



**Wafula v Khaemba (Environment and Land Appeal E034 of 2024)
[2025] KEELC 6043 (KLR) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6043 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E034 OF 2024
EC CHERONO, J
SEPTEMBER 18, 2025**

BETWEEN

JAFRED MAKHAKHA WAFULA APPELLANT

AND

STEPHEN WANJALA KHAEMBA RESPONDENT

RULING

1. The Applicants, Martha Nekesa Simiyu, Kelvin Munuya Wanyonyi and Mark Wafula Kisuya filed a Notice of Motion under certificate of urgency dated 30th June 2025 seeking the following orders;
 - a. (Spent)
 - b. That pending the hearing and determination of this application interpartes, this honourable court be pleased to arrest the judgment scheduled for 30th July 2025.
 - c. That this honourable court be pleased to grant leave to the Firm of Areba Atancha & Co. Advocates to come on record for the 1st, 2nd, 3rd & 5th Respondents herein and the draft notice of appointment of Advocate hereto annexed to this application be deemed to be properly on record.
 - d. That the honourable court be pleased to admit and substitute the deceased Respondents herein with the proposed Respondents and as follows;
 - i. Norah N. Khaemba (deceased), the 2nd Respondent herein be hereby substituted with Martha Nekesa Simiyu, the 1st Applicant herein being the legal representative of the estate of the 2nd Respondent.



- ii. Timothy Wanyonyi Khaemba(deceased), the 3rd Respondent herein be hereby substituted with Elizabeth Kilwatso Wanyonyi and Kelvin Munuya Wanyonyi, the 2nd Applicant herein being the legal representative of the estate of the 3rd Respondent.
 - iii. Joseph Kisuya Wabicho (deceased), the 5th Respondent herein be hereby substituted with Grace Nanjala Kisuya and Mark Wafula Kisuya, the 3rd Applicant herein being the legal representatives of the estate of the 5th Respondent.
 - e. That upon grant of prayer (d) hereinabove, this honourable court be pleased to arrest the judgment scheduled for 30th July 2025 and open the case to enable the 1st, 2nd, 3rd and 5th Respondents to file their submissions and for full final disposal of the appeal on merit.
 - f. That an order be issued directing the Appellant to serve the Respondents with the record of appeal for purposes of compliance.
 - g. That the costs of this application be in the cause.
2. The application is premised on 21 grounds apparent on the face of the said application and the supporting affidavit of Martha Nekesa Simiyu sworn on even date. The brief summary of the Applicants case is that they are the children and administrators of the 1st, 2nd and 5th Respondents and seek leave to be substituted on behalf of the estate of their loved ones. They contend that they had been given a chance by this court to apply for substitution but were not able to obtain the grant of letters of administration within the timelines given by the court. They stated that the delay in obtaining the grant of letters of administration was not deliberate but was beyond their control.
 3. The Applicants further stated that they filed letter of administration Ad litem in Succession Cause Number Bungoma PMC Misc. Succession Cause No. E039 of 2025 and E40 of 2025 respectively and apart from grant of letters of administration in respect to the estate of the 5th Respondent, the record shows that the rest of the grant of letters of administration were endorsed and issued by the Court on 18th June 2025. They stated that the 2nd, 3rd and 5th Respondents herein (deceased) were parties to the impugned judgment before the Webuye trial Magistrate which is the subject of the current appeal.
 4. The Applicants further contend that the 2nd and 5th Respondents passed on in the year 2016 and 2020 respectively during the pendency of the former suit and their estates are beneficiaries of the impugned judgment of the trial court.
 5. The Appellant filed a 42 paragraphs Replying affidavit in opposition to the application sworn on 25th July, 2025. According to the Appellant, the applicants' former suit which was filed in Bungoma High Court and registered as ELC Case No. 63 of 2017 between Stephen Wanjala Khaemba, Norah N.khaemba, Timothy Wanyonyi Khaemba, Benard Makhakha Khaemba & Joseph Kisuya Wabicho Versus Jafred Makhakha Wafula was subsequently transferred to Webuye Senior Principal Magistrate Court for hearing and determination on 26/07/2018 where it was registered as SPMC-ELC No. 28 of 2018. After hearing the matter, the trial Magistrate rendered herself on 28th June 2024 and held that the plaintiffs' claim was merited and allowed it with costs. Aggrieved by the trial court's Judgment, the defendant/Appellant preferred the present appeal.
 6. When this appeal came up for directions before the Deputy Registrar of this Court on 23/10/2024, the 1st Respondent who appeared alongside the Appellant informed the court that the other four (4) Respondents were death. The Deputy Registrar directed that the matter be mentioned before me for directions on 27/01/2025. On the said date, the Appellant alone was present and after examining the affidavit of service, this court concluded that proper service had not been effected upon the



Respondents. When the matter came up next on 19/02/2025, the Appellant and the 1st Respondent alone appeared and directions were taken to have the appeal canvassed by way of written submissions. The matter was agreed to be mentioned on 2/4/2025 to confirm compliance and taking a judgment date.

7. When the matter was called out on 2/4/2025, the Applicants stood up and informed the court that that the 2nd, 3rd and 5th Respondents had died. Since evidence of death would only be confirmed by a death certificate, this court directed the Applicants to obtain a certificate of death and if necessary apply for a grant of letters of administration Ad Litem for purposes of substitution. The Appellant was not amused with my directions and started shouting uncontrollably in court causing drama by screaming and disrupting proceedings. This court cautioned him to sit down and keep quiet or leave the court room. The Appellant continued shouting forcing the court to order him to leave the court room to allow court proceeding to proceed in an orderly fashion without interruption and granting the Applicants more time to seek and obtain grant of letters of administration for purposes of substitution. This matter was thereafter rescheduled to 19/05/2025 for mention for further directions. On the said 19/05/2025, the Applicants stated that they had not also been issued with grant of letters of administration and this court gave them the last chance until 16/06/2025. On the said date, the Applicants still had not obtained the grant of letter of administration and court directed the parties, including the Applicants to file their submissions and fixed the judgment for the appeal on 30/07/2025. During the judgment date on 30/07/2025, the Applicants herein filed the current application under certificate of urgency seeking orders for inter-alia arresting of said judgment.
8. I have considered the said application dated 30th July, 2025, the supporting and further affidavit, Replying affidavit, the record of appeal generally and the applicable law. What the applicants are seeking are discretionary powers of this court. From the grant of letters of administration Ad Litem from Webuye SPM Misc. Succession Cause No. E039 of 2025 and E040 of 2025 annexed to the affidavit in support of the present application, Nora Nabukwangwa Khaemba is said to have died on 13/08/2016 and Timothy Wanyonyi Khaemba is said to have died on 18/09/1996 while Joseph Kisuya Wapicho died on 29th January, 2020. From the record of appeal, the former suit was filed by the Respondents through the Firm of M/S Lucy Nanzushi & Co. Advocates on 9/05/2017. It follows that at the time of the commencement of the former suit, the 2nd and 3rd defendants had died and had no capacity to institute the former suit.
9. Regarding the 5th Defendant who is said to have passed away on 29/01/2020, no grant of letters of administration was sought and obtained within twelve months as required under the law.
10. Order 24 of the Civil Procedure Rules provides as follows;
 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
 2. Where there are more and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
 - 3(1) 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 or plaintiffs alone 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. From my interpretation of the law, Joseph Kisuya Khaemba, one of the three surviving plaintiffs when the former suit was commenced also died on 29/01/2020 and his claim abated on 28/01/2021. The legal representative in respect of Joseph Kisuya Khaemba, the 5th Plaintiff/Respondent did not seek and obtain leave to extend the time. In my respective view, the living plaintiffs at the commencement of the former suit were Stephen Wanjala Khaemba, Benard Makhakha Khaemba and Joseph Kisuya Khaemba. The present application in my opinion is a non-starter, frivolous and devoid of merit.
12. The upshot of my finding is that the Notice of Motion application dated 30th July 2025 is without merit and the same is hereby dismissed with costs.
13. It is so ordered.

READ, DELIVERED AND SIGNED AT BUNGOMA THIS 18TH DAY OF SEPTEMBER, 2025

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1. Appellant-present
2. 1st Respondent-present
3. M/S Nekesa H/B for Masiga for the 2nd, 3rd and 5th Respondents.
4. Bett C/A

