



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 414 OF 1996**

**1. MOHAMED BWANA BWANAADI**

**2. ABDULRAZAK KHALIFA (As Administrators of the Estate of  
KHATOR BIN SALIM DECEASED).....PLAINTIFFS**

**VERSUS**

**1. RISHAD ABDULREHMAN KHATOR**

**2. LAXMICHAND VIRCHAND KARAMSHI SHAH**

**3. ALI MOHAMED (DECEASED)**

**4. ZENA AHMED (DECEASED)**

**5. AMINA AHMED (DECEASED)**

**6. ABDULQUADIR S. A. SHURUTY**

**7. THE PUBLIC TRUSTEE**

**8. BURBANK ENTERPRISES LIMITED**

**9. THE REGISTRAR OF TITLES**

**10. THE COMMISSIONER OF LANDS..... DEFENDANTS**

**AND**

**ABDUL HAMID MOHIDIN LEGAL REPRESENTATIVE OF THE ESTATE OF**

**AMINA AHMED SALIM (DECEASED)**

**RULING**

The first application is dated 10<sup>th</sup> November 2021 and is brought under Order 23 rule 7 (2) of CPR, 2010 seeking the following orders;

- 1) That the court be pleased to join Mr. Abdul Hamid Mohidin as the appointed Legal Representative of the estate of Amina Ahmed Salim (deceased).
- 2) That leave to file a defence appropriate to his new character be given, once served with Summons to a Legal Representative of a Deceased Defendant(s).
- 3) Costs of these proceedings be provided for.

It is grounded on the fact that on 9<sup>th</sup> November 2021, he was appointed a legal representative of the estate of Amina Sinti Ahmed Salim, in

Mombasa CM Succession Misc. Application No. E 041 of 2021- In the matter of estate of Amina Ahmed Salim (deceased), to enable him to join these proceedings in place of the deceased 5<sup>th</sup> defendant and file pleadings suitable to his character as such legal representative.

The second application is dated 11<sup>th</sup> November 2021 and is brought under Order 23 Rule 7 (2) of CPR, 2010 seeking the following orders;

- 1) The suit against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants which abated on or about 30<sup>th</sup> November 2020 be revived, to enable the appointed Legal Representative of the estate of Amina Ahmed Salim (5<sup>th</sup> defendant) to apply to join these proceedings and file a defence suitable and appropriate to his character as such Legal Representative of the deceased defendant's estates.
- 2) A Summons to Legal Representative of a deceased Defendant do issue for service on Mr. Abdul Hamid Mohidin, the court appointed Legal representative of the estate of the 5<sup>th</sup> Defendant.
- 3) That the costs of this application are ordered in the cause.

It is based on the grounds that Amin Ahmed Salim, the 5<sup>th</sup> defendant died on 1<sup>st</sup> December 2019. By operation of law the suit against her, and the estates of the 3<sup>rd</sup> and 4<sup>th</sup> defendants which she represented before her death, abated on 30<sup>th</sup> November 2020. That the plaintiffs could not proceed with prosecution of their case against the remaining defendants as the said Amina Ahmed Salim was the last surviving daughter of Ahmed Salim (deceased), all her siblings having pre-deceased her. That as she, and her sisters did not have children, except Mr. AH Mohamed (3<sup>rd</sup> defendant) (also deceased), it was necessary to identify a suitable person to come in from the side of Khator Salim (deceased), a brother to Ahmed Salim, the father to Amina Ahmed, Zena Ahmed and Salima Ahmed (all deceased). A decision of the larger family was only reached on 9<sup>th</sup> October, 2021 when one Abdul Hamid Mohidin was allowed to make an application for a limited grant in Mombasa CMC Succ. Mis E041 of 2021-in the Matter of the estate of Amina Ahmed Salim (deceased). That they learnt that the said Succession Cause came on for hearing on 9<sup>th</sup> November 2021 before Hon. J. Nyariki (Court 10). A copy of the day's causelist for that court is exhibited and marked "A". That an order to appoint Abdul Hamid Mohidin as a Legal Representative of the estate of Amina Ahmed Salim was made on 9<sup>th</sup> November 2021 but the limited grant is yet to come out. That between 10<sup>th</sup> February 2020 and 3<sup>rd</sup> February 2021 some other beneficiaries of the estate of Mwana Ana (Mwanana) Salim had applied to be joined in these proceedings and their application was dismissed on 3<sup>rd</sup> February 2021. A copy of the ruling of Mr. Justice S. Munyao is exhibited herewith and marked "B". That when this matter was abating as against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants by operation of law, some beneficiaries were in court seeking to be joined in these proceedings as explained above. That from February, 2021 the surviving members of the families of Khator Bin Salim' (deceased) and Ahmed Salim (deceased) were arranging meetings to agree on who was suitable and close in consanguinity according to Islamic Law, to represent the estates of the three defendants. During that time the case was inadvertently set down for hearing on 21<sup>st</sup> September 2021 by the court with notices to all the parties. Copy of cause list of 21<sup>st</sup> September 2021 marked "C". Before that, the court had unilaterally cause listed the matter for hearing before Lady Justice Nelly Matheka on 4<sup>th</sup> September 2020, during the service week. Exhibited is a notice served on the parties, marked "D". Before determination of the said application and appointment of Legal Representative as aforesaid, the plaintiffs could not prosecute their case against the deceased defendants without special leave of court, and an order lifting the abatement and reviving the case against the said defendants.

The respondent submitted that the present suit was commenced in 1996 which is over twentyfive (25) years ago. That the 3<sup>rd</sup> - 6<sup>th</sup> Defendants when alive were in the present matter represented by the Law firm of Asige Keverenge & Anyanzwa. That during their lifetime the 3<sup>rd</sup> - 6<sup>th</sup> Defendants never served any written statement of Defence in the now part-heard matter and none has been traced from the court file. That that legal representatives joining suit after over 25 years should not be allowed to purport file written statements of Defence on behalf of the deceased's Estate as sought yet the original Defendant (now deceased) who are sought to be represented never bothered to file any during their lifetime in the now part-heard matter. That to allow filing of Defence after twenty five (25) years in a part-heard case on behalf of a party previously represented by counsel but did not file one shall derail hearing and will be unfair. That an application dated 30<sup>th</sup> August, 2017 filed on 4<sup>th</sup> September, 2017 sought to revive the Case of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants was duly allowed on 6<sup>th</sup> November, 2017. A true copy of the Notice of Motion, Supporting Affidavit of Abdulrazak Khalifa, annexures and Order extracted on 8<sup>th</sup> November, 2017 are produced at pages 1 - 8 of the Bundle of exhibit hereto collectively marked "SB-1". That from the aforementioned Order of 6<sup>th</sup> November, 2017 as extracted on 8<sup>th</sup> November, 2017 that the 5<sup>th</sup> Defendant and one Fatuma Yusuf were enjoined as legal representatives to continue with the suit on behalf of the 3<sup>rd</sup> Defendant. That that the Certificate of Death annexure "AHM-1" to Abdull Hamid Mohidin's Supporting Affidavit for Notice of Motion dated 10<sup>th</sup> November, 2021 and filed on 12<sup>th</sup> November, 2021 seeking joinder of legal representative indicates that the 5<sup>th</sup> Defendant died on 1<sup>st</sup> December, 2019 a copy produced at page 9 of the Bundle of exhibit. That the present Application dated 11<sup>th</sup> November, 2021 filed on 12<sup>th</sup> November, 2021 almost two (2) years from when the suit abated does not disclose when the 4<sup>th</sup> Defendant died and whereabouts of Fatuma Yusuf appointed on 6<sup>th</sup> November, 2017 alongside the 5<sup>th</sup> Defendant (now deceased) to represent the 3<sup>rd</sup> Defendant. That the suit against the 5<sup>th</sup> Defendant and that of the 3<sup>rd</sup> Defendant revived on 6<sup>th</sup> November, 2017 abated by 2<sup>nd</sup> December, 2020 which is now over two (2) years ago.

This court has considered the applications and submissions therein. Order 24 rule 4 (4) of the Civil Procedure Rules provides that;

*"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 subrule (1), the suit shall abate as against the deceased Defendant.*

This means that upon death of a defendant and on application the court has the discretion to substitute the deceased defendant and that after one year with no application the suit abates. In this matter it cannot be denied that the suit has abated. The deceased defendant died in 2018 and this application has been filed in 2020. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. In the case of **Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR**, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure 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 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.”***

In the case of **Titus Kiragu vs Jackson Mugo Mathai (2015) eKLR** it was held that:

***“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”***

**Charles Mugunda Gacheru vs Attorney General & Another (2015) eKLR**, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of **Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR**, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.

Be that as it may, when one of the defendants dies and the cause of action survives or continues and 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. Section 2 of the Civil Procedure Act 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”.***

The applicant submitted that Amin Ahmed Salim, the 5<sup>th</sup> defendant died on 1<sup>st</sup> December 2019. By operation of law the suit against her, and the estates of the 3<sup>rd</sup> and 4<sup>th</sup> defendants which she represented before her death, abated on 30<sup>th</sup> November 2020. Subsequently on 9<sup>th</sup> October, 2021 when one Abdul Hamid Mohidin was allowed to make an application for a limited grant in Mombasa CMC Succ. Mis E041 of 2021-in the Matter of the estate of Amina Ahmed Salim (deceased) hence these applications. The applicant now seeks orders to enable him to join these proceedings in place of the deceased 5<sup>th</sup> defendant and file pleadings suitable to his character as such legal representative.

This court has perused the court file and finds that the present suit was commenced in 1996 which is over twenty five (25) years ago. That the 3<sup>rd</sup> - 6<sup>th</sup> Defendants when alive and no statement of Defence was filed. The case is now a part-heard matter. That an application dated 30<sup>th</sup> August, 2017 sought to revive the Case of 2<sup>nd</sup> and 3<sup>rd</sup> Defendants which had abated was allowed on 6<sup>th</sup> November, 2017 and the 5<sup>th</sup> Defendant and one Fatuma Yusuf were enjoined as legal representatives to continue with the suit on behalf of the 3<sup>rd</sup> Defendant. That that the Certificate of Death annexure “AHM-1” indicates that the 5<sup>th</sup> Defendant died on 1<sup>st</sup> December, 2019! I find that the delay in bringing these applications was inordinate and inexcusable and I reject the reasons given by the applicant. This matter has abated once before and now the applicants are back with a similar application. Litigation must come to an end. Besides I concur with the respondent that to allow filing of Defence after twenty five (25) years in a part-heard case on behalf of a party previously represented by counsel but did not file one shall derail hearing and will be unfair on the other parties. I find these applications are frivolous and an abuse of the court process. These applications are not merited and I dismiss them with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH 2022.**

**N.A. MATHEKA**

**JUDGE**