



**Kithaka v Kithaka (Environment & Land Case 38 of 2019)
[2022] KEELC 13572 (KLR) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13572 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 38 OF 2019
CK YANO, J
OCTOBER 19, 2022
(FORMERLY ELC 118 OF 2018 NKUBU)**

BETWEEN

M'NDEGWA KITHAKA PLAINTIFF

AND

MAINGI KITHAKA DEFENDANT

RULING

1. The application before me is the notice of motion dated 28th September, 2022 filed by Lawrence Kimathi Maingi, the applicant for orders-;
 1. That this application be certified as urgent and heard in the first instance.
 2. That the court be pleased to set aside the ruling and/or order made on the May 5, 2022 against the 1st defendant/respondent and grant him leave to defend the suit so that the same may be heard on merit.
 3. That the honourable court be pleased to substitute the 1st defendant/respondent with his son Lawrence Kimathi Maingi to enable him proceed with the hearing and determination of the case.
 4. That costs of this application be provided for.
2. The application is supported by the affidavit of Lawrence Kimathi Maingi, the applicant sworn on September 28, 2022 and is based on the following grounds-;
 - a. That the 1st defendant/respondent Maingi Kithaka died on November 28, 2015 and left this case for hearing and determination before this honourable court.



- b. That the honourable court on March 18, 2022 directed the plaintiff/respondent to substitute the 1st defendant/respondent and fixed the matter for further mention date on May 5, 2022.
 - c. That on May 5, 2022 the plaintiff/respondent informed the court that they have not been issued with letters of administration *ad litem* since there was a miscellaneous succession Cause No 7 of 2022 petitioning for grant of letters of administration *ad litem* before honourable Lady Justice Cherere.
 - d. That the honourable court on May 5, 2022 vacated the orders of substitution of the 1st defendant/respondent because there was no miscellaneous succession cause No 7 of 2022 for grant of letters of administration *ad litem* on record before ELC court and also the 2nd to 5th defendant/respondent counsel had not been equally served with the miscellaneous application cause.
 - e. That however, when the suit against the 1st defendant was said to have abated on May 5, 2022, there was a petition for letters of administration *ad litem* that had already been filed in court by the applicant in order to be substituted to prosecute the case on behalf of the estate of his deceased father dated April 27, 2022, but the Limited Grant had not been issued yet until July 22, 2022.
 - f. That there is new material evidence on the face of the record.
 - g. That it is in the interest of justice that the said order and/or ruling of May 5, 2022 be set aside and the applicant be allowed to defend the suit so that the same may be heard and determined on the merit.
 - h. That the estate of the 1st defendant/respondent will be greatly prejudiced if the order/ruling entered is not stayed and/or set aside.
 - i. That there has been no delay in making this application and no prejudice will be suffered by the plaintiff and the 2nd to 5th defendants/respondents.
3. In the said supporting affidavit, the applicant has annexed copies of death certificate dated March 22, 2022, chief's letter dated April 6, 2022 and the letters of administration *ad litem* issued on July 22, 2022 in the Chief Magistrate's Court at Meru Misc Succession Cause No 95 of 2022 in the matter of the Estate of the late Maingi M'Kithaka (deceased).
 4. The application is opposed by the 2nd to 5th defendants through a replying affidavit sworn by Julius B. Marangu Mburugu, the 2nd defendant/respondent. He has deposed inter alia that the suit against the 1st defendant abated one (1) year after his death on November 28, 2015, and that even after obtaining the limited grant on July 22, 2022, the applicant took 66 days to file the present application which was filed only some days to the hearing date of October 3, 2022. The 2nd defendant read some collusion between the plaintiff and the applicant to defeat the 2nd 4th and 5th defendant's case in this matter, and pointed out a defence in admission filed on July 30, 2014, which was after a period of over three (3) years since the suit was filed on March 28, 2011. That the applicant should be glad that the suit against his father was declared by the court to have abated and therefore no liability will attach to him. It is further contended that no attempt to revive the suit against the 1st defendant. The 2nd, 3rd, 4th and 5th defendants pointed out that two of their crucial witnesses have since passed on while the 4th defendant is incapacitated and urged the court to expedite the hearing of this suit which has been pending in court for over ten (10) years. It is the 2nd, 3rd, 4th and 5th defendants contention this application is a non-



starter, misconceived, non -suited, an abuse of the court process and a red-herring either designed to delay the hearing or assist prop up the collapsing case of the plaintiff.

5. The application is not opposed by the plaintiff.
6. I have considered the application alongside the submissions made by the applicant who appeared in person and Mr. Kiruai learned counsel for the 2nd, 3rd, 4th and 5th defendants. The main issues for determination are whether to set aside the ruling and/or order made on May 5, 2022 and whether the order for substitution should be granted as sought.
7. In this matter, it is not in dispute that the plaintiff's suit was instituted through a plaint dated March 22, 2011 and filed in court on March 28, 2011. The case was initially filed in the Chief Magistrate's Court at Meru as No 75 of 2011. Later, the matter was transferred to Nkubu Principal Magistrate's Court and given number Nkubu E& L No 118 of 2018 before it was finally transferred to this court and given the current number, ELC No 38 of 2019.
8. The 1st defendant is said to have passed away on November 28, 2015. The court on May 5, 2022 noted that there had been no substitution of the deceased defendant and therefore found that the suit against the 1st defendant had abated. The matter was then fixed for hearing on June 22, 2022 as against the remaining defendants but could not proceed following an application for adjournment made by the advocate for the plaintiff. The matter was then fixed for hearing on October 3, 2022.
9. On September 29, 2022 the applicant filed the current application. Therefore when the matter came up for hearing on October 3, 2022, the hearing of the main suit could not proceed because the court was of the view that it was advisable to first deal with the current application.
10. As already stated, the application seeks to set aside the order of May 5, 2022 that declared that the suit as against the 1st defendant had abated and also to substitute the 1st defendant who is deceased with the applicant herein, who is the son and the administrator of the estate of the deceased.
11. Order 24 Rule 4 of the [Civil Procedure Rules](#) gives the procedure in case of death of one of several defendants or of sole defendant and provides as follows-;
 1. Where one of the 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 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. Rule 5 of order 24 provides that "where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court"
13. Going by the provision of order 24 rule 4 (3) it is clear that where within one year no application is made the suit shall abate as against the deceased defendant. In this case, the 1st defendant died on November 28, 2015 as depicted by the certificate of death annexed to the applicant's affidavit in support of the application. Therefore, going by the above provision of law, the suit against the 1st defendant abated on November 28, 2016.



14. The application for substitution was filed on September 29, 2022, which is a period of over five (5) years from the time the suit against the 1st defendant abated. I have perused the application. There is no prayer to revive the suit that had abated as provided for under order 24 rule 7 of the Civil Procedure Rules. Therefore, in the absence of an application to revive the suit that abated on November 28, 2016 in my view, granting the order to set aside the orders of May 5, 2022 would be an exercise in futility.
15. Whereas the court has discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown, there is no such application before this court.
16. 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”
17. Therefore, a suit abates by operation of law. That means that no order is required to declare the suit abated. In my opinion therefore, there was no suit against the deceased 1st defendant, the suit against him having abated on November 28, 2016 which is one year after his death on November 28, 2015.
18. Accordingly, I find that the notice of motion dated September 28, 2022 is without merit and is hereby dismissed.
19. On costs, I order that each party bear their own costs of the application.
20. Orders accordingly

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF OCTOBER, 2022.

IN THE PRESENCE OF;

C.A Mwenda

Kiruai for 2nd, 3rd and 5th defendants

Ms Waswani for plaintiff

1st defendant present in person

No appearance for 4th defendant (deceased)

C.K YANO

JUDGE

