



Ashraf v Fatehidin & another; Fatehidin - Administrator of the Deceased’s Estate Mokowe Traders Limited & another (Intended Defendant) (Environment & Land Case E063 of 2022) [2024] KEELC 5922 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5922 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E063 OF 2022
JO MBOYA, J
SEPTEMBER 16, 2024**

BETWEEN

JAMILA ASHRAF PLAINTIFF

AND

MOHAMED ANWAR FATEHIDIN 1ST DEFENDANT

MAFDIN ENTERPRISES LIMITED 2ND DEFENDANT

AND

**MEHNAZ FATEHIDIN ADMINISTRATOR OF THE DECEASED’S ESTATE
MOKOWE TRADERS LIMITED INTENDED DEFENDANT**

TASKEEN FATHEDIN INTENDED DEFENDANT

RULING

INTRODUCTION AND BACKGROUND

1. The Plaintiff/Applicant has approached the court vide Notice of Motion Application dated the 24th June 2024 brought pursuant to the provisions of Order 24 Rules 4 & 7; Order 1 Rules 9 & 10 of the Civil Procedure Rules; Sections 1A, 1B and 3A of the Civil Procedure Act and Article 159 of the Constitution and wherein the Applicant seeks for the following reliefs [verbatim]:
 - i. This Honourable court be pleased to extent time to apply for joinder of the deceased Defendant’s legal representative.
 - ii. This Honourable court be pleased to substitute the 1st Defendant namely MOHAMED ANWAR FATEHIDIN [deceased] with MEHNAZ FATEHIDIN [the legal administrator thereof].



- iii. The Honourable court be pleased to revive the suit as against the 1st Defendant.
 - iv. That upon substitution and revival of the suit, this Honourable court be pleased to join MOKOWE TRADERS LIMITED and TASKEEN FATHEDIN, as Defendants/Interested Parties, in the suit.
 - v. Costs be in the cause.
2. The instant application is premised and anchored on various grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of Jamila Ashraf [Plaintiff/Applicant] sworn on the 24th June 2024 and to which the Applicant has exhibited four [4] annexures.
 3. Upon being served with the application under reference, the Respondent herein filed a Replying affidavit sworn by Menaz Fatehdin. For coherence, the Replying affidavit is sworn on the 18th July 2024 and wherein the deponent has opposed the Application beforehand. In particular, the deponent of the Replying affidavit contends that the application beforehand has been filed with unreasonable and inordinate delay, which delay has neither been accounted for nor explained.
 4. The application beforehand came up for hearing on the 15th July 2024 whereupon the advocates for the respective parties covenanted to canvass the application by way of written submissions. In this regard, the court thereafter proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.
 5. Suffice it to point out that the Plaintiff/Applicant duly filed written submissions dated the 29th July 2024 whereas the Defendants/Respondents filed written submissions dated the 31st July 2024.
 6. Both set of submissions are on record.

PARTIES' SUBMISSIONS:

a. APPLICANT'S SUBMISSIONS:

7. The Applicant filed written submissions dated the 29th July 2024 and wherein same [Applicant] has adopted the grounds enumerated in the body of the application as well as the averments contained in the supporting affidavit. Furthermore, the Applicant herein has highlighted and canvassed four[4] salient issues for consideration by the court.
8. Firstly, learned counsel for the Applicant has submitted that the 1st Defendant herein died/passed on the 4th December 2022. However, despite the death of the 1st Defendant, the estate of the 1st Defendant was not succeeded up to and including the 9th April 2024 when a grant of probate was issued to and in favour of the current administrator.
9. To the extent that the estate of the 1st Defendant had not been succeeded up to and including the 9th April 2024, learned counsel for the Applicant has submitted that the Applicant was thus barred from mounting the requisite application for the substitution of [sic] the administrator of the Estate within the prescribed/statutory timelines.
10. Additionally, learned counsel for the Applicant has contended that owing to the delay by the estate of the 1st Defendant to take out grant of letters of administration/representation, the timeline for substituting the 1st Defendant [deceased], lapsed and hence there is need to extend timelines to facilitate the requisite substitution.



11. Based on the foregoing, learned counsel for the Applicant has thus posited that the lapse of time and the failure to undertake the requisite substitution within the set timelines, was occasioned by the failure and/or omission of the estate of the deceased to procure and obtain the grant of representation timeously and with due promptitude. In this regard, learned counsel for the Applicant has submitted that the Applicant has laid before the court plausible and cogent reasons why the substitution was not taken within the prescribed timelines.
12. Secondly, learned counsel for the Applicant has submitted that the estate of the 1st Defendant [now deceased] has since been succeeded. In this regard, learned counsel for the Applicant has referenced the grant of probate issued vide Nairobi HCC SUCC CAUSE NO. E1198 of 2023 and wherein the grant was issued in favour of Mehnaz Fatehidin.
13. To the extent that the grant of probate was issued to and in favour of the said Mehnaz Fatehidin, learned counsel for the Applicant has submitted that the said administrator/executor, is now seized of the requisite capacity to be substituted in place of the 1st Defendant, [now deceased].
14. In the premises, learned counsel for the Applicant has contended that the limb of the application seeking for the substitution of the 1st Defendant [now deceased] with the executor, in whose favour a grant has since been issued, is meritorious.
15. Thirdly, learned counsel for the Applicant has submitted that the suit herein abated because the estate of the 1st Defendant [now deceased] had not been succeeded. In particular, it has been contended that the estate of the 1st Defendant [now deceased] was only succeeded upon issuance of the grant of probate on the 9th April 2024.
16. Owing to the foregoing, it has been contended that prior to and before the issuance of the grant of probate, the Applicant herein could not proceed and take the necessary steps including substitution. In this regard, it has been contended that the abatement of the suit was occasioned by the delay in the Constitution of the Administrator/Executor of the Estate of the deceased.
17. According to learned counsel for the Applicant, the suit herein ought to be revived so as to enable the real issue in dispute, namely, adverse possession to be heard and determined on merits. At any rate, learned counsel for the Applicant has contended that a failure to revive the suit shall be tantamount to driving away the Applicant from the seat of justice.
18. Finally, learned counsel for the Applicant has submitted that there is also need to join the proposed 3rd and 4th Defendants into the suit. For good measure, learned counsel has contended that the proposed 3rd Defendant took out and filed proceedings before the business premises rent tribunal vide BPRT No. E401 of 2024, wherein same contended to be the landlord in respect of the suit property.
19. On the other hand, it has been further submitted that the proceedings before the BPRT were commenced against the proposed 4th Defendant, who was contended to be a tenant in respect of the suit premises. In this regard, learned counsel for the Applicant has submitted that the proposed 3rd and 4th Defendants are therefore necessary parties, whose presence will enable the court to effectively and effectually determine the issues in controversy.
20. In support of the foregoing submissions, learned counsel for the Applicant has cited and referenced various decisions including *Rebeca Mijide Mongole & Another v Kenya Power & Lighting Company Ltd* [2017]eKLR, *Muema v Maddison Insurance Company Ltd* [2022] KEHC 15449 and *Cheshire & 4 Others v Kwambai & 3 Others; Rono & 3 Others* [Interested Parties]; *Sawe & Another* [2022] KEELC 120, respectively.



b. RESPONDENT'S SUBMISSIONS:

21. The Respondent filed written submissions dated the 31st July 2024 and wherein same adopted and reiterated the contents of the Replying affidavit and thereafter highlighted three [3] salient issues for consideration and determination by the court.
22. First and foremost, learned counsel for the Respondent has submitted that even though the court is seized of the discretion to allow a suit which has abated to be reinstated and revived, the discretion ought to be exercised only where the Applicant has tendered and placed before the court plausible and cogent reasons why the suit was left to abate.
23. Furthermore, learned counsel for the Respondent has also submitted that the exercise of discretion towards reinstatement of a suit which has since abated is also dependent on the timeline taken by the Applicant to apply for such reinstatement. In this regard, it has been contended that where the application for reinstatement is made with unreasonable and inordinate delay, the court ought not to exercise discretion towards reinstatement.
24. Premised on the foregoing submissions, learned counsel for the Respondent has submitted that the application beforehand has been made and mounted with unreasonable delay. Besides, learned counsel for the Respondent has also submitted that the delay beforehand has neither been accounted for nor explained.
25. Based on the foregoing, learned counsel for the Respondent has invited the court to hold that insofar as the delay attendant to the application herein has not been explained, the court ought not to exercise its discretion in favour of the Applicant herein.
26. To this end, learned counsel for the Respondent has cited and referenced various decisions including *Ivita v Kyumbu* [1884] KLR 441, *Charlse Mugunda Gacheru v Attorney General & Another* [2015]eKLR, *Sony v Mohan Dairy* [1958] EA 58 and *Philips, Harrison & Crosfield Ltd v Kassam* [1982] EA 458, respectively.
27. Secondly, learned counsel for the Respondent has also submitted that the Applicant herein ought to have sought for extension of time prior to and before the suit abated. However, it has been contended that the Applicant failed to take appropriate and diligent steps towards extension of time and hence her failure reeks of negligence and deliberate inaction.
28. Furthermore, learned counsel for the Respondent has submitted that the Applicant herein has similarly failed to explain the reason why extension of time was neither sought for prior to the abatement of the suit. In this regard, learned counsel for the Respondent has invoked and relied on the provisions of Order 24 Rule 4 of the Civil Procedure Rules, 2010.
29. In short, it has been contended that the Applicant herein has not placed before the court any justifiable reasons or basis to warrant the extension of time. Consequently, learned counsel for the Respondent has implored the court to decline the extension of time in favour of the Applicant, whose conduct is contended to have been negligent.
30. Lastly, learned counsel for the Respondent has submitted that the Applicant has not demonstrated any sufficient cause and/or basis to warrant the joinder of the proposed 3rd and 4th Defendants into the suit. For good measure, learned counsel for the Respondent has submitted that a party can only be joined in a suit as a Defendant if there exists a claim/relief against such a party and not otherwise.



31. According to learned counsel for the Respondent, the Applicant herein has neither demonstrated nor established any claim or relief to be sought as against the proposed 3rd parties to warrant their joinder into the suit.
32. On the other hand, learned counsel for the Respondent has also contended that the limb of the application seeking for the joinder of the proposed third parties is premature and misconceived, insofar as the suit beforehand has since abated. Furthermore, it has been contended that the intended joinder amounts to placing the wagon before the horse, to the extent that the suit has not been reinstated/revived.
33. In support of the foregoing submissions, learned counsel for the Respondent has invoked and relied in the case of *Zephir Holdings Ltd v Mimosa Plantation Ltd, Jeremiah Matagaro & Ezekiel Misambo Mutisya* [2014]eKLR, wherein the court defined the meaning of a proper party, who can be impleaded as a Defendant in terms of Order 1 Rule 3 of the Civil Procedure Rules 2010.
34. As a result of the foregoing submissions, learned counsel for the Respondent has implored the court to find and hold that the Applicant beforehand has neither established nor demonstrated sufficient cause to warrant the application being granted. In this regard, learned counsel for the Respondent has implored the court to dismiss the application with costs to the Respondent.

Issues For Determination:

35. Having reviewed the application beforehand and the response thereto and upon taking into consideration the written submissions filed by the respective parties, the following issues do crystallize [emerge] and are thus worthy of determination;
 - i. Whether the Applicant has established and demonstrated sufficient cause to warrant extension of time for substitution of the 1st Defendant [now deceased].
 - ii. Whether the legal administrator of the estate of the 1st Defendant [deceased] ought to be joined.
 - iii. Whether the Applicant has established a basis to warrant the reinstatement/revival of the suit.
 - iv. Whether the proposed Defendants ought to be joined into the suit as co-Defendants or otherwise.

Analysis And Determination

Issue Number 1

Whether the Applicant has established and demonstrated sufficient cause to warrant extension of time for substitution of the 1st Defendant [now deceased].

36. The suit beforehand was commenced by and on behalf of the Applicant herein vide Originating Summons dated the 21st November 2022 and wherein the Applicant sought to be declared as the lawful owner/proprietor of L.R No. 209/7784 [hereinafter referred to as the suit property] on the basis of adverse possession.
37. Subsequently, upon the filing of the originating summons, the Applicant herein sought for and obtained leave to amend the originating summons. In this regard, the originating summons was duly amended culminating into the filing of the amended originating summons dated the 8th March 2023.



38. Be that as it may, it has been posited that the 1st Defendant died/passed on, on the 4th December 2022. In this regard, it was incumbent upon the Applicant to take necessary steps towards the substitution of the 1st Defendant [now deceased]. Suffice it to point out that the application for substitution of the deceased, 1st Defendant ought to have been filed within one [1] year from the date of the death of the 1st Defendant.
39. Nevertheless, there is no gainsaying that the application for substitution of the 1st Defendant [now deceased], could only have been filed and mounted, once the Estate of the 1st Defendant [now deceased], was duly succeeded and not otherwise. For good measure, the substitution of the 1st Defendant [now deceased] could only be done once grant of letters of administration/representation were duly issued to the beneficiaries/dependants of the 1st Defendant [now deceased].
40. Put differently, the Applicant herein could not have filed the requisite application for purposes of substitution of the 1st Defendant [now deceased], until and unless an administrator/executor was duly appointed. Suffice it to point out that an administrator/executor of the Estate of the deceased was only appointed on the 9th April 2024.
41. Nevertheless, during the intervening period, the 12 months period, within which the requisite application for substitution ought to have been filed lapsed. Furthermore, the suit also abated by operation of the law.
42. Be that as it may, the Applicant is now before the court and same is seeking for extension of time within which to apply for and substitute the 1st Defendant [now deceased].
43. The question that does arise is whether or not the Applicant has placed before the court plausible and credible reasons/explanation why the application for substitution was neither made nor taken within the statutory/prescribed timeline. To this end, it is not lost on the court that the grant of probate in favour of the administrator, who is proposed to be joined in the suit, was only issued on the 9th April 2024.
44. Furthermore, there is no gainsaying that the application for substitution of the 1st Defendant [now deceased] could not have been made prior to and or before the issuance of the grant of representation. Quite clearly, the 1st Defendant [deceased] can only be substituted by a person in whose favour the requisite grant of representation has been issued and not otherwise. [See Section 82 of the *Law of Succession Act*, Chapter 160 Laws of Kenya] [See also *Rajesh Prajivan Chudasama v Sailesh Prajivan Chudasama* [2014]eKLR].
45. To my mind, the application for extension of time within which to substitute the 1st Defendant [now deceased] has been made timeously and without undue delay. For good measure, the computation of time for the substitution of the Deceased, is reckoned from when the grant of representation was issued, namely, the 9th April 2024 and not otherwise.
46. In short, it is my finding and holding that the Applicant herein has indeed accounted for the steps and endeavours that same took as soon as same [Applicant] realized that the grant of probate had been issued in favour of the administrator.
47. Consequently and in this respect, I am satisfied that credible basis has been established to warrant the extension of time. [See the decision in *Njoroge v Kimani (Civil Application Nai E049 of 2022)* [2022] KECA 1188 (KLR) (28 October 2022) (Ruling)].



ISSUE NUMBER 2

Whether the legal administrator of the estate of the 1st Defendant [deceased] ought to be joined.

48. Having found and held that the application for extension of time has been filed timeously and with due promptitude, the next question that needs to be addressed relates to whether the administrator of the estate of the 1st Defendant ought to be substituted in the manner sought.
49. To my mind, the dispute beforehand is still pending and the proceedings and subsequent determination, whichever way, would impact upon the estate of the 1st Defendant [now deceased]. In this regard, the Estate of the 1st Defendant [now deceased], have a stake in the proceedings by dint of the provisions of Article 50[1] of *the Constitution* 2010.
50. In addition, the primary purpose for which the grant of representation was issued to the administrator/executor, was to protect the assets of the deceased. For good measure, the suit beforehand touches on and concerns one of the assets of the deceased and hence the administrator is obligated to enter into the suit with a view to discharging his statutory responsibility.
51. Without belabouring the point, it is my finding and holding that it is in the interests of the administrator/executor to be joined into the suit, so as to have the requisite opportunity to ventilate his/her part of the story. Furthermore, it is through the joinder into the suit that the Administrator/Executor, will be able to perform his obligation of protecting the Estate of the Deceased, where apposite.
52. On the contrary, if the administrator is not joined, the net effect is that the proceedings may very well continue and adverse orders may issue against the estate of the deceased. Such kind of a scenario would be contrary to the rules of natural justice and the right to fair hearing.
53. In a nutshell, I am convinced that sufficient basis has been laid before the court to warrant the joinder of the administrator/executor of the estate of the 1st Defendant [now deceased].
54. To this end, it is worthy to take cognizance of the holding of the Court of Appeal in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR), where the court state and observed as hereunder;

“It is only after time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without sort succiting it. The proviso to Rule 3[2] to the effect that the court may, for good reasons on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the efflication of time that cause the suit to abate. It is that time, that first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for revival of the action. In aour view, there is nothing objectionable to making an omnibus application for all the three prayers. But is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted”

55. My answer to issue number two [2] is to the effect that the Applicant has duly established the requisite basis to warrant the joinder. At any rate, the joinder of the administrator/executor, will go along way in vindicating the rights and interests of the estate of the Deceased over the suit property.



Issue Number 3

Whether the Applicant has established a basis to warrant the reinstatement/revival of the suit.

56. The suit beforehand touches on and concerns a claim based on adverse possession. Quite clearly, the Applicant is before the court contending that same has since acquired adverse possessory rights to and in respect of the suit property.
57. More importantly, the dispute beforehand concerns a claim based on land. In this regard, there is no gainsaying that such a claim, ought to be heard and determined on merits, unless that exists serious debilitating factors, to warrant a determination on a technicality.
58. Suffice it to point out that claims based on land are emotive and hence the courts are called upon to rise to the occasion and to endeavour and do substantive justice by affording the parties sufficient latitude to canvass their respective cases. [See the holding of the court of appeal in the case of Elizabeth Wamboi Githinji & 29 Others v Kenya Urban Roads Authority [2019]eKLR, as per Ouko JA [as he then was].
59. In my humble view, the revival of the suit beforehand would serve the interests of justice by enabling all the parties concerned to canvass and ventilate their respective claims before the court, so as to enable the court to effectively and effectually determine the dispute, once and for all.
60. At any rate, there is no gainsaying that the court is seized and possessed of the requisite discretion to revive and/or reinstate a suit which has abated or been dismissed on the basis of abatement. For good measure, what the Applicant must demonstrate and/or establish is the existence of sufficient cause to warrant the exercise of equitable discretion in his/her favour.
61. In the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR, the court of appeal whilst considering the scope of discretion towards reinstating a suit stated and held thus;

“It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.”
62. In a nutshell, I am duly persuaded that the suit beforehand, ought to be revived and/or reinstated. The reinstatement of the suit would serve the wider interests of justice and enable the court to deal with and dispose of the dispute once and for all.
63. In addition, it suffices to state that the mere lapse and/or delay by the Applicant, which led to the abatement to the suit herein, does not connote that the Applicant ought to be denied a right to have the dispute before hand heard and determined on merits. Such endeavour shall be tantamount to meting out punishment or discipline on the Applicant.
64. Before departing from the issue beforehand, I beg to adopt and reiterate the dictum in the case of Philip Keipto Chemwolo & Another v Augustine Kubende & Another [1986]eKLR, where the court of appeal stated and held thus;

I think a distinguished equity judge has said:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”



Issue Number 4

Whether the proposed Defendants ought to be joined into the suit as co-Defendants or otherwise.

65. The Applicant herein has invited the court to find and hold that there is basis to warrant joinder of the proposed 3rd and 4th Defendants in this matter. For good measure, the Applicant contends that the proposed 3rd Defendant filed proceedings before the Business Premises Rent Tribunal and wherein same contended to be the landlord of the suit property.
66. On the other hand, the Applicant has also contended that the proposed 4th Defendant was stated to have been a tenant in the suit property. Consequently, the Applicant submits that there is a basis to warrant the joinder of both the proposed 3rd and 4th Defendants respectively into the matter.
67. On their part, the Respondents herein have contended that the Applicant has neither established nor demonstrated any basis to warrant the joinder of the proposed 3rd and 4th Defendants to the suit. Furthermore, the Respondents have contended that a party can only be joined into a suit where it is shown/demonstrated that there exists a cause of action or claim against the intended Defendant and not otherwise.
68. In addition, learned counsel for the Respondent has submitted that in respect of the instant matter, the Applicant has neither demonstrated nor proved any claim and/or relief, if any, to be sought against the proposed 3rd and 4th Defendants.
69. On the other hand, learned counsel for the Respondent has also posited that the intended joinder of the 3rd and 4th Defendants cannot be sought for when the suit beforehand has not been reinstated/revived. In this regard, learned counsel for the Respondent has contended that the limb of the application seeking joinder of the proposed 3rd and 4th Defendants is premature and misconceive.
70. Having taken into account the rival submissions by the parties, I beg to take the following position. Firstly, the proposed 3rd Defendant filed and/or commenced proceedings before the Business Premises Rent Tribunal wherein same indicated that she [proposed 3rd Defendant] was the landlord in respect of the suit property.
71. To the extent that the proposed 3rd Defendant contended to be the landlord over and in respect of the suit property, the said proposed 3rd Defendant appears to be laying a stake to the suit property. Quite clearly, the said intended Third Defendant seems to be suggesting that same [Intended Third Defendant] is the proprietor of the Suit Property.
72. In any event, it is also not lost on the court that the Plaintiff's claim beforehand touches on and concerns adverse possession. In this respect, the Plaintiff's claim, which is a claim rem impacts upon not only the previous land owner but also any other person who lays a claim to the suit property. In this regard, if by any chance the proposed 3rd Party has accrued title to the suit property, then no doubt the Plaintiff would have a semblance of claims/cause of action against same. [See *Njuguna Ndatho v Masai Itumo & 2 Others* [2002]eKLR].
73. Be that as it may, I beg to add that as to whether or not the claim or cause of action would succeed, is another matter. Same can only be gone into and/or addressed during the plenary hearing.
74. On the other hand, the Plaintiff herein also seeks to join the proposed 4th Defendant. Same is stated to be a tenant in respect of the suit property. For good measure, the proposed 3rd Defendant had impleaded and sued the proposed 4th Defendant before the Business Premises Rent Tribunal.



75. Similarly, it is my finding and holding that the proposed 4th Defendant also has an interest in the suit beforehand. At any rate, the orders, if any, that may [I repeat, may] ultimately issue in favour of the Plaintiff may impact upon and/or affect the proposed 4th Defendant.
76. Either way, I am of the humble view that a basis has been established to warrant the joinder of the proposed 3rd and 4th Defendants. At any rate, the joinder of the said proposed 3rd and 4th Defendants shall go along way in enabling the court to effectively determine the issues pertaining to ownership of the suit property and by extension, whether the Plaintiff has accrued adverse possession or otherwise.
77. As regards to the contention by the Respondents' that the proposed joinder cannot be allowed because the suit has since abated, it suffices to posit that the limb for joinder was predicated and contingent upon the reinstatement of the suit.
78. In short, I find and hold that the proposed 3rd and 4th Defendants are proper parties to be joined in respect of the instant matter. At any rate, the joinder of the proposed 3rd and 4th Defendants, would not only enable the court to effectually determine all the issues in controversy, but will also enable the proposed 3rd and 4th Defendants to ventilate their claims/defences where appropriate.
79. The court in the case of *Deported Asians Property Custodian Board v. Jaffer Brothers Limited (1999) I EA 55 (SCU)* discussed the parameters to be considered and taken into account whilst dealing with an application for joinder. The court stated thus;

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (emphasis by underline).

80. The legal parameters to be taken into account and considered before joinder of a party in accordance with the provisions of Order 1 Rule 10[2] of the Civil Procedure Rules, 2010 were also elaborated in the case of *Pravin Bowry v John Ward [2015]eKLR*, where the court stated and held as hereunder;

This Court sitting at Mombasa in *Civicon Limited v. Kivuwatt Limited & 2 others [2015] eKLR (Civil Appeal No. 45 of 2014)* identified that the provisions of Order I of the Civil Procedure Rules call for the exercise of discretion and had this to say of the same:

“Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any



protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”

..... From the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I Rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

The issue was also the subject of consideration by this Court in *Meme v. Republic* [2004] KLR 637 where it was held that joinder of parties will be permissible:

- “(i) Where the presence of the party will result in the complete settlement of all the questions involved in the proceedings;
- (ii) Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
- (iii) Where the joinder will prevent a likely course of proliferated litigation.”

81. Simply put, the provisions of Order 1 Rule 3 and 10 of the Civil Procedure Rules, 2010, grants unto this court wide and unfettered discretion to deal with joinder of parties provided that the joinder in question shall enable the court to deal with and determine all the issues in controversy, once and for all.
82. To my mind, the proposed 3rd and 4th Defendants are proper parties to be joined in the instant suit. Furthermore, the joinder of the proposed 3rd and 4th Defendants shall enable the court to effectively deal with all the issues in dispute/ controversy.

Final Disposition:

83. Flowing from the discussion [details in the body of the ruling], it must have become crystal clear that the application beforehand is meritorious. At any rate, there is no gainsaying that the application for extension of time to substitute the 1st Defendant, [now deceased], could not have been mounted prior to the issuance of grant of representation.
84. In the premises, the final orders of the court are as hereunder;
 - i. The Application dated the June 24, 2024 be and is hereby allowed.
 - ii. Time for substituting the 1st Defendant [now deceased] with the legal representative thereof be and is hereby extended.
 - iii. The legal representative of the 1st Defendant [now deceased], namely Menaz Fatehidin be and is hereby substituted in place of the 1st Defendant [now deceased].
 - iv. The suit herein be and is hereby reinstated and same shall be heard and determined on merits.
 - v. The proposed 3rd and 4th Defendants be and are hereby joined into the suit as the 3rd and 4th Defendants.



- vi. The Plaintiff herein shall proceed to file and serve a further amended originating summons in compliance with Order 1 Rule 10 [4] of the Civil Procedure Rules, 2010 and same to filed and served within 14 days from the date hereof.
- vii. The Defendants or such of the Defendants, where appropriate shall be at liberty to file and serve their statement of defence or amended statement of defence, if any within 14 days of service of the further amended originating summons.
- viii. Costs of the application shall abide the outcome of the suit.

85. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF SEPTEMBER 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant.

Ms. Sheila Mugo for the Plaintiff/Applicant.

Ms. Asli Osman for the Defendants/Respondents and the Proposed Defendants.

