



Sigma Feeds Limited v Metcourt Hostels Ltd & 7 others (Environment & Land Case 420 of 2008) [2025] KEELC 3416 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3416 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 420 OF 2008**

AA OMOLLO, J

APRIL 30, 2025

BETWEEN

SIGMA FEEDS LIMITED PLAINTIFF

AND

METCOURT HOSTELS LTD & 7 OTHERS & 7 OTHERS & 7 OTHERS DEFENDANT

RULING

1. The Applicant filed a Notice of Motion dated 7th March 2025 supported by an affidavit sworn by Kirtesh P.Shah on the same date seeking for the following orders;
 - a. Spent.
 - b. That this Honourable Court be pleased to substitute the 2nd Defendant's name herein James Mwangi Gacheru (who is now deceased) with Stephen Mungai Gacheru and Josephine Wanjiru Gacheru who are now the Administrators/ Executors of the Estate of the late James Mwangi Gacheru pending hearing and determination of this suit.
 - c. That the costs of this application be provided for
2. The motion was based on the grounds that the 2nd Defendant, James Mwangi Gacheru, passed away on November 14, 2023, while the case was ongoing. That following his death, his legal representatives, Messrs. Amolo & Gacoka, sought time to obtain a Grant of Letters of Administration for his substitution but later stated they had no further instructions, with his son, Martin Gacheru, also not assisting with the succession process. That the Plaintiff reserved the right to seek substitution once the necessary details were available.
3. The Applicant stated the deceased's family appointed M/S Titus Marenye Kagiri & Company Advocates to handle the estate, and a Petition for Letters of Administration with Will was filed on



- 16th February, 2024 with the matter set for further hearing in March 2025. That the Plaintiff seeks to substitute the deceased Defendant with the proposed administrators of his estate, as they have failed to do so themselves despite the Defendant's key role in the case.
4. In opposition, the 2nd Defendant's Estate filed grounds of opposition dated 11th April 2025 while the 1st-4th Defendants filed grounds of opposition dated 4th April 2025. The grounds of opposition stated that the application is bad in law, incompetent and misconceived. That the deceased as admitted by the Applicant died on 14th November 2023 and the instant application was filed after one (1) year four (4) months since the demise of the late 2nd Defendant.
 5. Consequently, the application offends the provisions of Order 24 Rule 4 of the Civil Procedure Rules and the basis of the alleged delay upon which the Application is premised offends the provisions of Rule 7 (4) of the Probate and Administration Rules.
 6. They averred that the application is seeking substitution of a deceased party in a suit that has abated and does not exist as against the 2nd Defendant. Also, the application is otherwise an abuse of the Court process and it ought to be struck out or dismissed with costs.
 7. The motion was heard orally on 24th April 2025. The Applicant argued that the court has discretion to substitute a defendant where the cause of action survives him/her under section 2 of the Law Reform Act. Mr. C. N Kihara learned counsel for the Applicant submitted that the good reason for seeking extension of time is based on the representation made by Mr Chege learned counsel for the Defendant that he was to take out letters of administration until later on 8.10.2024, when he intimated that he had no obligation to take out the same.
 8. It is the Plaintiff's submission that it had relied on the deceased defendant's counsel word and therefore did not take out steps to substitute him in good time. Thus, he urges the court to re-instate the suit which had abated as against 2nd Defendant.
 9. On his part, Mr. Chege learned counsel for the 1st and 4th Defendants besides relying on the grounds of opposition dated 4th April 2025 submits that the deceased died on 14th November 2023 therefore, Order 24(4)(3) the suit has against the 2nd Defendant has abated. Further, in the Applicant's supporting affidavit, there is no mention of his (Mr Chege) making of any representation and in any event, he had no capacity to represent the deceased.
 10. Mr. Kagiri Counsel for the estate of the 2nd Defendant associated himself with Mr. Chege's submissions in arguing that the orders sought are in the nature of equitable reliefs and those who come to equity must come with clean hands. That there is no prayer for extension of time and additionally there was no disclosure in the application that a grant was made on 29.4.2025.
 11. Counsel submitted that the Applicant did not lodge the application within the one-year period and the delay has not been explained. That the 1st Defendant is a legal person independent of the 2nd Defendant so the Defendants having been sued jointly and severally, the Applicant will not be prejudiced in any manner if the substitution is not allowed.
 12. In response, Mr Kihara for the Applicant stated that the period between date of death and before lapse of one year, it is the estate which is the Respondent. That they have mentioned the issue of representation by Mr.Chege in Paragraph 3 of the supporting affidavit.
 13. In addition, the Plaintiff/Applicant also filed written skeleton submissions dated 22nd April 2025 stating that they seek an order to substitute the deceased 2nd Defendant, James Mwangi Gacheru, with the Executors of his Estate, arguing that the cause of action survives his death. They submitted that



this case has been ongoing since 2008 claiming wrongful eviction and demolition by the Defendants. The 2nd Defendant died on November 14, 2023, after the Plaintiff's case had been heard but before the Defendants presented their evidence.

14. That various delays occurred in substituting the 2nd Defendant, with several court mentions and adjournments, including an attempt to have the deceased's family apply for Letters of Administration. The Plaintiff asserts that the cause of action survives the 2nd Defendant's death, referencing the [Civil Procedure Act](#) and the [Law Reform Act](#), which allow the substitution of a deceased Defendant's estate.

Analysis and Determination:

15. I have read and considered the application together with the supporting affidavit thereof and the grounds of opposition to the same. I have also considered the oral submissions made in court by the parties' counsels and the written skeleton submissions by the Plaintiff.
16. The gist of the application is seeking an order to substitute the 2nd Defendant who is now deceased with Stephen Mungai Gacheru and Josephine Wanjiru Gacheru who are the legal Administrators/Executors of his Estate. This request is opposed by the 1st, 2nd and 4th Defendants stating that the application having been filed after one year without explaining the delay and that it offends the provisions of Order 24 Rule 4 of the Civil Procedure Rules.
17. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:-
 - “(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.”
18. The factual position is that the deceased who was the 2nd defendant died on 14th November 2023. Therefore, his substitution ought to have been undertaken on or before 13th November, 2024. The present application was made on 7th March, 2025, approximately three (3) months after the suit abated.
19. The proviso to Order 24 Rule 3 (2) of the Rules states as follows;
 - “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.”
20. The Applicant has approached this court under Article 159 (2)(d) of [the Constitution](#) of Kenya, 2010, Sections 1A, 1B & 3A of the [Civil Procedure Act](#) among other applicable laws seeking for extension of



substituting the 2nd Defendant. In the case of *Ndichu Kahuha v Stanley Njeru Peter & another* [2019] eKLR, the court held that;

“The court is further of the opinion that where such period is extended by the court the question of abatement of a suit does not arise. If a suit abates only when no application for substitution is made within one year, then it means that no abatement can take place before expiry of the time. By parity of reasoning, where that period of one year is extended by the court, there can be no abatement until the extended period has expired.”

21. I have considered the reason tendered by the Applicant for the default in filing the application for substitution within the stipulated period. From the record, Mr Chege, learned counsel for the 1st and 4th Defendant previously appeared for the 1st, 2nd, 3rd and 4th Defendants. Before 8th October 2024, Mr Chege said he was seeking instructions to substitute the deceased Defendant. He reported in April, 2024 that the family had even agreed on the person to be appointed as the administrator of the estate the 2nd Defendant. Therefore, having previously acted for this person, there was nothing to make the Plaintiff doubt that he had no instructions to take substitute the said deceased party.
22. Also, the instant application was filed only four months after the stipulated time within which to file for substitution. It is not inordinate given that hearings have proceeded. I am thus satisfied that there is good reason to justify the extension of time under Order 24 Rule 3 (2) of the Rules. The upshot of the foregoing is that the court finds merit in the notice of motion and the same is hereby allowed in terms of Order No. b thereof. The suit against the 2nd Defendant is also re-instated.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF APRIL, 2025.

A. OMOLLO

JUDGE

