate when the application dated 28/2/2019 came up for hearing inadvertently abandoned the prayer to substitute the 1st Defendant without consultation. He urged that the mistake should not bar him from being heard on merit. Further, he contended that the former application was not heard on merit and therefore was not res judicata. He maintained that the present application was properly before this court.
6. It was his position that the 1st Defendant was an important party to the suit as she was accused of committing fraud in the transfer of the suit property to the 2nd and 3rd Defendants, and that if this were found to be true, her estate would be affected. He urged that the substitution of the 1st Defendant was necessary for purposes of determining the real issues in controversy between the parties.
7. In his submissions, Feisal Mohammed reinforced the position that the instant application was res judicata and added that the Plaintiff cannot seek to substitute the 1st Defendant who died almost seven years ago. Further, that no explanation was given for the delay in substituting the dead Defendant. He urged the court to dismiss the application.
8. The issue for determination is whether the court should grant the orders sought in the application dated 20/2/2024 by allowing the Plaintiff to substitute the 1st Defendant with the administrator of his Estate. The administrator urged the point that this application was res judicata in that the orders sought were similar to the orders that were sought in a former application but which were abandoned. In this court's view, the abandonment of that prayer in the former application amounted to a withdrawal which means the issue was not heard and determined conclusively. Res judicata only applies where a matter was conclusively heard and the issue in controversy determined on merit.
9. It is not in dispute that the 1st Defendant died on 13/9/2017 as can be discerned from the death certificate which was annexed to the affidavit in support of this application. It is also not in dispute that the Plaintiff previously filed the application dated 28/2/2019 and amended it on 26/6/2019 seeking inter alia, to substitute the 1st Defendant. The application was heard on 1/7/2019 when the prayer for substitution was abandoned.
10. There is no doubt that the application was brought more than a year after the 1st Defendant's death. Order 24 rule 4 of the Civil Procedure Rules requires that upon the death of a defendant and where the cause of action survives her death, an application should be made to cause the legal representative of the dead defendant to be made a party to the suit. Order 24 Rule 4(3) provides that where no application is made for the substitution of the defendant within one year of her death, the suit shall abate as against the dead defendant.
11. No application for substitution of the 1st Defendant was made within one year of her death and by operation of law, the suit against her abated on 13/9/2018. Similarly, at the time the first application dated 28/2/2019 was made, the suit against the 1st Defendant had already abated.
12. Order 24 rule 7 affords a party the opportunity to apply to revive a suit which has abated and if it is proved that the applicant was prevented by sufficient cause from continuing the suit, the court shall



revive the suit upon such terms as to costs or as it deems fit. In this case no application was made for the revival of the suit which had abated against the 1st Defendant by operation of the law.

13. There is no suit subsisting against the 1st Defendant in which substitution can be made. Order 1 rule 10(2) cannot assist the Plaintiff to join Feisal Mohammed in the suit since there is a procedure set out for substituting a dead party.
14. The application dated 20/2/2024 fails and is dismissed. The costs of that application shall be in the cause.

DELIVERED VIRTUALLY AT EMBU THIS 13TH DAY OF MARCH 2025.

K. BOR

JUDGE

In the presence of: -

Ms. M. Kagema holding brief for Mr. A. Mahmoud for the Plaintiff

Mr. K. Musyoka holding brief for Mr. K. Guantai for the 2nd Defendant

Mr. Josiah Gichobi- 3rd Defendant

Court Assistant- Diana Kemboi

No appearance for the other Defendants

