



**M’Akwalu v Gikunda; Kaburu & another (Applicant) (Environment & Land
Case 83 of 1997) [2023] KEELC 566 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 83 OF 1997**

**CK YANO, J
FEBRUARY 8, 2023**

BETWEEN

M’EMENCHU M’AKWALU PLAINTIFF

AND

JAPHET GIKUNDA DEFENDANT

AND

WINFRED KANARIO KABURU APPLICANT

CATHERINE MUTHONI NABEA APPLICANT

RULING

1. The subject of this ruling is an application dated March 29, 2022 and filed in court on April 13, 2022. The applicants seek for revival of the suit as well as to be substituted as the plaintiffs in place of the deceased plaintiff. The application is said to be brought pursuant to Order 24 Rule 1, 3, 7(2) of the [Civil Procedure Rules](#) and any other enabling provisions of the law and is supported by the grounds on the face of the motion and the supporting affidavit of Catherine Muthoni Nabea sworn on March 29, 2022.
2. The grounds relied on by the applicants are that this suit has abated by effluxion of time, that the applicants are the deceased plaintiff’s daughters who have never been in conduct of the matter and therefore were not aware of its existence and the consequent abatement, that the applicants are desirous of prosecuting this case and shall do so expeditiously, and that it is only fair, just and equitable that the application be granted in the interests of justice.
3. In the supporting affidavit, the applicants deposed that they are daughters to the plaintiff herein M’emenchu M’akwaru who died on 29th February 2010. They have annexed a copy of Letters of Administration Intestate issued to them on August 16, 2015 in Meru HC succession cause No 826 of



2015. They have further deposed that sometime in February, 2022, the applicants received a call from the office of M/s Maitai Rimita & Co. Advocates advising them to pick the plaintiff's file from the said office. The applicants aver that they were surprised as they were always unaware of this matter. That they established from the history in the file that their father had filed this suit and upon his demise, their mother, Julia Ntheru George took over as plaintiff but she too passed on before the conclusion of the case. A copy of her death certificate has been annexed.

4. The applicants further aver that they also established that on February 6, 2015 Rimita Advocate who was acting for the plaintiff stated in court that the plaintiff had passed on and the matter was marked as abated with no order as to costs. The applicants state that they were never informed about the existence of this matter either by their deceased parents or the firm of Maitai Rimita & Co. Advocates. It is further deposed that there will be no prejudice if this matter is heard by court on its merits and substantive justice granted to all the parties. That this application is preferred in the interests of justice, more so given that the subject matter of the suit is land.
5. When the application came up for hearing on November 18, 2022, Mr. Karanja advocate appeared for the applicants while Mr. Muthomi Njeru appeared for the respondent. Mr. Muthomi Njeru learned counsel for the respondent informed the court that the application can be allowed. The application is therefore not opposed.

6. I have carefully considered the application. 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 plaintiffs or defendants than one, 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 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 sub-rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and on the application of the defendant, the court may award 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 time.

7(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal, and if it is proved that he was prevented by any sufficient



cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

7. From the foregoing provisions, it is trite that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. The suit herein was instituted on August 6, 1997. From the record, it appears that the original plaintiff died in the year 2010 and was substituted by his widow, though the date of substitution is not clear. It appears that again that the wife of the original plaintiff Julia Ntheru George, who took over as plaintiff upon the demise of the original plaintiff also died.
8. The record further shows that on July 6, 2018, the suit was marked as abated pursuant to an application made by the then advocate for the plaintiff. The application to revive the suit and seeking the substitution of the deceased plaintiff was made on April 13, 2022, about seven years after the abatement of the suit. The applicants have stated that they were not aware of the existence of the suit until when they received a call from the Firm of M/s Maitai Rimita & Co. Advocates in February, 2022. From the foregoing, I am of the most considered opinion that the applicants have shown sufficient cause or reason which prevented them from applying for revival of the suit earlier than April 13, 2022 since they had no knowledge of the existence of the suit before February, 2022. Further, the respondent is not opposed to the application. I therefore exercise my discretion in favour of the applicants.
9. The upshot of this is that the application dated March 29, 2022 is allowed as prayed.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF FEBRUARY, 2023

C.K YANO

ELC JUDGE

In Presence Of:

C.A Kibagendi

E. Kimathi for applicants

No appearance for respondent

