



**Mutio v Kaesa (Suing on behalf of the estate of Kaesa Kiiti
(Deceased) & 4 others; Mutemi (Exparte Applicant) (Civil Appeal
5 of 2022) [2022] KEELC 14440 (KLR) (27 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14440 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
CIVIL APPEAL 5 OF 2022
LG KIMANI, J
OCTOBER 27, 2022
(FORMERLY MACHAKOS ELC CIVIL APPEAL NO. 19 OF 2018)
FORMERLY MACHAKOS HIGH COURT CIVIL APPEAL NO. 83 OF 2011**

BETWEEN

CHRISTOPHER MUTEMI MUTIO APPELLANT

AND

**ESTHER MASAA KAESA (SUING ON BEHALF OF THE ESTATE OF KAESA
KIITI (DECEASED) 1ST RESPONDENT**

PETER KIITI NGUI 2ND RESPONDENT

SIMEON MUNYASYA 3RD RESPONDENT

SAMUEL M. MWINZI 4TH RESPONDENT

KITUI COUNTY COUNCIL 5TH RESPONDENT

AND

ANGELINA MANZILE MUTEMI EXPARTE APPLICANT

*(Being an appeal from the whole Judgment of the Learned Resident
Magistrate Mr Gichimu WJ and read by the Learned Senior Resident
Magistrate Mr Nyaberi on in Mwingi SRMCC No 111 of 1988)*

RULING

1. The applicant herein Angelina Manzile Mutemi filed the application dated December 6, 2021 seeking the following orders:



1. That this honorable court do grant leave to the applicant to file an application for substitution out of time and beyond the statutory period.
2. That Angelina Manzile Mutemi be substituted as the appellant in these proceedings in place of Christoher Mutemi Mutio (deceased) who passed on, on September 27, 2019.
2. The applicant claims that the appellant who was her husband died on September 27, 2019 but she could not file the application for substitution within time due to difficulties enumerated in the supporting affidavit. She claims that initially she took time to mourn her husband and also had difficulties in collecting his estate and obtaining relevant information to enable her file the application. She claims further, that when she was ready, she was prevented from doing so due to COVID-19 restrictions. Her other reasons for not filing the present application was that there were difficulties experienced when the appellant's lawyer, Mr Nzili advocate became a judge but that she eventually obtained the grant of letters of administration on July 27, 2021.
3. The 1st respondent filed grounds of opposition dated January 16, 2022 and a replying affidavit sworn on the same date. The respondent states that the application for substitution is incompetent, bad in law and the same does not lie. She further claims that there has been inordinate delay in bringing the application. Further that the appeal abated on April 27, 2020 and thus there is no appeal on record on the basis of which the orders sought can be granted. She claims that the applicant has no capacity to bring the present application and that her supporting affidavit is full of falsehoods.
4. Further, the 1st respondent claims that she has never been served with the appeal itself and that the suit land has already been transferred into her name.

applicant's submissions

5. The applicant reiterated her reasons for the delay in applying for substitution of her deceased husband in the appeal after his demise. She submitted that she is ready and willing to prosecute this appeal to its logical conclusion and seeks that the court exercises its inherent powers to reinstate the appeal so that the death of the appellant is not used as a reason to deny his beneficiaries the right to defend their interests.
6. The applicant relied on order 24 rule 3 of the *Civil Procedure Rules* on substitution of plaintiffs and submitted that she could not make this application for substitution without being an administrator of the estate of the deceased she stated that she has shown sufficient cause or proof as to why she was not able to file the application for substitution.
7. The applicant relied on the case of *Mathenge Ngatia Ngari (suing on behalf of himself and on behalf of his deceased brothers represented by their wives) v Christopher Wang'ombe Ngatia & Another(2020) eKLR* where the court noted that order 24 rule 7(2) of the *Civil Procedure Rules (2010)* gives the court discretion to revive an abated suit if there is sufficient proof.
8. The applicant further relied on the cases of *The Hon Attorney General v The Law Society of Kenya & Another Civil Appeal (application) No 133 of 2011* and *Mbaya Nzulwa v Kenya Power & Lighting Co Ltd (eKLR) 2018*. It is the applicant's submission that it will only be fair to hear all the parties in this appeal in full and determine the case.

The 1st respondent's Submissions

9. In her submissions, the 1st respondent pointed out that the appellant died on September 27, 2019, over 2 years and 2 months prior to filing of the present application. Therefore, the appeal abated by



operation of law as per order 24 (3) of the *Civil Procedure Rules*. The respondent submitted that the said provision uses the mandatory word ‘shall’.

10. It is the 1st respondent’s submission that although the court has the discretion to extend time within which to make an application for substitution, such discretion must be exercised judiciously and the applicant must provide sufficient and adequate reasons.
11. Counsel for the respondent submitted that all the applicant required to apply for a limited grant was the death certificate, which she acquired 12 days after the death of the appellant. The applicant took one year and seven months to apply for grant of letters of administration.
12. Counsel further submitted that there is no application before the court for the revival of the abated appeal as required under rule 7(2) of order 24 of the *Civil Procedure Rules* and there is no provision for the court to make such an order suo moto.
13. The 1st respondent added that she has not been served with the appeal to date and the decree of the lower court has been executed and therefore reviving the abated suit would be an exercise in futility. The 1st respondent cited the cases of *Musha Chengo Kenya & another v Lenox Kabindi Fukuro (2019) eKLR*, *Francis Sirma, Kios v Kibore Sigilai (2018) eKLR* and *Said Sweilem Gheitan Saanum v Commissioner of Lands & 5 others (2015) eKLR* where the courts in those cases dismissed the appeals due to inordinate delay in making the application for substitution.

Analysis and Determination

14. I have considered the application at hand the supporting affidavit and the supplementary affidavit, the grounds of opposition, replying affidavit and the submissions by counsels for the parties.
15. The applicant has brought this application pursuant to order 24 rule 3 and order 51(1) of the *Civil Procedure Rules 2010*. Order 24 rule 3 of the *Civil Procedure Rules* provides as follows:

“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.”

16. The above provision raises certain issues for consideration and the court finds with regard to the said issues: first, it is not contested that the cause of action in the appeal survived the deceased and the same continues. On the second consideration it is confirmed that the applicant is the legal representative to the estate of the appellant by virtue of the limited grant of letters of administration ad litem dated July 27, 2021. Further, the said legal representative has, as required, made an application to court to be made a party to the suit and to continue with the suit.



17. Order 24 rule 3 (2) provides that if no application for substitution of the deceased by the legal representative is made within one year of death the said suit abates. In this case it is not in dispute that the appeal abated on April 27, 2020.
18. In my view the issue for determination is whether the applicant has given good reason for allowing the present application and whether the said application can be sustained in light of the fact that the appeal has abated.
19. It is noted that after the deceased died on April 27, 2019, his death certificate was issued on October 9, 2019; the grant of letters of administration ad litem was issued on the July 27, 2021 in Principal Magistrate Court at Mwingi in P&A Cause No E83 of 2021 while the current application was filed on December 8, 2021.
20. The applicant stated that she was prevented from filing the current application for substitution within the time provided in law due to difficulties enumerated in her supporting affidavit. She claims that initially she took time to mourn her husband and also had difficulties in collecting his estate and obtaining relevant information to enable her file the application. She claims further, that when she was ready, she was prevented from doing so due to COVID-19 restrictions. Her other reasons for not filing the present application was that there were difficulties experienced when the appellant's lawyer, Mr Nzili advocate became a Judge but that she eventually obtained the grant of letters of administration on July 27, 2021.
21. In my considered view the reasons given for failing to make the application for substitution in time are not good or sufficient. There is no plausible explanation why after obtaining the death certificate on October 9, 2019 slightly over five months after the death of the appellant, the applicant did not pursue the grant of letters of administration and subsequent substitution. It is not stated that any further documents were required to apply for the grant were given. Obtaining of the death certificate suggests to the court ability by the applicant to start dealing with the deceased estate after a period of mourning. Further, it is a known fact that covid-19 restrictions were first imposed in Kenya in mid-March 2020 thus the applicant had a period of five months after she obtained the death certificate when she would have taken relevant action before the said restrictions were imposed. No explanation has been given for failure to take action in that period. On the reason that the deceased lawyer was appointed a judge and that caused difficulties, the applicant does not explain when the said appointment took place and how it caused difficulties in taking action.
22. As provided in the proviso to order 24 rule 3 (2) of the *Civil Procedure Rules* a party who applies for extension of time for filing an application for substitution must give good reason for failure to make the application within the period provided in law or the subsequent period. The same states that:

Provided the court may, for good reason on application, extend the time.”

23. The Court of Appeal in the case of *The Hon Attorney General v The Law Society of Kenya & Another – Civil Appeal (application) No 133 of 2011* observed as follows as to the meaning of sufficient cause:

“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 *Black’s Law Dictionary, 9th 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 judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

24. My considered view of the law is that once a suit has abated under order 24 rule 3(2) then the case is no longer in existence. This was held in [Kenya Farmers Co-Operative Union Limited v Charles Murgor \(Deceased\) T/A Kaptabei Coffee Estate \[2005\] eKLR](#) that;

“In the instant case there was no application for substitution made within one year since the death of the defendant. Therefore as a matter of law the suit as against him abated. When substitution was subsequently purportedly made on March 5, 1998 there was no suit subsisting in which substitution could be made. It had abated on or about April 23, 1996, that is, one year since the death of the defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered..... The suit having abated on or about April 23, 1996, as seen above, the order of substitution of March 5, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity.”

25. Order 24 rule 7 further provides that:

“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.”

26. It is noted that the applicant herein has not applied to have the appeal herein revived under order 24 rule 7 of the [Civil Procedure Rules](#). The Court of Appeal in the case of [Said Sweilem Gheithan Saanum v Commissioner of Lands \(being sued through Attorney General\) & 5 others \[2015\] eKLR](#) had this to say about abatement of a suit by death of the plaintiff.

“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.”

27. Under order 24 rule 7 of the [Civil Procedure Rules](#), an applicant who makes an application for revival of an appeal/suit and substitution of the deceased must prove to the court that he/she was prevented by any sufficient cause from continuing the suit. In my view even if the relevant application for revival of the abated appeal had been made, I am not convinced that sufficient reasons have been given for failure to make the application before abatement of the appeal and in any case within a reasonable time after the said abatement.

28. I therefore find that there is no subsisting appeal that is capable of forming the basis for the orders prayed for in the application dated December 6, 2021. I find that the prayers sought in the said application are unsustainable and the application is thus incompetent and the same is hereby dismissed with costs to the 1st respondent.



DELIVERED, DATED AND SIGNED AT KITUI THIS 27TH DAY OF OCTOBER 2022.

HON L G KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court in the presence of-

Musyoki Court Assistant

M/S Mbilu advocate holding brief for Mulu for the appellant

No attendance for the respondents

