



**Letoluo v Haba Haba Investment Limited & 4 others (Environment & Land  
Case 3 of 2020) [2022] KEELC 14818 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14818 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE 3 OF 2020  
CG MBOGO, J  
NOVEMBER 17, 2022**

**BETWEEN**

**LESHAN OLE LETOLUO ..... PLAINTIFF**

**AND**

**HABA HABA INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES OCHEGO ONDUSO ..... 2<sup>ND</sup> DEFENDANT**

**SERAH NJOKI MUNGE ..... 3<sup>RD</sup> DEFENDANT**

**SANKALE OLE OTUNI ..... 4<sup>TH</sup> DEFENDANT**

**LAND REGISTRAR NAROK ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. Before this court for determination is a notice of motion application dated September 15, 2022 expressed to be brought under section 1A,1B,3,3A & 95 of the [Civil Procedure Act](#) and order 24 rules 1 & 3 (1,2) of the [Civil Procedure Rules](#) seeking the following orders: -
  1. Spent/matter not certified as urgent.
  2. That this honourable court be pleased to extend/enlarge time to enable the legal representatives of the plaintiff's estate to file an application to substitute the plaintiff out of time.
  3. That this honourable court be pleased to substitute the plaintiff in this matter with legal representatives of his estate.
  4. That the costs of this application be in the cause.



2. The application is premised on the grounds *inter alia* that the plaintiff died on September 3, 2021 and his family delayed in taking out the letters of administration but have since obtained limited grant for purposes of representing the estate in this matter.
3. The application is supported by the affidavit of Duncan Kiprono, advocate sworn on even date. The applicant deposed that the family of the plaintiff now deceased obtained special limited grant of administration and the legal representatives now want to substitute the deceased plaintiff so that the matter can proceed to conclusion. Further, that the legal representatives of the estate of the plaintiff are Salome Naanyu Leshan Letoluo, Joy Namunyak Leshan and Leshan Kuntai and no prejudice will be suffered by the defendants if the application is allowed.
4. The 1<sup>st</sup>-4<sup>th</sup> defendants filed grounds of opposition challenging the application on the following grounds: -
  1. That the application is misleading, incompetent and an abuse of the court process.
  2. That the application is bad in law for want of substratum for failure to apply the revival of the abated suit.
  3. That the applicant is only interested in protracted litigation to the detriment of justice.
  4. That the application is against the policy that litigation must come to an end.
  5. That the application offends order 24 rule 7 (2) of the *Civil Procedure Rules* and the applicant is guilty of laches, lacks candidness and diligence and he has not proved that he was prevented by any sufficient cause from continuing the suit.
  6. That the applicant is guilty of none disclosure of material facts or is deliberately misleading the court.
5. Mary W Muigai, advocate filed a replying affidavit in response to the grounds of opposition sworn on October 19, 2022. The counsel deposed that the grounds of opposition as filed do not divulge any law that is offended by the application and that the provision of the law cited provides for revival of an abated suit. The counsel further deposed that the plaintiff died on September 3, 2021 and it was not until August 5, 2022 that the court issued limited grant for special purpose to the legal representatives. Further, that as at the time the application for substitution was filed, 13 days had lapsed beyond the statutory period which is 1 year and as such the advocate was not indolent. In addition, the counsel had orally submitted before court that the family of the deceased were experiencing difficulties in procuring special grant from Narok High Court and this court ought to apply equity in favour of the application.
6. Both parties disposed off the application by way of written submissions. The applicant filed written submissions dated October 19, 2022. The applicant submitted that the plaintiff died intestate and there was no executor or executrix appointed by will who would automatically have filed for letters of administration and obtain locus in the suit and it therefore became difficult for issue of special grant to allow for substitution. Further, that 13 days passed beyond the one-year period provided in law and the applicant disclosed to the court during every mention of the matter. Further, that the advocates on record filed the instant application as soon as the special grant was placed in their hands. The applicant relied on the case of *David Akongo Obilo v Dipen Hasmukhlal Faldu* [2022] eKLR.
7. The defendants filed written submissions dated October 24, 2022. The respondents raised one issue for determination which is whether the applicant established sufficient cause for failing to continue with the suit after the death of the deceased plaintiff. The respondents submitted that under order 24 rule 3 (2) of the *Civil Procedure Rules* abatement is by operation of the law and more than one



year has lapsed without substitution of the deceased plaintiff. Further, that such an application ought to be made within one year in default of which the suit shall abate. The respondents relied on the case *Kenya Farmers' Cooperative Union Limited v Charles Murgor (deceased) t/a Kiptabei Coffee Estate* [2005] eKLR, *Hannah W Mwangi v County Council of Nairobi (Formerly City Council of Nairobi) & 2 Others* [2021] eKLR and *M'Mboroki M'arangacha v Land Adjudication Officer Nyambene & 2 Others* [2005] eKLR.

8. The respondents further submitted that the instruction to the firm of Muigai Kemei & Associates were terminated by the demise of the plaintiff on September 3, 2021 and same not renewed as no one had taken out letters of administration to give competent instructions and therefore, the supporting affidavit of Duncan Kiprono is incompetent because substitution has not been granted and the application ought to have been filed by the legal representatives of the estate of the deceased. The respondents relied on the cases of *Nephant Kiguta Kingori & 2 others v Jane Gathoni Kingori & Another* [2015] eKLR, *Said Sweilem Gbeitham Saanum v Commissioner of Lands & 5 Others* [2015] eKLR and *Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others* [2014] eKLR and *Soni v Mohan Dairy* [1958] EA 58.
9. I have analysed and considered the application, grounds of opposition, replying affidavit and the written submissions filed by both parties and the issue for determination is whether the application dated September 15, 2022 has merit.
10. Order 24 rule 3 of the *Civil Procedure Rules* provides as follows: -

- “3. 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.”

11. I understand the above provision of the law to say that upon death of sole plaintiff or the only surviving plaintiff and on application the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time. In this matter, the 13 days period delay in filing the instant application qualifies the suit to be considered as having abated. 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.
12. I hold the view that under the proviso to rule 3(2) of the *Civil Procedure Rules* the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit needs revival under rule 7(2) of the same. The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the court's duty to sustain claims for purposes of them being heard on the merits. In any



case, the applicant informed the court orally of the circumstances leading to the delay in obtaining the special grant and the 13 days delay period in filing the application is excusable.

13. Arising from the above, I allow the application to have the legal representatives substituted for the deceased plaintiff. Having done so, I further order that the suit be revived for purposes of being heard on the merits. I hereby direct that the plaint be amended within 14 days from today to reflect the legal representatives as the plaintiffs and the matter be mentioned on January 11, 2023 for further directions. Costs of the application shall be in the cause. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**HON. MBOGO C.G.**

**JUDGE**

**17/11/2022.**

In the presence of:

CA:Chuma

