



REPUBLIC OF KENYA



KENYA LAW
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**Kimitei (Suing as the Legal Representative of the Estate of Nyongio Kimitei) v Mitei & 5 others
(Environment & Land Case 36 of 2019) [2025] KEELC 4145 (KLR) (4 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 4145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 36 OF 2019**

CK YANO, J

MARCH 4, 2025

BETWEEN

**ANNAH KIMITEI (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF NYONGIO KIMITEI) PLAINTIFF**

AND

JAMES KIPROP MITEI 1ST DEFENDANT
JUSTINE KIPLIMO ROTICH 2ND DEFENDANT
LEAH CHEBET KIMUTAI 3RD DEFENDANT
RONCERS KARMAIT MURKOMEN 4TH DEFENDANT
GEOFREY KIPROTICH KOMEN 5TH DEFENDANT
DANIEL MURKOMEN 6TH DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 12th January, 2024 by the plaintiff/Applicant seeking the following orders:-
 - a. That this Honourable court be pleased to revive the suit against the Defendants.
 - b. That this Honourable court do enlarge or extend time to substitute the plaintiff herein Annah Kimitei (deceased) with her legal representative and the suit be deemed as subsisting.
 - c. That costs of this application be in the cause.
2. The application is brought under Order 24 rule 7(2) of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* and is premised on the grounds on the face of the motion and supported by the affidavit of David Rioba Omboto Advocate for the applicant sworn on 12th January, 2024. It



is stated that the plaintiff died on 1.9.2022 while prosecuting this suit and her family took time to appoint a legal representative and many attempts to fast track the appointment bore no fruits. That the letters of administration ad litem were filed immediately upon the plaintiff's family appointing a legal representative. That the delay in filing this application was due to unavoidable circumstances and beyond human control. That it is in the interest of justice and the right to fair hearing that this application be allowed as prayed.

3. In the supporting affidavit, the deponent has annexed copies of a death certificate and limited grant of letters of administration ad litem issued on 22nd March, 2023 in *Eldoret CMC Ad Litem Cause No. 70 of 2023* and deponed that when they made an application for grant ad litem, one year had lapsed and the suit had abated, hence the need to revive it. It is averred that the application herein has been brought promptly and in good faith and that the defendants will not in any way suffer any prejudice should the orders sought herein be granted.
4. The application is opposed by the 1st Defendant who filed grounds of opposition dated 8th February, 2024 on the following grounds: -
 1. That application is misconceived, frivolous, vexatious and an abuse of the court process.
 2. It is made without instructions as it is conceded the plaintiff died over 1 year ago.
 3. The affidavit in support of the application is made by a person who is neither a party nor possessed with locus standi over the subject matter.
 4. There is nothing to revive as the abatement is a legal process that takes effect once a party fails to comply with Order 24 Rule 3(2) *Civil Procedure Rules* which rule is couched in mandatory terms.
5. The application was canvassed by way of written submissions. The Plaintiff/Applicant filed submissions dated 20th March, 2024 through the firm of Rioba Omboto & Co. Advocates while the 1st Defendant/Respondent filed his dated 22nd April, 2024 through the firm of Ngigi Mbugua & Co. Advocates.
6. The Applicant's counsel identified the issues for determination to be whether the application is merited and whether the Plaintiff/Applicant is entitled to the orders sought.
7. The Applicant's counsel cited the provisions of Order 24 rule 7(2) of the *Civil Procedure Rules* and relied on the case of *Kariuki & another (Administrator of the Estate of Gitau Karanja Wainaina also known as Kariuki Wainaina (Deceased) v Waboti & others* (Environment & Land case 1 of 2021 [2023] KE ELC 16921 (KLR) (24 April 2023) Ruling) and *James Mwaniki Kinuthia v Hemed Iddi Mukili & another* [2019] eKLR and reiterated the contents of the supporting affidavit and urged the court to overshadow technicalities and grant the applicant the orders sought.
8. On his part, learned counsel for the 1st Defendant/Respondent gave a brief background of the case and pointed out that even prior to the plaintiff's death, the matter had already gone inactive for non-attendance by the plaintiff. That after the death of the plaintiff, her family took inordinate amount of time to appoint a legal representative against laid down timelines and made an application for letters of administration ad litem when one year had already lapsed and as such the suit had abated. That the applicant has come to court with the application to revive the suit, but has not adduced tangible evidence to explain the inordinate delay in coming to court long after the one-year period envisaged by the law had lapsed.



9. It was submitted on behalf of the 1st defendant that in the instant application, it is clear that the person making the affidavit had no instructions as it is conceded the plaintiff died over one year ago. Learned counsel for the 1st Defendant cited Order 19 Rule 3 of the *Civil Procedure Rules* and relied on the case of *Obonyo Walter Oneya & Another v Jackline Anyango Ogonde (suing as the admnisrtator of the estate of Fredrick Odhiambo Sewe –deceased)* [2018] eKLR.
10. On whether a matter that has abated can be reinstated by court, it was submitted by counsel for the 1st Defendant that the long and short of an abated suit is that it ceased to exist in the eye of the law. That the abatement takes on its own force by passage of time and is informed by the push by the law to implead on the legal representative of the deceased plaintiff to effect substitution in due time. The 1st Defendant’s counsel cited Order 24 Rule 3(2) of the *Civil Procedure Rules* and relied on the case of *Musha Chengo Kenga v Lenox Kabindi Fakuro* [2019] eKLR in which this court explained the provisions of Order 24 of the *Civil Procedure Rules*. Learned counsel for the 1st Defendant also relied on the case of *Joseph Kabonge Muthondu v John Thuo Macharia Muthoni Kabange* [2019] eKLR which held that it is not the act of the court declaring the suit that abates the suit but by operation of law, and *John Muthee Mabumo v Thomas Gerishon & 4 others* [2023] eKLR in which 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. That in the instant suit, no sufficient reason has been espoused by the applicant, if any, to show the delay of over one year and as such the suit abated rightfully and it ought not to be revived. The respondent urged the court to dismiss the application with costs for being a non-starter both in its letter and spirit.
11. I have considered the application, the affidavit in support, the grounds of opposition as well as the rival submissions. The issues for determination are whether the affidavit in support of the application is defective and whether the applicant has shown sufficient cause for granting of the orders sought.
12. On the first issue, the Respondent contends that the affidavit in support of the application is made by a person who is neither a party nor possessed with locus standi over the subject matter and that the same violates the provisions of Order 19 Rule 3 of the *Civil Procedure Rules*.
13. Order 19 Rule 2 of the Civil Procedure Rules on matters to which affidavits shall be confined provides as follows: -
 1. Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove; provided that in interlocutory proceedings, or by leave of the court an affidavit may contain statements of information and belief showing the sources and grounds thereof.
14. The issue of advocates swearing affidavits in contentious matters has been decided in several court cases. In *Republic v Nairobi City County Government & 6 others Ex-parte Mike Sonko Mbuvi*, Miscellaneous Civil Application No. 116 of 2015, [2015] eKLR, Odunga J. (as he then was) stated as follows: -

“Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases where the matters deposed to are agreed or on purely legal positions, advocates should refrain from temptations of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel



should desist from the temptation to be the pipe stem through which such an averment is transmitted.”

15. In the case of *Oyugi v Law Society of Kenya & another* [2005] 1 KLR 463, Ojwang J. (as he then was) stated as follows:-

“It is not competent for a party’s advocate to depone to evidentiary facts at any stage of the suit and by deponing to such matters the advocate courts an adversarial invitation to step down from his privileged position at the Bar into the witness box. He is liable to be cross-examined on his depositions and it is impossible and unseemly for an advocate to discharge his duty to the court and to his client if he is going to enter into the controversy as a witness. He cannot be both counsel and witness in the same case. Besides that, the counsel’s affidavit is defective for the reason that it offends the provision to Order 18 rule 3(1) by failing to disclose who the source of his information are and the grounds of his beliefs.”

16. Further, in *Yussuf Abdulgani vs Fazal Garage* [1953] 28 LRK 17 it was held that an advocate should not swear a belief affidavit on information supplied by his client if his client is available to swear on his own. Filing of affidavits was also discussed in the Halsbury’s Laws of England, 3rd Edition, paragraph 845 where it was stated that:-

“Affidavits filed in the High Court must deal only with facts which a witness can prove of his own knowledge, except that in interlocutory proceedings or with leave, statements as to a deponent’s information or belief are admitted, provided the services and the grounds thereof are stated...

However, under Rule 9 of the *Advocates (Practice) Rules, 1966*, Advocates are not permitted to swear affidavits in contentious matters.”

17. Rule 8 of the *Advocates (practice) Rules, 1966* provides that:-

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear; provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

18. The affidavit in support of the application herein is sworn by David Rioba Omboto advocate who has stated that his firm is on record for the plaintiff/applicant. It is however not stated who the applicant is, considering that the plaintiff is deceased. Whereas counsel has annexed copies of a certificate of death for the deceased and Limited Grant of Administration Ad Litem granted one Kenneth Kipkoech Korir who is listed as a plaintiff (though he is not as his prayer for substitution is yet to be decided), it is not clear why the said Kenneth Kipkoech Korir could not swear the affidavit himself. Was the Applicant unavailable to give his own testimony? Moreover, it was only the applicant who could explain the delay in filing the application. Indeed, the advocate has not explained the reason that hindered the applicant from filing the application immediately the Limited grant of letters of administration ad litem were issued to the said Kenneth Kipkoech Korir on 22nd March 2023 when in fact the suit had not abated until 24th January, 2021 when the application herein was filed.



In my view, no reason has been given for the extension of time to substitute the deceased plaintiff with her legal representative and the revival of the abated suit. The applicant has not satisfied the court that he was prevented by any sufficient cause from continuing with the suit upon the demise of the deceased plaintiff. The delay in bringing this application in my view, is inordinate and no reason has been given for the delay. The applicant, immediately upon being issued with the limited grant on 22nd March, 2023, ought to have sought for substitution since by then, the suit had not abated since the plaintiff died on 1st September, 2022 and the case could only abate by 30th August, 2023. The explanation that the plaintiff's family took time to appoint a legal representative is incorrect since the limited grant was issued within six months on 22nd March, 2023 and when there were still several other months before the suit abated.

19. For the foregoing reasons, the Notice of motion dated 12th January, 2024 is devoid of merit and is hereby dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 4TH DAY OF MARCH, 2025.

HON. C. K. YANO

ELC, JUDGE

4TH MARCH, 2025

In the presence of;

Court Assistant – Laban

No appearance for Plaintiff/Applicant.

No appearance for Defendants/Respondents.

