



**Nzioka v Chief Land Registrar & 3 others (Environment & Land Petition
13B of 2017) [2024] KEELC 1228 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1228 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND PETITION 13B OF 2017
A NYUKURI, J
MARCH 5, 2024**

BETWEEN

PHILIP KIBUBA NZIOKA PETITIONER

AND

THE CHIEF LAND REGISTRAR 1ST RESPONDENT

**MINISTRY OF TRANSPORT, INFRASTRUCTURE URBAN
DEVELOPMENT 2ND RESPONDENT**

THE COUNTY COMMISSIONER MACHAKOS COUNTY ... 3RD RESPONDENT

**REDUBEN KAVIITHI KYUNGU (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF DANIEL KYUNGU) 4TH RESPONDENT**

RULING

Introduction

1. Before court is a Notice of Motion dated 25th September 2023 filed by the petitioner seeking for leave to substitute the petitioner who is now deceased, with Jeremiah Wambua Kivuva, the administrator of the deceased's estate.
2. The application is predicated on the supporting affidavit sworn by Jeremiah Wambua Kivuva on 22nd September 2023. The applicant states that he is the administrator of the estate of Philip Kibuba Nzioka the deceased petitioner, having obtained letters of administrator for his estate.
3. Further that this petition concerns the same subject matter in ELC Case No. 217 of 2010 where the applicant herein has already been joined in the suit to substitute Philip Kibuba Nzioka, his late father and that the court directed that these two suits be heard together. He stated that being joined to this suit will enable and facilitate the hearing and disposal of this petition and no prejudice will be suffered by the respondent. He attached the limited grant issued to him.



4. The application is opposed. Reuben Kavithi Kyungu, the 4th respondent filed a replying affidavit sworn on 6th November 2023. He stated that the deceased died on 13th September 2021 and that grant of letters of administration were made to the applicant on 25th February 2022. He stated that the matter has abated as twelve months have lapsed since the death of the deceased, without substitution.
5. He stated that this petition is subjudice due to the pendency of Machakos ELC No. 217 of 2010.
6. The applicant filed submissions which I have considered.

Analysis and determination

7. I have carefully considered the application and the response filed together with submissions. The only issue that arise for determination is whether the applicant deserves to be substituted in the place of the deceased petitioner.
8. In the event of the death of a plaintiff, where the cause of action survives, this court has power to join the legal representative of the deceased plaintiff to the suit.
9. Order 24 Rule 3 (1) and (2) of the [Civil Procedure Rules](#) provides as follows;
 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 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.
10. Therefore an application for joining a legal representative of a deceased plaintiff to a pending suit ought to be made within one year, although the court has power to extend the period where there is good reason for delay.
11. In the instant case, the evidence on record shows that the petitioner died on 13th September 2021 and on 28th February 2022, on an application made by the applicant herein, a limited grant of letters of administration in respect of the deceased petitioner was made to the applicant in Machakos High Court Succession Cause No. 16 of 2022. The application herein was filed on 25th September 2023. From the date of death of the deceased petitioner on 13th September 2021 to the date of filing the instant application on 25th September 2023, a period of two years had lapsed. It is therefore true that the application herein was filed outside the timelines provided in Order 24 Rule 3 (2) of the [Civil Procedure Rules](#).
12. The above position notwithstanding, the record shows that on 12th October 2021 this suit was consolidated with Machakos ELC 217 of 2010 whereof the latter is the lead file. The court also directed that the plaintiff in that suit remains the main plaintiff and the petition herein becomes the counterclaim. Subsequently, on 4th April 2022, Mr. Munyao Counsel for the 4th respondent herein conceded to and did not oppose the application of the applicant herein, dated 14th March 2022 seeking similar orders as those sought in the instant application, namely for substituting the late Philip Kibuba



with Jeremiah Wambua Kivuva. The basis for that application were the same as those in the instant application.

13. In view of the above, it is clear that this suit was consolidated with ELC 217 of 2010 and since the substitution application by the current applicant was allowed in the lead file, the two suits are indeed one suit by virtue of the consolidation and cannot be separated. It would be absurd to join the applicant in half of the suit and deny his participation in the other half. Although there was delay in filing the application herein, no prejudice has been shown that would be suffered by the respondent if substitution is done, considering that the respondent did not oppose the substitution application made in the lead file. This court is enjoined by provisions of Article 159 of *the Constitution* of Kenya to facilitate substantive rather than technical justice. Therefore, the interests of justice require that the applicant be substituted in the place of the late Philip Kibuba Nzioka so that there is representation on the petition herein which is deemed a counterclaim.
14. I therefore find that the application is merited and the same is hereby allowed. There is no order as to costs.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Koyoko for defendant

Mr. Munyao for plaintiff/respondent

Josephine – Court Assistant

