



REPUBLIC OF KENYA



**Matheka & 3 others v Ngula & 3 others (Environment and Land
Appeal 43 of 2018) [2022] KEELC 2966 (KLR) (23 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2966 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 43 OF 2018**

CA OCHIENG, J

MAY 23, 2022

BETWEEN

MBALUKA MATHEKA 1ST APPELLANT

NGANDA MUTHIANI 2ND APPELLANT

AND

JONATHAN KINYUNGU (DECEASED) 1ST APPLICANT

JUSTUS WAMBUA MUTUKU 2ND APPLICANT

AND

MUTHAMA NGULA 1ST RESPONDENT

MBATHA NGULA 2ND RESPONDENT

NTHUKU NGULA 3RD RESPONDENT

MWALIMU NGULA 4TH RESPONDENT

RULING

1. What is before court for determination is the appellants' notice of motion application dated the February 9, 2022 brought pursuant to section 3A of the *Civil Procedure Act* and order 24 rule 4(1) of the *Civil Procedure Rules*. The appellants seek the following orders:
 1. That this honourable court be pleased to substitute the 3rd appellant herein one Jonathan Mutuku Kinyungu (now deceased) with the applicant herein Justus Wambua Mutuku.
 2. That costs of this application be in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Justus Wambua Mutuku where he deposes that the 3rd appellant Jonathan Kinyungu who was his father



died on October 17, 2016. He confirms that he petitioned for letters of administration ad litem in the Machakos Chief Magistrate's Court on February 18, 2021 for purposes of continuing with the appeal, and the same was granted on March 30, 2021. He contends that the cause of action herein survives and continues, therefore he is desirous to be substituted in place of his late father. He reiterates that he seeks to be substituted in this appeal which emanated from the Embu Appeals Committee.

3. Upon consideration of the instant notice of motion application including the supporting affidavit as well as the annexures thereon, the only issue for determination is whether the applicant should be substituted in place of the 3rd appellant in this appeal.
4. On substitution of a deceased party, order 24 rule 3 of the Civil Procedure Rules provides *inter alia*:

“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.”
5. In this instance, the applicant seeks to be substituted with the 3rd appellant who died in October, 2016. I note the applicant who is also a party to the appeal herein claims the cause of action which emanated from the Embu Appeals Committee survives and continues. Further, he is desirous to be substituted in place of his late father. However, except for the averments in the supporting affidavit, he has failed to demonstrate how the said cause of action indeed survives the deceased.
6. Based on the facts as presented while relying on the legal provisions I have cited, I find that this application has been filed after an inordinate delay. Further, noting that no substitution was undertaken by 2017, I find that this suit abated as against the 3rd appellant almost five years ago.
7. In the circumstance, I find this application unmerited and will dismiss it.
8. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

