



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Askew (Suing as the administrator and representative of the Estate of the Late Kassim Khamisa) v Khamisa & 5 others (Environment & Land Case 81 of 2019) [2025] KEELC 311 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 311 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 81 OF 2019**  
**LL NAIKUNI, J**  
**JANUARY 31, 2025**

**BETWEEN**

**KHADIJA ASKEW (SUING AS THE ADMINISTRATOR AND REPRESENTATIVE OF THE ESTATE OF THE LATE KASSIM KHAMISA) ..... PLAINTIFF**

**AND**

**ABDULHAFIZ MUSA KHAMISA ..... 1<sup>ST</sup> DEFENDANT**  
**YUSUF MUSA KHAMISA ..... 2<sup>ND</sup> DEFENDANT**  
**MANSOOR MUSA KHAMISA ..... 3<sup>RD</sup> DEFENDANT**  
**JITHIADA AGENCIES LTD ..... 4<sup>TH</sup> DEFENDANT**  
**MUSA SULEIMAN ..... 5<sup>TH</sup> DEFENDANT**  
**HON ATTORNEY-GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked to make a determination on the Notice of Motion application dated 16<sup>th</sup> June, 2023 by Khadija Askew (Suing as the Legal Administrator and representative of the estate of the late Kassim Khamisa), the Plaintiff/Applicant herein. It was brought under the provision of Order 50 Rule 6, Order 24 Rule 4 and Order 8 Rule 3 of the Civil Procedure Rules, 2010, Section 3A of the [Civil Procedure Act](#), Cap. 21 and all other enabling powers and provisions of law.

**II. The Plaintiff/Applicant case**

2. The Plaintiff/Applicant sought for the following orders:-



- a. That the time allowed for the Plaintiff to file and serve this application be enlarged.
  - b. That the Legal Representative of the 1<sup>st</sup> Defendant be made a party to this suit on behalf of the 1<sup>st</sup> Defendant who passed away on an unspecified date.
  - c. That the Plaintiff be amended to reflect the change.
  - d. That the costs of this application be provided for.
3. The application by was premised on the grounds, testimonial facts and averments made out under the Seven (7) Paragraphed Supporting Affidavit of –KHADIJA KHAMISA ASKEW, the Plaintiff/Applicant herein and dated on the same day as the Application with two (2) annexures marked as ‘KA -1 to 2’ herein. The Plaintiff/Applicant averred that:-
- a. The 1<sup>st</sup> Defendant died on an unspecified date.
  - b. Her advocate wrote to the advocates for the 1<sup>st</sup> Defendant to get an indication as to when the 1<sup>st</sup> Defendant passed away, but no response had been received as yet. Exhibit marked as “KA - I” was a copy of the Letter dated the 13<sup>th</sup> October, 2022 authored by her Advocates).
  - c. There was as no need to substitute the deceased 1<sup>st</sup> Defendant with his Legal Representative.
  - d. The delay in making this application was caused by the fact that she never knew when the 1<sup>st</sup> Defendant died. Further, she had been suffering taking that she had been having health issues. Lastly, her husband also had health issues. Exhibit marked as “KA - II” was a copy of the letter by her advocates dated the 10<sup>th</sup> February, 2023.
  - e. The Application was made in support of her application herein.

### III. Submissions

4. On 21<sup>st</sup> November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 16<sup>th</sup> June, 2023 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not had access to the written submissions by the parties herein as guided. Pursuant to that a ruling date was reserved on 31<sup>st</sup> January, 2025 by Court accordingly.

### IV. Analysis & Determination.

5. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
6. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
  - a. Whether the Notice of Motion application dated 16<sup>th</sup> June, 2023 is merited?
  - b. Who will bear the Costs of Notice of Motion application dated 16<sup>th</sup> June, 2023.

#### Issue No. a). Whether the Notice of Motion application dated 16<sup>th</sup> June, 2023 is merited

7. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being:-



- a. Whether the Legal representative of the 1<sup>st</sup> Defendant should be made a party to this suit on behalf of the 1<sup>st</sup> Defendant who passed away on an unspecified date.
  - b. Whether the Plaintiff can amend the plaint to reflect the change.
8. The provision of Order 24 Rule 4 (4) of the Civil Procedure Rules, 2010 provides as follows:-

“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) .....
- (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant. (emphasis is mine).

9. Ideally, the law is clear on what happens when one of the Defendants dies and the cause of action survives or continues. Upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case.

10. The provision of Section 2 of the Civil Procedure Act, Cap. 21 defines Legal Representative as follows:-

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

11. The Applicant seeks to substitute the Legal Representative of the estate of the deceased, the 1<sup>st</sup> Defendant herein in place of the 1<sup>st</sup> Defendant. Other than the mention of the legal representative, no evidence has been tabled to show that she indeed is a person contemplated by the above definition. That is to say, the duly appointed Legal Representative of the estate of the 1<sup>st</sup> Defendant. The rule requires that substitution of a Defendant with a party to be clothed with legal representation. The main issue here is whether the court can permit the substitution of the 1<sup>st</sup> Defendant by the said legal representative.

12. Legally speaking, and specifically the provision of Section 82 of the Law of Succession, Cap. 160. one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the said Law-. The further provides the procedure to be followed in the application for such a grant, and the various forms a grant may take including the Grant Letters of Administration. The provision of Section 54 of the Act provides that a Court may limit a grant of representation which it has jurisdiction to make in any of the prescribed forms described in the Fifth Schedule. The Fifth Schedule provides as follows at Paragraph 14 with respect to grants of administration limited to suit:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act,



letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may be commenced in the same or in any other Court between the parties, or any other parties, touching the matters at issue in the cause or suit, and until a final decree shall be made therein, and carried into complete execution.” (emphasis is mine)

13. Flowing from above, it is in doubt whether the Applicant has followed the aforesaid procedure in seeking a legal representative of the deceased 1<sup>st</sup> Defendant’s estate. The Applicant would be at liberty to cite the intended substitute as per the provisions provided in the Succession Act for the purposes of the pending proceedings. The provision of Order 24 of the Civil Procedure Rules, 2010 dictates that the application must be made within one year in default of which the suit shall abate as against the deceased Defendant. To buttress on that point, in the case of: “Kenya Farmers’ Cooperative Union Limited – Versus - Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR” the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.
14. In the instant case, I reiterate that it is not known when the 1<sup>st</sup> Defendant died. Further, that to date no substitution has been done. The application under consideration was filed in court on 16<sup>th</sup> June, 2023. Which takes the court to the issue of leave to file this application out of time or rather extension of time as stipulated under the provision of Section 95 of the Civil Procedure Act, Cap. 21 and Order 50 Rules 6 and 7 of the Civil Procedure Rules, 2010. In this matter, it is not disputed that the suit has abated by virtue of failure by the applicants to file an application for substitution within a year.
15. The legal provision that deals with revival of an abated suit is found under Order 24 Rule 7 (2) of the Civil Procedure Rules, 2010 which provides:-

“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.”

16. Guided by the provisions of Order 24 Rule 7 (2) of the Civil Procedure Rules, 2010 it is clear that a Plaintiff can make an application seeking for revival of a suit that has abated or setting aside of an order of dismissal. I find that this is what the applicants in this case are seeking by moving this court to revive an abated suit as against that deceased defendant. The court therefore has powers to consider applications and grant orders where a Plaintiff seeks to revive an abated suit against a deceased Defendant as in the case herein.
17. From the provisions of Order 24 Rule 7 (2) of the Civil Procedure Rules, 2010 cited above it is provided that an application for revival of suit can be allowed if the applicant shows that he was prevented by a sufficient cause from continuing the suit. What is sufficient cause was defined in the Court of Appeal in the case of “The Hon. Attorney General – Versus - the Law Society of Kenya & Another Civil Appeal (Application) No. 133 of 2011”,

“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 Blacks Law Dictionary, 9<sup>th</sup> 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 Judges mind. The explanation should not leave unexplained gaps in the sequence of events”.

18. In my view, I make the following two fold - findings. Firstly, the Applicant is an zealous litigant who is committed to ensuring the continuity of the suit. Secondly, that the Applicant has sufficient reason to seek extension of time to revive the suit as they were clearly prevented from doing so by the actions and/or omissions of the duly appointed Legal Representative of the estate of the 1<sup>st</sup> Defendant.
19. Accordingly, in view of the special circumstances of this case, I am inclined to exercise the courts unfettered and inherent powers and allow for revival of the suit herein to ensure that the ends of justice are met. As pointed out earlier in this ruling, where a Defendant dies and the cause of action survives the Defendant, then such deceased person can only be substituted by the Legal Representative of his estate. The overriding objective of this court is to do substantive justice in cases presented before it. Guided by the provision of Article 159 (2) of *the Constitution* of Kenya, 2010 and Order 51 Rule 10(1) of the Civil Procedure Rules, 2010 this court shall administer justice without undue regard to procedural technicalities. It is therefore not in dispute that these were the duly appointed Legal Representatives of the estate of the Defendant. Therefore, it follows that they are the right parties to be substituted in place of the 1<sup>st</sup> Defendant herein.
20. On whether the Plaint can be amended to reflect the change? The underpinning of this consideration is provided for under the provision of Order 8 Rule 1 (1) of the Civil Procedure Rules, 2010 which grants a Plaintiff recourse to amend his pleadings once at any time before pleadings close. The provisions of law that allows a party to amend pleadings lies with the provision of Section 100 of the *Civil Procedure Act*, Cap. 21 and Order 8 of the Civil Procedure Rules, 2010. These provisions of law give the court jurisdiction to grant leave to a party to amend pleadings at any stage of the proceedings on such terms as to costs or as maybe just. This issue was specifically addressed in the Court of Appeal case of: “Central Kenya Ltd – Versus - Trust Bank Limited [2000] EALR 365” which held that: -

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment for joinder as the case maybe, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”

21. Resultantly, the Honorable Court has considered the ground on which the Plaintiff has sought leave to amend Plaint. Ideally, it is satisfied that the Plaintiff has established grounds to warrant the Court to exercise its discretion tot grant the leave to amend the Plaint to reflect the substitution. Accordingly, the application is allowed.

#### **Issue No. b). Who will bear the Costs of Notice of Motion application dated 16<sup>th</sup> June, 2023.**

22. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
23. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.



24. In this case, this Honourable Court has reserved its discretion in not awarding costs.

## **V. Conclusion & Disposition**

25. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to the Preponderance of Probabilities and balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-

- a. That the Notice of Motion application dated June 16, 2023 be and is hereby found to have merit hence hereby allowed in its entirety upon fulfillment of the Pre – Conditions set out herein.
- b. That an order be and is hereby made that the name of the Legal Representative of the estate of the 1<sup>st</sup> Defendant herein, Yusuf Musa Khamisa be and is hereby substituted as a party to this suit in the place of the 1<sup>st</sup> Defendant who since deceased.
- c. That an order do and is hereby granted for the amendment of the Plaintiff to reflect the substitution in prayer (b) above within the next 14 days from this date herein.
- d. That the Defendants/Respondents are at liberty to file corresponding amended replies.
- e. That for expediency sake, this matter to be fixed for hearing on February 24, 2025 before Hon. Mr. Justice Olola. There be a mention on February 10, 2025 for purposes of conducting an intensive Pre – Trial Conference Session in accordance with the provision of Order 11 of the Civil Provision Rules, 2010.
- f. That there are no orders as to costs.

It is so ordered accordingly.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS 1<sup>ST</sup> DAY OF JANUARY 2025.**

**HON. MR. JUSTICE L. L. NAIKUNI,  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

M/s. Firdaus Mbula, the Court Assistant.

Mr. Okello Advocate for the Plaintiff/Applicant.

Mr. Hassan Advocate for the Defendant/Respondent.

No appearance for the Hononurable Attorney General.

