REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

FORMERLY HCC NO. 36 OF 1998

ELC LAND CASE NO. 36 OF 1998

MONGENI WEPUKHULU.....PLAINTIFF

VERSUS

THOMAS WASIKE WEPUKHULU.....DEFENDANT

AND

PATRICK SIMIYU MONGENI.....APPLICANT

VERSUS

ROBERT BARASA WASIKE.....RESPONDENT

RULING

(On setting aside and order of dismissal of abated suit, its revival, and substitution of deceased parties)

1. This is a ruling in respect to a Notice of Motion dated **26/7/2021**. The Motion was brought by **Patrick Simiyu Mongeni.** It was brought under **Section 1A, 1B, 3** and **63 (e)** of the **Civil Procedure Act, and Order 24 Rule 3 (1), 7 (2), Order 45 Rule (1), (2)** and **Order 51 Rule (1)** of the **Civil Procedure Rules** and **Article 159** of the Constitution of Kenya (**2010**). The applicant sought the following orders:

(1) …spent

(2) That the order made on 18/10/2004 dismissing the suit be revived, varied and or set side

(3) This Honourable court be pleased to order for the revival of the suit and thereafter substitute the deceased Plaintiff with the Applicant, Patrick Mongeni.

(4) That the defendant who is likewise deceased be substituted with Robert Barasa Wasike.

(5) That the Court do give directions as to hearing and disposal of the suit.

(6) Costs be in the cause.

2. The Application was based on the grounds on the face of it and supported by the Affidavit sworn by the Applicant on **26/7/2021**. It was the Applicant's contention that the Plaintiff died on **10/3/2000** while the defendant died on **21/11/2015**. The Applicant states that after the demise of the Plaintiff, the Applicant initiated succession proceedings on the **31/7/2000** but the same was objected to by the deceased defendant. It resulted in a delay of **ten 10 years** because the final orders were made **ten (10) years** after.

3. He further stated that the notice of dismissal for want of prosecution was issued to the deceased after his demise and the suit was dismissed on **18/10/2004**. His contention was that this occurred while the objection proceedings were still on. He then stated that he had instructed the firm of Ms. **Saenyi Juma Advocate** to act for him but he did not receive any communication from counsel and that since then the file was missing. He stated again that that the former counsel on record closed office and joined the judiciary and it took him time to trace the original file at the court archives. The applicant further averred that he was not aware of the notice of dismissal as it was served upon the Plaintiff who was then deceased.

THE RESPONSE

4. The Respondent being the legal representative of the original defendant (deceased) swore a Replying Affidavit on **24/8/2021** and filed it on **27/8/2021** in opposition to the Application. In it, he stated that the Application was misconceived, bad in law and amounted to an abuse of the court process; that the Applicant always had the ulterior motive of disinheriting him and other beneficiaries of the estate of the late **Thomas Wasike Wepukhulu.** It was his argument that the Application had been overtaken by events since all issues pertaining to **SPMC Land Case No. 90 of 1997** regarding plot **No. 252 Sinyerere Scheme** were resolved by Hon. Justice **NRO Ombija**'s decision. His argument was that the ruling delivered and decree issued thereon had never been appealed, reviewed or set aside to date and there were vesting orders which were issued by the court on **23/7/2019** in respect to the suit land. He summed it that the Applicant had not given valid reasons for the delay in filing the instant Application for reviving the suit. He then stated that the Applicant was aware of the confirmed grant issued by the High Court and the Application had been overtaken by events since the land has been registered in his name, thus the present application was an abuse of the court process. He prayed for its dismissal with costs.

5. The Applicant sought leave to file a further affidavit. It was granted. He filed it on **1/10/2021.** In the Affidavit he stated that it was the respondent who had disinherited him from his father's property. He then stated that the rulings by Honourable Justices Ombija and Chemitei were in respect of Succession proceedings but not a land matter. He deponed that he had given reasons for the delay and the suit was erroneously dismissed by the court.

SUBMISSIONS

6. On **23/9/2021**, this Court directed the parties to dispose the Application by way of written submissions. Both parties filed their submissions.

ANALYSIS, ISSUES AND DETERMINATION

7. I have carefully considered the Application, the grounds in support thereto, the affidavits both in support and opposition, the submissions filed by the parties, the authorities cited as well as the law. I form the opinion that the following issues are the ones I should determine:

(a) Whether an abated suit can be dismissed for want of prosecution

(b) Whether the Orders of 18/10/2004 can be revived, varied and set aside

(c) Whether an abated suit can be revived

(d) What orders, including payment of costs, should issue

8. I analyze the issues as here below:

(a) ***Whether an abated suit can be dismissed for want of prosecution***

9. The instant Application presents a unique situation. This flows from the law on abatement of suits and the history of the suit herein both of which I summarize here. The law governing abatement of suits is found in **Order 24 Rules 3** and **4** of the **Civil Procedure Rules**. **Order 24 Rule 3** takes care of a situation where the plaintiff or several plaintiffs die. It provides as follows:

> **"3 (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit".**
>
> **(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.

10. The above provision relates to a situation where a plaintiff dies and a suit survives him or her. In the circumstance, the legal representative is legally under the obligation to file an application within one year for substitution of the deceased plaintiff. It is incumbent on the surviving relatives to move quickly within one year to make the application. If they think it is not possible to do so within the period, they can ask for leave of the Court for extension of the period, and it behooves them to move the Court within that extended period if granted. However, if after the lapse of one year after the death of the plaintiff or after the extended period an application for substitution is not made, then the suit abates automatically by operation of law. The grant of leave for extension of time to file an application for substitution happens where the applicant gives good reason for delay in filing the application for substitution.

11. The Rules also provide for continuity of a suit even at the demise of a defendant or defendants. **Order 24 (4) (1)** provides:

> **"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 sub-rule (1), the suit shall abate as against the deceased defendant."

12. In the instant suit, both the Plaintiff and the Defendant are deceased. The Plaintiff died in on **10/03/2000** whereas the defendant on **21/11/2015**. But of interest and relevance to the issue at hand is the order made on **18/10/2004** by which the Court dismissed the suit **for want of prosecution**. That was made **three years and seven months after** the Plaintiff had died. The question then that follows is whether the Court order was valid. This is because if it was, then the prayer for revival or setting the order aside of that date as it is made in the instant Application would have a basis for its consideration on merits.

13. The effect of abatement of a suit is that the suit, if it was by a Plaintiff ceases to exist against the defendant(s) or if against a defendant who dies ceases to exist as against that defendant.

14. The applicant herein did not file an application within the prescribed statutory of one year for the substitution of the plaintiff until the suit was dismissed in **2004** for failure to prosecute the matter. In the year **2015**, the defendant also died and there is no application which has been filed for substitution of the deceased defendant to date.

15. The conclusion that this court arrives at is that the suit abated in **10/3/2001** as against the defendant when the legal representatives of the deceased plaintiff failed to present before this court an application foe substitution of the plaintiff. It does not matter at what stage the suit was, whether it was fresh or partly heard at the Plaintiff's stage or the defence stage. No matter the amount of evidence that had been adduced as at the time of abatement, the suit no longer exists once it has abated. As long as the Court had not pronounced itself on the merits or otherwise of the suit, it ceases to exist.

16. In the case of ***Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR*** the Court of Appeal expressed this point as follows:-

> "***The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."***

17. Also, in ***Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others Civil Appeal No.283 of 2015 [2017] eKLR,*** the same Court sitting at Malindi stated that*:*

> ***"The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death...".***

18. In the persuasive case of ***Wallace Kinuthia v Anthony Nd'ung'u Muongi & 3 Others [2013] eKLR*** her Ladyship Nyamweya P. J. stated "*The effect of a suit that has abated is that it ceases to exist in law."* She then cited the definition of abatement in the Black's Law Dictionary as being ***"the suspension or defeat of a pending action for a reason unrelated to the merits of the claim".*** Earlier, in ***Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate, (2005) e KLR*** his Lordship Waweru J held:

> ***"If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time."***

19. I cannot agree more with the learned judges on effect of abatement. Once it happens, the suit is no more: it is extinguished. The Court has no jurisdiction on it, except in so far as it is called upon to make an order for costs on the part of a Defendant against whom the abated matter had been brought.

20. While this Court is not sitting on an appellate level in relation to the order made on **18/10/2004**, to hold that the order was valid or rightly given would mean that the suit was still pending before the Court for the mere reason that the Court had not been informed that the Plaintiff had died on **10/03/2000**, three years and seven months before. To me the order was made in ignorance of the facts, as have come out later in the proceedings and Application before me. That being the case, then the order was null and no amount of argument can breathe life into it. The Court could not dismiss rightly that which was not existing. As at **10/03/2001**, there was no suit to be dismissed. It therefore mattered not whether the deceased Plaintiff was or was not served with the Notice to Dismiss the suit for want of prosecution. Again, the Court did not have jurisdiction in the matter by virtue of its abatement. It mattered not whether the legal representative could have been served with the said Notice. The notice was issued in respect of a non-existent suit. Thus, its service and the consequent orders were all null. As stated by Lord Denning, stated in ***MacFoy v United Africa Co. Limited (1961) 3 All ER 1169***,

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so…."***

21. The fact that the Court had not declared the suit abated before the Notice for its dismissal for want of prosecution was issued and the orders made thereto did not of itself mean that the suit was still alive. It had abated. And there was no necessity for an order of abatement to be made on the matter except for reason of costs as provided for by the Rules. On the issue of such an order being unnecessary, in ***Elizabeth Mutuku & Nzioka Mutuku & 6 others v Aimi Ma Kilungu Company Ltd [2019] eKLR*** Odunga J held as follows:- "*That an express order abatement of suits is unnecessary was also recognized in* ***Vamus & Partners vs. S. F. Hassan [1964] EA 644*** *where it was held that a suit having been abated a declaration to that effect is unnecessary but the estate is entitled to costs*."

22. Thus, the order of dismissal of the suit herein it for want of prosecution was not one that anyone would make efforts on or waste time to apply to vary or set it aside. It is and should have been treated as not existing. It would have been convenient for the court to make such an order but in making it such an order would be of no consequence or change the status of the abatement of suit except for a claim by the Defendant for costs.

23. I think it is appropriate to give more clarification of this issue for the sake of the Applicant not falling into the trap of thoughts that my finding is wrong than leaving it at this point. This I do by way of posing and answering a logical question. Granted that the Court did not make the order of dismissal of the suit for want of prosecution as it did on **18/10/2004**. Supposing further that by that date, or even after the **ten (10) years** that it took to obtain the letters of grant, the legal representative of the deceased Plaintiff herein had been given a confirmation of the grant to the Estate of the deceased and he made an application for his substitution for the deceased. What would the Court have ordered or told him? The simple answer would have gone this way: "*Oh! Since the plaintiff died on* **10/03/2000** *and no substitution was made before the* **10/03/2001**, *the suit abated. There is no existing suit as of now (at the time of the application) unless extension of time has been sought and granted. Application declined.*" (my short flashback 'ruling'). If the Court would have found the suit having abated and not existing or alive hence inability to grant the order without extension of time and application for it to be revived and a prayer for substitution irrespective of there having been no order specifically as such, by the same token, there was no suit existing to be dismissed as at that date. Therefore, the order of **18/10/2004** and any steps or processes immediate thereto that led to it being made were null and worth no action thereon.

24. It is important to note that the point above, regarding the necessity for an order for the payment of costs in an abated suit, is provided for the **Civil Procedure Rules**. Such a declaration becomes important when and for purposes of a Defendant making a claim for costs after a suit has abated. That is when the Court has to be moved and upon being satisfied by proof that the Plaintiff died more than a year before and no substitution of him made, it then makes the specific order of abatement and payment of costs of the suit. It is upon that that the Defendant can claim the costs of the suit from the estate of the deceased. On that, reference is made to **Order 24 Rule 3(2)** of the **Civil Procedure Rules** which provides that:

> ***"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."***

25. The totality of the whole discussion above is that once a suit abates, it ceases to exist. There cannot rightly be and there is no need for an application by a party for its dismissal for want of prosecution or a notice by the Court to dismiss it for want of prosecution and orders to issue to that effect. The only orders fit to be issued are that the suit has abated in terms of either **Order 24 Rule 3(2)** or **4(3)** of the **Civil Procedure Rules** whichever is applicable for a deceased Plaintiff or Defendant respectively.

(b) ***Whether the Orders of 18/10/2004 can be revived, varied and set aside***

26. The second issue which calls for the court to determine the question of the nature of the orders which are sought to be revived, varied and set aside. The prayer is an omnibus one which needs to be broken down. To me it is in two limbs: one it calls for this court to revive the orders, two, it asks this court to vary and set aside the said orders. This Court understands that the two are to be done in sequence: revive and then set aside. First, the Applicant seeks to revive the orders of **18/10/2004**. What does the term revive mean? Brian A. Garner in **Black's Law Dictionary**, **11th** Edition, Thompson Reuters, **2014** defines the term as a verb whose noun is "revival". It then defines revival as *"Restoration to current use or operation, especially the act of restoring the validity or legal force of an expired contract, an abandoned patent or a dormant judgement."* In essence, and for the purposes of the instant application, the word means restoration of the validity of the order made on **18/10/2021**. From the explanation and finding I made on the previous issue, both the prayer to revive and set aside or vary the same cannot be granted. The wording of the prayer is to the effect that the Order made on **18/10/2004** is the one which abated. That is far from the fact. There can be no abatement of an order and not a suit. An interlocutory order is dependent on the existence or otherwise of a suit. It is not refuted that the prayer presupposes that the order was made before the suit had abated and then the order abated. Of course that is an absurdity. But it is a fact that this suit had abated over two years before the order sought to be varied or set aside was made. It was the suit that abated and not the order. The Applicant should have prayed for the suit to be revived and not the order made on **18/10/2004**.

27. In any event if the prayer to revive the suit could have been made without him first making an application for extension of time, it would still fail, as I explain further below. Therefore **prayer 2** of the Application fails.

(c) ***Whether an abated suit can be revived***

28. The analysis of this issue will lead to a finding whether **prayers 3** and **4** of the Application herein should be granted because in them the Application prayed for the revival of the suit by the Plaintiff and against the Defendant and substitution of both deceased persons. The court is alive to the fact that when a suit has abated, all is not lost for the legal representative of the deceased party. It takes cognizance of the fact that it has discretion to enlarge time for substitution of a Plaintiff where he dies and his suit abates or is dismissed by reason of abatement, or a Defendant where he dies and is not substituted within the prescribed time. Of course, in the two instances, this occurs where the suit survives the deceased person(s). The **Rules** provide accordingly.

29. **Order 24 Rule 7** gives the court power to revive a suit that has abated. It provides as follows :-

> **"7 (1)** ***Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***
>
> **(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."***

30. The Court of Appeal has explained that although a suit automatically abates one year after the death of a party when an application for substitution of the deceased is not made to bring in a legal representative, it can be revived if sufficient cause is demonstrated by the applicant. In the ***Said Sweilem Gheithan Saanum*** (cited above), the same Court, while interpreting **Order 24** of the **Civil Procedure Rules**, observed as follows:-

> ***"There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.***
>
> ***Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.***
>
> ***Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."***

31. Again, in ***Rebecca Mijide Mungole & Another*** (cited above) the Court of Appeal emphasized the need to apply for extension of time as follows;

> *"Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death...*
>
> *Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings,* ***it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.*** *Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it.* ***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.* ***But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted..."*** (emphasis added).

32. The Application has no merits on the above issue for two main reasons. The first is that he brought the instant Application without first seeking extension of time as per the Proviso to **Order 24 Rule 3 (2)** of the **Civil Procedure Rules**, and as clearly explained in the ***Rebecca Mijide Mungole*** case above. He should have moved the Court to extend the time. He did not. The Application is therefore incompetent, bad in law and an automatic candidate for dismissal. Secondly, the applicant came to this court seeking orders to revive a suit which, as I have found above, abated on **10/3/2001.** If this court was to be inclined to allow the application, it means that the applicant shall have discharged the onus of demonstrating *sufficient cause* for the failure to filing the application for substitution within the requisite time. The applicant must also give sufficient cause for the delay in filing the application for substitution. Has the applicant proved done so?

33. As stated earlier in this ruling, the suit abated on **10/3/2001**. The applicant has to show sufficient cause for the delay of **20 years** in moving the Court appropriately. The applicant submitted that he had explained the delay. His explanation was that the delay was caused by the long succession process which was initiated in time but objected to by the Defendant. He further submits that the succession process was concluded in the year **2010**. Even if the succession proceedings took **10** years as stated by the Applicant, and assuming that that was good reason, it has taken him another **10 years** to file the instant Application.

34. The reasons for the delay of **10 years** since **2010** as stated by the Applicant were that he instructed the then learned counsel **Saenyi Juma** who neither updated him of the matter nor got back to him about it until he joined the Judiciary. The second reason was that the file was missing from the registry. The applicant is under the duty to prove those assertions by way of evidence. Upon perusal of the court file, it is clear that there is no letter of instruction to the said law firm of **Ms. Saenyi Juma Advocate**. Additionally, there is no Notice of Appointment of Advocates filed in Court by the said law firm. The Affidavit fell extremely short of disclosing and bringing out any material fact on the issue of instructions by the Applicant to the said law firm. It did not give the dates when that was done, when the said firm closed shop, when counsel joined the judiciary, and what happened between then and when Court was moved on **08/05/2021** by way of a written request about the missing file. On that date the applicant wrote a letter dated the same date and forwarded to the Registry on **9/05/2021**. Both the letter and email were annexed as **PSW 5** to the Affidavit sworn on **26/7/2021**, which reads in part, **"We have made effort to trace this file in the archives and the registry to no avail..."** It is worth noting that the letter was written to the Deputy Registrar of the High Court

roughly **two (2)** months before the filing of the instant Application. It was a letter written after **ten (10)** years of efforts of tracing the file. Is that a coincidence? There was no other correspondence from the year **2010** when the ruling in the Succession Cause was allegedly delivered. Furthermore, there is no letter written by the applicant to the court informing it that succession proceedings were pending in respect to the estate of the deceased so that the Court extends time, as per the Rules. Clearly, Annexture **PSW 5** was a design by the Applicant to sway the mind of the Court to imagine and find that the Court file was missing and he had made efforts to trace it when that was not true. The Court is able to discern such tricks. There was no confirmation from the Court Registry that indeed the file went missing all along. If the file was missing, no Application for reconstruction of the same was ever made. There is no explanation whatsoever why when the letter was written on **08/05/2021** the file could be traced within two months yet when there was no other earlier written communication to the Court the file could be said to be missing.

35. Further, there is no justification whatsoever for a party to rely on counsel during and for good times but when the Advocate makes a mistake the party folds hands, drops his face and turns to the Court with a prayer that the mistake of counsel whom he fully instructed should not be visited on him. If learned counsel is obligated to bring good tidings to and actions for a party, counsel's failures too should be attributable to him. Shifting blame to counsel does not amount to sufficient cause. In ***Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR*** the Court of Appeal stated as follows:-

> ***"In the above case however, the court also stated that legal business should be conducted efficiently and we can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age" (emphasis added by underline).***

36. In my understanding, their Lordships were of the view that time has come for Courts to be more critical and cautious than before regarding allegations by parties of mistakes by their counsel and the fact of not laying that burden on them. It is time someone took up their errors and sorted them out rather than shifting the same to an innocent adverse party who carried out his duty to court diligently and appeasing him or her with costs.

37. Also, in ***Tana and Athi Rivers Development Authority v Jeremiah Kinigho Mwakio and 3 Others, Civil Appeal No.41 of 2014*** the Court of Appeal explained how learned counsel's mistake in relation his client should be handled by courts. It stated:-

> ***"From past decisions of this Court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justifiable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistakes of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side. (see Halsbury's Laws of England, 4th Edn, Vol.44 at P.100-101 and also Re Jones (1870)6 Ch.App.497 in which Lord Hatherley communicated the court's expectations this way: 'I think it is the duty of the court to be equally anxious to see that solicitors not only perform their duty towards their own clients, but also towards all those against whom they are concerned'."***

38. The blame herein on learned counsel for 'mistakes' which should not be visited on the Applicant is not merited. I have explained why the delay in bringing this matter or even the order of dismissal of the abated suit, which I have found to be of no consequence, cannot be attributable learned counsel Indeed, nothing could have been easier than to obtain an affidavit from learned counsel or the office that took over the alleged instructed law firm to explain that indeed that was the position. Even then, there is ample evidence that after the confirmation of grant was given in **2010**, the Applicant herein went on pursuing other matters in the High Court and not bothering to apply for extension of time in this abated suit and moving the court for revival of the suit and his substitution to prosecute it. Having run aground in the other matters, he has been shaken to the reality that he should have moved this Court accordingly. This suit is not alternative to the succession matter.

(d) What orders, including the payment of costs, should issue

39. Given the totality of the circumstances of the present application, this court holds that the applicant has failed totally to explain the inexcusably inordinate delay of **10** years in bringing the same for consideration before this court. He has not demonstrated sufficient cause for the delay. To excuse it would greatly prejudice the Respondent. In the end, the entire application dated **26/7/2021** is devoid of merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 17TH DAY OF JANUARY, 2022.

DR. *IUR* FRED NYAGAKA

JUDGE, ELC, KITALE.