



**Njoroge v Kamau (Environment and Land Case Civil Suit
32 of 2012) [2025] KEELC 5136 (KLR) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5136 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT 32 OF 2012**

**JO OLOLA, J
JULY 10, 2025**

BETWEEN

DOUGLAS MUNGAI NJOROGE PLAINTIFF

AND

STEPHEN KIMONDO KAMAU DEFENDANT

RULING

1. By the Notice of Motion dated 10th December, 2024, Nahashon NJenga Kamau and Markaret Wambui Kamau suing as the Legal Representatives of Peter Kamau Nguatha (the Applicants) pray for a raft of orders as follows:
 1. Spent
 2. That the firm of M.N. Ndiritu & Co. Advocates be granted leave to come on record after judgment.
 3. That the Applicant's be enjoined in this suit for the purpose of prosecuting this application and the application dated 12th June, 2024
 4. That the execution of the decree in this suit by the 1st Respondent/2nd Defendant in the Counterclaim or any person claiming under him as against the estate of the 1st Defendant in the counterclaim, be declared null and void.
 5. Spent.
 6. That any affidavit purported to have been signed by the 1st Defendant in the Counterclaim (deceased) from 26th June, 2021, (being the date of his death) be struck down (sic) on (the) basis of fraud and misrepresentation;



7. That the Honorable Court do set aside the judgment entered in default of substitution on the 28th April, 2022 and the suit as against the 1st Defendant in the Counterclaim be deemed to have abated as against the 1st Defendant (deceased) in the counterclaim.
 8. Spent;
 9. That a permanent injunction be issued as against the 1st Respondent by themselves or by their agents, servants or otherwise howsoever be restrained from advertising, auctioning, offering for sale, leasing, mortgaging, charging, transferring, assigning, entering upon, trespassing on, dealing with any property comprised of the estate of Peter Kamau Nguatha (deceased);
 10. That demand for legal fees and any threatened execution by the firm of J.O. Magolo & Co. Advocates the purported Advocates for the 1st Defendant (deceased) be declared null and void for want of authority and proper instructions;
 11. That in the alternative to paragraph 10 above that the firm of J.O. Magolo & Co. Advocates have their bill of costs subjected to taxation and retainer proceedings;
 12. Spent;
 13. That in the alternative to prayer 3 above the court do enlarge time for substituting the 1st Defendant and that the suit be revived after granting prayers 1, 2, 4, 5, 6, 7, 8, 9, 10 11 and 12.
 14. That the Costs of this application be provided for.
2. The application is supported by an Affidavit sworn by the 1st Applicant and is premised inter alia on the grounds:
 - i. That the 1st Defendant passed away on 26th June, 2021 and the suit as against him has abated;
 - ii. That none of the beneficiaries of the 1st Defendant's estate were aware of this suit and any decision made is contrary to Article 50(3) of *the Constitution* of Kenya 2010;
 - iii. That there are Affidavits presented before this court purported to have been signed by the deceased after he passed away;
 - iv. That the 1st Respondent has issued warrants of attachment against the 2nd Respondent for Kshs. 4,991,081.40;
 - v. That the estate of the deceased was previously being administered by the Public Trustee; and
 - vi. That the Applicant stand to suffer substantial loss and the application ought to be granted in the interest of equity and justice.
 3. Douglas Mungai Njoroge (the 1st Respondent) is opposed to the application. In his Replying Affidavit sworn on 17th January, 2025, the 1st Respondent avers that the application has deliberately concealed facts and is intended to deceive and embarrass the court.
 4. The 1st Respondent avers that he commenced the suit against Stephen Kimondo Karuku as the Defendant and that the late Peter Kamau Nguatha was the vendor with regard to the agreement and the 1st Respondent's witness. Thereafter the Defendant filed a counterclaim against the 1st Respondent and the late Peter Kamau Nguatha.



5. The 1st Respondent further avers that upon being joined as the 1st Defendant in the Counterclaim, the late Peter Kamau Nguatha instructed the same Advocate as his own and they co-operated together throughout the hearing.
6. The 1st Respondent asserts that Peter's family was aware of the pending judgment even after he passed away as the 1st Respondent remained in communication with the family through the 1st Applicant.
7. Peter Kamau Kimondo as the legal representative of the Estate of Stephen Kimondo Karuku (the Defendant) is equally opposed to the application. In his Replying Affidavit sworn on 21st January, 2025, the Defendant avers that he enjoined Peter Kamau Nguatha to this suit by way of his Defence and Counterclaim dated 21st March, 2012 and that Peter entered appearance and participated in the proceedings.
8. The Defendant denies that the suit had abated as against Peter as at the time the Judgment was delivered herein on 28th April, 2022 as it was not yet a year after Peter passed away. He asserts that the Applicants have not given any sufficient reason to warrant a stay of the proceedings and/or the setting aside of the judgment and urges the court to dismiss the application.
9. I have carefully perused and considered the application as well as the respective responses thereto. I have similarly perused the submissions and authorities placed before me and as highlighted by the Learned Advocates representing the parties herein.
10. By their application before the court, the two Legal Representatives of the Estate of Peter Kamau Nguatha have made thirteen (13) prayers ranging from a prayer to be enjoined in the suit, an order for setting aside of the judgment; for stay of execution of the judgment, an order for a permanent injunction and in the alternative, an order to enlarge time for substituting the deceased and to have the suit revived for hearing.
11. Those prayers arise from the Applicants' contention that the deceased passed away on 26th June, 2021 and that the suit as against him abated by operation of the law. The Applicants aver that none of the beneficiaries of the estate of the deceased were aware of the present suit and hence their failure to request in good time to be enjoined as the legal representatives of the deceased.
12. The application before the court appears to have been precipitated by some two letters both dated 5th December, 2024 from the Law Firm of J.O. Magolo & Company Advocates addressed to the two Applicants. In the first letter, the Law firm asserts that they were acting for the deceased and they make a demand of Kshs. 500,000/= from the legal representatives of the deceased being what they state is their pending legal fees.
13. In the second letter, the Law Firm asserts that it was acting for the Plaintiff herein and demands the sum of Kshs. 7,241,957/= from the two Applicants being the decretal sum as per the judgment of the court delivered on 28th April, 2022. The letter proceeds to threaten the Applicants with execution unless the sum was paid within seven (7) days of the letter.
14. While it was unclear to me the basis upon which the second letter was written by the said Law Firm, it was evident that its contents did not resonate very well with the Applicants who, feigning any knowledge of this suit, rushed to institute the application before the court with the main aim of staying any execution proceedings.
15. As it were, the thrust of the Applicant's case is that Peter Kamau Nguatha passed away during the pendency of the proceedings and that any proceedings could not be taken against him and/or his estate as the suit had since abated. The Applicants asserted that the execution of the decree in this suit by the



1st Defendant in the Counterclaim or any other person claiming under him as against the estate of the 1st Defendant in the Counterclaim should be declared null and void.

16. As regards the death of a Defendant in the course of proceedings, Order 24 Rule 4 of the Civil Procedure Rules provides as follows:

“(1) Where one of 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 defendant 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 subrule (1), the suit shall abate as against the deceased defendant.

17. In the matter herein, it was not in dispute that the deceased died on 26th June, 2021. Prior to his death the record reveals that he had attended court on 23rd October, 2019 and testified about the case. Under Order 24 Rule 4 of the Civil Procedure Rules, the cause of action survived him and he needed to have been substituted. Some 10 months after his death, the court rendered the Judgment whose stay is sought herein on 22nd April, 2022.

18. I was unable to find the basis upon which the Applicants herein therefore insisted that the suit herein had abated. From the provisions of Order 24 Rule 3 of the Civil Procedure Rules aforesaid, it was evident that a suit only abates where one year has passed and no substitution of the Defendant has been made. In this case, only 10 months had lapsed.

19. Considering a similar matter in Eunice Kivunda Kinyua –vs- Josephat Mwathi Kibiri (2018) KEHC (3858) KLR, R. Korir J. held as follows:

“16. in the present case, both parties were alive and well till the Court concluded the hearing and reserved the judgment to a future date. The defendant died a few weeks before the judgment was delivered. It is my view that under Order 24 Rule 1, the suit did not abate as the cause of action continued. What remained was execution which could be effected against the estate of the deceased. This is especially so because the judgment was delivered well within the one year prescribed by order 24 rule 2.”

20. From a perusal of the material before me, I was not persuaded that the Applicants, particularly, the 1st Applicant and the deponent of the Supporting Affidavit herein was unaware of these proceedings which have now reached the execution stage. In Mueni Kiamba –vs- Mbithi Kimeu (2017) eKLR, it was held that:

“The provisions of Order 23, rule 11 of the old Civil Procedure Rules and now Order 24 rule 10 of the New Rules provide expressly that substitution and abatement of suits shall not apply to execution of orders.”



21. Arising from the foregoing, this court was equally persuaded that in the circumstances herein the matter had been concluded and all that remained after the judgment was the process of execution which could be effected against the estate of the deceased.
22. I was similarly unable to find any basis to set aside the Judgment entered herein on 28th April, 2022. The deceased was a party to the suit. He filed pleadings and gave oral testimony at the trial.
23. In the premises, I was not persuaded that there was any merit in the Motion dated 10th December, 2024. The same is dismissed with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 10TH DAY OF JULY, 2025

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Ms. Nderitu Advocate for the Applicants
- c. Mr. Mwanzia holding brief for Ms. Katisya Advocate for the 1st Defendant
- d. Mr. Magolo for the Plaintiff

