



Maeke ((Suing as legal representative of the Estate of William Mutua Joel Maeke – Deceased)) v Mutwetumo & 3 others (Environment & Land Case 67 of 2019) [2023] KEELC 761 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 761 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 67 OF 2019
TW MURIGI, J
FEBRUARY 8, 2023**

BETWEEN

**HELLEN WANZA MAEKE PLAINTIFF
(SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF WILLIAM
MUTUA JOEL MAEKE – DECEASED)**

AND

**GERALD MUTUNGA MUTWETUMO 1ST DEFENDANT
LEONARD CEDRIC MAKAU 2ND DEFENDANT
ALBANAUS KIMEU MUTHOKA 3RD DEFENDANT
CHRISTOPHER KILONZO 4TH DEFENDANT**

RULING

1. Before this Court for determination is the Notice of Motion application dated April 22, 2022 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* in addition to Orders 51 and 24 Rule 3 (1) and (2) of the *Civil Procedure Rules, 2010* in which the Applicants seek the following orders: -
 1. That this honourable court be pleased to extend time for substitution of the legal/personal representative of the estate of william mutua joel maeke (deceased) following her demise.
 2. That the Deceased Legal/Personal Representative of the Estate of William Mutua Joel Maeke be substituted by the current Legal Representatives of the Estate who are Gregory Musembi Maeke, Regina Nthenya Maeke and Noella Kiloko Maeke.



3. That Gregory Musembi Maeke, Regina Nthenya Maeke and Noella Kiloko Maeke be made parties and be allowed to proceed with the suit for and on behalf of the Estate of William Mutua Joel Maeke (Deceased).
 4. That the Honourable Court do give such directions as to the hearing of the case.
 5. That costs of this application be provided for.
2. The application is premised on grounds appearing on its face together with the joint affidavit of Gregory Musembi Maeke, Regina Nthenya Maeke and Noella Kiloko Maeke.

The Applicants Case

3. The Applicants averred that the personal representative of the Estate of William Mutua Joel Maeke (Deceased) namely Hellen Wanza Maeke died intestate on September 3, 2020. They further averred that they have since obtained an Order to substitute her as the personal representative of the Estate of William Mutua Joel Maeke (Deceased). The Applicants contended that they came to learn of the instant suit when they were grieving and now wish to pursue the matter to its logical conclusion as the cause of action has survived the demise of Hellen Wanza Maeke.
4. The applicants further added that the instant application seeks the leave of Court to extend time and substitute the said Hellen Wanza Maeke (Deceased). That William Mutua Joel Maeke (Deceased) had the title to the suit property and it is just and fair that the matter be heard on merits.
5. It was further averred that the application had been made timeously and that no prejudice would be suffered by the Defendants if the application was granted.

2nd and 3rd defendants case

6. Opposing the application, the 2nd Defendant/Respondent filed a replying affidavit on July 8, 2022 on his behalf and that of the 3rd Respondent. He contended that the application is misleading, incompetent and a misapprehension of facts and the law. He argued that an application for substitution ought to have been filed within one year of the Plaintiff's death in line with the provisions of Order 24 Rule 3 of the [Civil Procedure Rules](#). He contended that the suit has abated since no application was made thereof.
7. It was further averred that the Applicants have not given sufficient reasons for extension of time as from the annexures, the Plaintiff died on September 3, 2020 and letters of administration intestate were issued on June 16, 2021 while the suit was filed in 2019. That from those dates, the 2nd Defendant inferred that the Applicants are not keen on prosecuting the suit. He further averred that the Applicants had not sought to revive the proceedings after abatement pursuant to Order 24 Rule 7 of the [Civil Procedure Rules, 2010](#) and hence, the application ought to be dismissed.
8. The 1st and 4th Defendants did not file their respective responses to the application.
9. The application was canvassed by way of written submissions.

The applicants submissions

10. The Applicants submissions were filed in Court on September 20, 2022. Counsel for the Applicants argued that the Applicants have obtained the requisite grant of letters of administration intestate to enable them substitute the deceased Plaintiff.



11. That in addition, the Applicants had owned up to the delay in filing the instant application for the reason that they were grieving the Plaintiff, who was their mother.
12. Counsel further submitted that the period for substitution of a deceased party can be extended by Court under the proviso to Rule 3(2) of Order 24 of the [Civil Procedure Rules, 2010](#). That the Applicants had expressed their desire to pursue these proceedings to their logical conclusion as the cause of action survives the deceased Plaintiff. Finally, it was argued that the 2nd and 3rd Defendants had not demonstrated any prejudice they would suffer if the Court were to exercise its discretion in the Applicants' favour.
13. Counsel implored this Court to apply the overriding objective and relied on the following authority: -
[Corner Holiday Inn Limited & 2 Others v Andrew Kuria Wangunyu & Another](#) [2012] eKLR.

The 1st respondent's submissions

14. The 1st Defendant's submissions were filed in Court on 1st of November, 2022. It was argued that over one year had lapsed following the demise of the Plaintiff herein. That as a consequence the suit had abated because no application for substitution of the Plaintiff was made within one year of her demise.
15. Counsel submitted that the instant application is defective as it offends the mandatory provisions of the law. It was urged that the application ought to be dismissed.

The 2nd and 3rd Defendants Submissions

16. The 2nd and 3rd defendants submissions were filed in Court on 2nd of November, 2022. Counsel submitted that the Applicants ought to have sought for an order to revive the suit after abatement pursuant to Order 24 Rule 7 of the [Civil Procedure Rules](#).
17. Counsel further submitted that the Applicants have not complied with the provisions of Order 24 Rule 3 of the [Civil Procedure Rules](#). To buttress his argument, Counsel relied on the following authority: -

Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 Others
[2017] eKLR.

Analysis and determination

18. Having considered the application, affidavits and the rival submissions, I find that the only issue that arises for determination is whether the Applicants have demonstrated sufficient cause for the revival of the proceedings herein pursuant to the provisions of Order 24 Rule 3 of the [Civil Procedure Rules, 2010](#).
19. Order 24 Rule 3 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.

20. In the application, annexure “GMM1” shows that the Plaintiff died on September 3, 2020. By implication of the law (sub-rule 2), these civil proceedings abated on September 3, 2021 because no application for substitution had been made by the legal representatives of the estate of the deceased Plaintiff. The application herein was made on April 25, 2022 which is approximately seven months after the suit abated by operation of the law.
21. Nonetheless, after abatement, the proviso to Order 24 Rule 3 gives the Court discretion to extend time or in other words to revive the suit, upon application by the legal representative. It is only after the suit has been revived, that the legal representative can be made a party to the proceedings if the cause of action survives. The *Black’s Law Dictionary* 9th Edition page 1435 defines revival in respect to civil proceedings as follows: -

Civil Procedure [Cases: Wills 196-202.] 3. Patents. Renewal of a patent prosecution that has been deemed abandoned because the applicant did not respond to an office action within the statutory period. The applicant can petition for revival on the basis of unavoidable or unintentional delay.

22. Similarly, in the authority relied on by Counsel for the 2nd and 3rd Respondents ie *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 Others* [2017] eKLR, the Court of Appeal aptly held as follows: -

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the 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 short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason 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 effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings.”

23. The reasons advanced by the Applicants that they had been grieving the death of their mother and that they were unaware of the existence of the suit are fair and acceptable. Within the said one year and seven months, the Applicants also managed to obtain an amended full grant for the Estate of the William Mutua Joel Maeke (Deceased) which is again very reasonable.
24. In *Timothy Limo & 2 Others v Joel Kinyanjui Muchiri (Suing as the legal representative of the late Jacob Muchiri Kinyanjui)* [2020] eKLR, Justice Edward Muriithi observed as follows: -

“ 11. Indeed, I respectfully consider that the provision for revival of abated suits which was inserted by amendment to the Civil Procedure Rules in 1996 by



LN No 5 of 1996 introducing the subrule 8 (2) to the Order XXIII (now rule 7 (2) of Order 24) was clearly calculated to ameliorate the injustice of the situations where a deceased person dies and his personal representative has a good cause for not being able to seek joinder by substitution within the period of 12 months allowed by the rules before abatement after which no fresh suit may be brought on the same cause of action. It is for the same object of securing justice that the Proviso under Order 24 Rule 3 (2) of the Civil Procedure Rules for extension of the period of 12 months for substitution of a personal representative before abatement was introduced by the new Civil Procedure Rules 2010.

12. The reason given for the default in seeking to substitute the deceased plaintiff as explained by his father on account of being unaware of the fact of filing of the suit by his adult son is reasonable and I do not see that the trial court misdirected itself in finding therein “that he was prevented by any sufficient cause from continuing the suit”, in terms of the requirements of Order 24 Rule 7 (2) of the Civil Procedure Rules.”

25. In the circumstances, the Applicants have demonstrated merit in the application. It is hereby allowed in terms of prayers 1, 2, 3 and 4 as follows: -

1. Time is hereby extended for substitution of the Legal/Personal Representative of the Estate of William Mutua Joel Maete (deceased) following her demise.
2. The deceased Legal/Personal Representative of the Estate of William Mutua Maeke be and is hereby substituted by the current Legal Representatives of the Estate who are Gregory Musembi Makeke, Regina Nthenya Maeke and Noella Kiloko Maeke.
3. Gergory Musembi Makeke, Regina Nthenya Makeke and Noella Kiloko Maeke are hereby made parties and allowed to proceed with the suit for and on behalf of the Estate of William Mutua Joel Maeke (Deceased).
4. Parties to fix dates at the registry.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF FEBRUARY, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

