



REPUBLIC OF KENYA



**Matheka (Deceased) & 3 others v Ngula & 3 others (Environment and Land Appeal 43 of 2018) [2023] KEELC 21387 (KLR) (9 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21387 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 43 OF 2018  
CA OCHIENG, J  
NOVEMBER 9, 2023**

**BETWEEN**

**MBALUKA MATHEKA (DECEASED) ..... APPELLANT**

**AND**

**DOMINIC WAMBUA MBALUKA ..... APPLICANT**

**AND**

**NGANDA MUTHIANI ..... 1<sup>ST</sup> APPELLANT**

**JONATHAN KINYUNGU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MUTHAMA NGULA ..... 1<sup>ST</sup> RESPONDENT**

**MBATHA NGULA ..... 2<sup>ND</sup> RESPONDENT**

**NTHUKU NGULA ..... 3<sup>RD</sup> RESPONDENT**

**MWALIMU NGULA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. What is before Court for determination is the Applicants' Notice of Motion Application dated the 13<sup>th</sup> April, 2023 brought pursuant to Section 3A of the *Civil Procedure Act* and Order 24 Rule 3(2), 4(1) and 7(2) of the *Civil Procedure Rules*. The Applicants seek the following Orders:
  1. That the instant Appeal having abated, be revived for hearing on merit.
  2. That this Honourable Court be pleased to extend time and order substitution of the deceased the 1<sup>st</sup> Appellant herein one Mbaluka Matheka with the Applicant herein, his legal representative Dominic Wambua Mbaluka out of time.



4. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Dominic Wambua Mbaluka where he deposes that the 1<sup>st</sup> Appellant, Mbaluka Matheka, who was his father died on 23<sup>rd</sup> December, 2011. He explains that he filed for Letters of Administration *Ad Litem* in the Machakos Chief Magistrate's Court on 4<sup>th</sup> August, 2022 for purposes of continuing with this Appeal and the same was granted on 14<sup>th</sup> December, 2022. He contends that the cause of action herein survives as the properties which are subject of the present Appeal being Wamunyu/Wambiti/7 and Wamunyu/Wambiti/139 are ancestral properties and as the legal representative of the estate of his father, he is desirous to be substituted in place of his late father. He claims failure to apply for substitution in good time was occasioned by lack of proper communication with the advocate previously handling the matter.
3. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

4. I have considered the instant Notice of Motion Application including the Supporting Affidavit as well as the submissions and the issue for determination is whether this suit which abated should be revived and Dominic Wambua Mbaluka allowed to substitute the deceased 1<sup>st</sup> Appellant Mbaluka Matheka.
5. The Applicants in their submissions reiterated their averments as per the Supporting Affidavit and stated that he was issued with a Limited Grant of Representation for the Estate of Mbaluka Matheka in Machakos Succession Cause No. E323 of 2021. He argues that they took all the necessary steps to substitute the deceased Appellant through filing the Letters of Administration *Ad Litem*. Further, that they were prevented by sufficient cause from substitution of the 1<sup>st</sup> Appellant within a period of one (1) year as a result of lack of proper communication with their Advocate. To support their averments, they relied on Order 24 of the *Civil Procedure Rules* as well as the following decisions: *Said Sweilem Gheitban Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 Others* (2015) eKLR and *Philip Kiptoo Chemwolo & Another v Augustine Kubende* (1986) eKLR.
6. On revival of an abated suit, Order 24 Rule 7, of the *Civil Procedure Rules* provides that:-
  - “(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 a 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. In this instance the Appellants have sought for the revival of the Appeal as well as the extension of time to substitute the deceased 1<sup>st</sup> Appellant Mbaluka Matheka with his legal representative Dominic Wambua Matheka. The Applicant confirms the deceased died on 23<sup>rd</sup> December, 2011. He claims that the cause of action herein survives as the properties which are subject of the present Appeal being Wamunyu/Wambiti/7 and Wamunyu/Wambiti/139 are ancestral properties and as the legal representative of the estate of his father, he is desirous to be substituted in his place.



8. In the case of *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, the Court of Appeal while dealing with an Appeal touching on revival of an abated suit held that:-

“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.... In any case the burden of showing that there was sufficient cause for condonation of delay by the court was upon the appellants. It took six years between the date the deceased died and time when the application was presented. Except for the general averment that the local chief of the location where the deceased came from refused to issue the 1st appellant with a letter confirming her relationship with the deceased, no other justifiable reason was advanced by the appellants. Although there is no law that requires that the relationship of any party with a deceased person be proved by the local chief, under Section 46 *Law of Succession Act*, the chief, in whose location free property of a deceased person is found is required to take all necessary steps to protect that property. He is also expected to ascertain if other free properties of the deceased exists in the area and all persons appearing to have any legitimate interest in the succession to or administration of his estate. This duty is limited only to situations where the property of a deceased person is situated in the location of the chief. It was not claimed that there was such property in the location concerned. In any case the 1st appellant was able nonetheless to obtain the letter from a chief in Nairobi. It is inconceivable that it would take six years to get a grant of probate on such a ground as advanced by the appellants. Even on this aspect of the appeal, we come to the conclusion that the delay was inordinate and no sufficient cause was shown.”

9. In the current scenario, I note the Appellants filed the Memorandum of Appeal on 9<sup>th</sup> October 2009. On 5<sup>th</sup> January, 2021, the Appellants were served with a Notice to Show Cause why the Appeal should not be dismissed for want of prosecution. The Appellants were further served with a second Notice to Show Cause why the suit should not be dismissed for want of prosecution and on 19<sup>th</sup> February, 2021, Counsel for the Appellants informed Court, that the Appellants were dead. Further, a third Notice to Show Cause was served upon the parties herein and on 11<sup>th</sup> November, 2021, the Counsel for the Appellants further sought leave of two months to substitute the Appellants but still failed to do so. In the instant application, the Applicant explains that failure to apply for substitution in good time was occasioned by lack of proper communication with the advocate previously handling the matter.
10. Based on the facts as presented while relying on the decision cited, I find that the Applicant has failed to demonstrate sufficient cause as to why he took almost twelve (12) years to seek leave to substitute the deceased 1<sup>st</sup> Appellant. Further, the Advocate was severally granted an opportunity to do so, but



he failed. It is inconceivable that the Applicant failed to communicate with his erstwhile advocate for over a decade as well as apply for Grant *Ad Litem* to substitute his deceased father. I opine that the delay is inordinate and inexcusable.

11. In the circumstances, I find the Notice of Motion Application dated the 13<sup>th</sup> April, 2023 unmerited.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9<sup>TH</sup> DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

