



**Natasha Jobovna Mutai & Alexander Kiplagat Mutai (suing as Administrators of the Estate of Job Kibiwott Mutai t/a Ludi Investments and Fudi Investments) & 3 others v Hebatulla Investment Limited & 5 others (In respect to the 1st and 2nd Applicant’s application dated 14th February, 2021 seeking to revive the 1st & 2nd Plaintiffs suit after abatement) (Environment and Land Case Civil Suit 1291 of 2013) [2022] KEELC 3589 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3589 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1291 OF 2013**

**MD MWANGI, J**

**JULY 12, 2022**

**BETWEEN**

**NATASHA JOBOVNA MUTAI & ALEXANDER KIPLAGAT MUTAI (SUING AS AMINISTRATORS OF THE ESTATE OF JOB KIBIWOT’T MUTAI T/A LUDI INVESTMENTS AND FUDI INVESTMENTS) ..... 1<sup>ST</sup> APPLICANT**

**ROSE ESTHER MUTHONI WAMUIYA & IRENE WANGARI WAMUIYA (SUING AS THE LEGAL REPRESENTATIVES OF JUDY WAMUIYA MUKOMA (DECEASED) T/A JUKOMA ENTERPRISES) ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JOHNSON HOME GICHUHI T/A JOHNSON PROPERTY CARES COMPANY ..... 1<sup>ST</sup> PLAINTIFF**

**RUTH CHEPNG’ETICH ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**HEBATULLA INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**HEBATULLA PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**GOD’S HOUSE OF MIRACLES ..... 3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 4<sup>TH</sup> DEFENDANT**

**NATIONAL LANDS COMMISSION ..... 5<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**



**IN RESPECT TO THE 1ST AND 2ND APPLICANT'S APPLICATION DATED  
14TH FEBRUARY, 2021 SEEKING TO REVIVE THE 1ST & 2ND PLAINTIFFS  
SUIT AFTER ABATEMENT**

**RULING**

**Background**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Applicants who are the administrators of the estates of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively, filed the Notice of Motion Application dated the February 14, 2022 under Certificate of Urgency seeking the following orders that;
  - a. An order is issued enlarging time within which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's suit can be revived.
  - b. An order to revive the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's suit.
  - c. To grant leave to substitute the 1<sup>st</sup> plaintiff, with the 1<sup>st</sup> Applicants, who are jointly the legal representatives and administrators of the 1<sup>st</sup> Plaintiff's Estate.
  - d. To grant leave to substitute the 2<sup>nd</sup> plaintiff, with the 2<sup>nd</sup> Applicants, who are jointly the legal representatives of the 2<sup>nd</sup> Plaintiff's Estate.
  - e. That costs of the application be in the cause.
2. The Application is premised on the grounds on the face of it and further supported by the joint Supporting Affidavits of Rose Esther Muthoni and Irene Wangari Wamuiya and that of Alexander Kiplagat Mutai on the other hand. Both Affidavits were deponed on the February 14, 2022.
3. The 1<sup>st</sup> Applicants in the Supporting Affidavit of Alexander Kiplagat Mutai avers that the 1st Plaintiff, Job Kibiwott Arap Mutai died intestate on the April 26, 2016. That the surviving family members were unaware of the existence of this suit and/or the deceased's Plaintiff's interest in the suit property.
4. That though the 1<sup>st</sup> Plaintiff's surviving spouse intended to apply for the grant of letters of administration, the process was drawn out and severally delayed when she suffered a decline in cognitive function sometime in 2016 and was indeed confirmed mentally incapacitated sometime in 2019, rendering her unfit to proceed with the succession proceedings.
5. The 1<sup>st</sup> Applicants were therefore forced to replace their mother in the Succession proceedings. An order for ad litem was only issued in the year 2019, thus, allowing them to petition for a grant of letters of administration.
6. They petitioned court for letters of administration but were inordinately delayed in obtaining the chief's letter and the loss of the original gazettelement receipts in the Court registry. That at the same time, the 1<sup>st</sup> Applicants were still pursuing a petition Misc No 136 of 2019 in the Family Division of the High Court for the final adjudication of mental incapacity, guardianship and management orders for the deceased's spouse.
7. The 2<sup>nd</sup> Applicants on their part aver that the 2<sup>nd</sup> plaintiff died on July 20, 2020 and neither the Applicants nor other family members were aware of the existence and pendency of the suit.
8. That extensive and prolonged negotiations took place between family members after the 2<sup>nd</sup> Plaintiff's death on the administration of the estate. Negotiations were complicated and delayed by the fact that the 2<sup>nd</sup> Plaintiff was survived by 7 beneficiaries out of whom, four (4) reside outside the country.



9. That the Petition for grant ad litem was prepared by the June 29, 2021 and lodged on June 30, 2021 however, the filing of the same took long due to the delay occasioned by obtaining a chief's letter to validate the intended petition for letters of administration.
10. That in due consideration of the delay already occasioned, the 2<sup>nd</sup> Applicants filed the petition for grant ad litem under certificate of urgency on July 15, 2021 to facilitate the application for substitution. The grant ad litem was issued on September 27, 2021. That the delay in seeking substitution is not inordinate as they took the steps required but the administration proceedings delayed the process. The Applicants therefore pray to be granted the orders sought.

### **Response by the Defendants**

11. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendants opposed the Application by way of a Preliminary Objection, grounds of opposition and a replying affidavit. The Defendant's main objection was that they no longer have any proprietary interests in the suit property, hence the suit can no longer be maintained against them. Further they accused the Applicants of inordinate delay in bringing the current application.

### **Further Affidavit**

12. The 2<sup>nd</sup> Applicants filed a Further Affidavit sworn by Rose Esther Muthoni Wamuiya deponed on the May 13, 2022. She swore the affidavit on her own behalf and that of her co-administrators.
13. She avers that the cause of action in the suit is still survived by the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs who had joint legal and beneficial interests with the deceased Plaintiffs. It is only fair that the administrators be allowed to pursue the interests on behalf of their respective estates. The delay in filing the application were beyond their control.
14. The 2<sup>nd</sup> Applicants further contend that the issue of non-joinder and/or mis-joinder of parties is unfounded and misplaced in the instant application as it does not relate to the orders sought herein. In addition, party(s) can be joined to the proceedings at any time.
15. In addition, that the Defendants have not demonstrated any prejudice they may suffer by the delay in substituting the deceased Plaintiffs. That the Applicants ought to be allowed to prosecute the suit fully.
16. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants did not file any document in response to the application despite service having duly effected on them.

### **Court's Directions**

17. The Court directed that the Application and the Preliminary Objection be canvassed by way of written submissions. The parties complied and filed their submissions.

### **Issues for Determination**

18. In the Court's opinion, the issues for determination are as follows; -
  - A. Whether the objection raised by the Defendants is sustainable.
  - B. Whether the Applicants should be allowed to revive the suit and substitute the deceased Plaintiffs.

### **Analysis and Determination**

- A. Whether the objection raised by the Defendants is sustainable.



19. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the Application with the ‘1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants’ Preliminary Objection and grounds of objection’ dated February 18, 2022. The Defendants seem to be raising a Preliminary Objection which was merged with grounds of Objection. It is not clear from the document whether it is a Preliminary Objection or grounds of objection. However, counsel for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants informed the Court that they had a Preliminary Objection on record dated the February 18, 2022. I will therefore consider it as such.
20. In the case of *Mukisa Biscuits Manufacturing Ltd. -vs- West End Distributors Ltd. Civil Appeal No 9 of 1969 (1969) EA 696* the Court held that:
  - ‘ A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.’
  - ‘A preliminary objection is in the nature of what used to be called demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or of what is sought is the exercise of judicial discretion.’
21. The same position was upheld, in the case of *Oraro -vs- Mbaja [2005] 1 KLR 141* where the court held as follows:
  - ‘ A ‘preliminary objection’ correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.’
22. The Defendants’ Preliminary Objection is to the effect that the suit and the application is misconceived, and is wholly misdirected on the basis that the Defendants lacks proprietary ownership and/or physical possession of the suit property. That the Defendants aver that they have since transferred the suit property to third parties who are presently not joined in this suit. That should the suit and the application proceed as prayed, the resulting judgement will be annulled as the current proprietors are not parties to this suit. The suit is therefore defective for non-joinder and mis-joinder of the parties.
23. The allegation by the Defendants that they have transferred the suit property to third parties is a point of fact that must be proved by way of evidence. It is not a point of law. It is an issue that cannot be raised by way of a Preliminary Objection. The Preliminary Objection by the Defendants is therefore unsustainable. It is hereby dismissed.

**B. Whether the Applicants should be allowed to revive the suit and substitute the deceased Plaintiffs.**

24. *The Black’s Law Dictionary, 11<sup>th</sup> Edition* defines abatement as ‘the suspension or defeat of a pending action for a reason unrelated to the merits of the claim.’
25. Order 24 of the *Civil Procedure Rules* gives the court the discretionary power to revive a suit that has abated. It 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.
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 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.
- 7.(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
  - (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'.

26. The Court of Appeal in the case in the case of *Rebecca Mijide Mungole & another -vs- Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR* comprehensively explained the procedure and the sequence to be followed in the following words: -

' Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in *Said Swailem Gheithan Saanum v Commissioner of Lands (sued through the Attorney General ) & 5 Others Mld Civil Appeal No 16 of 2015* the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

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. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) 'sufficient cause' has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.'

27. It is evident from the proceedings herein that the suit herein abated as no legal representative of the deceased plaintiffs was substituted within one year as required. The Applicants in my opinion have sufficiently explained the reasons for the delay in seeking to substitute the deceased Plaintiffs. I find the reasons convincing and sufficient in the circumstances. Although, the Defendants contend that the delay in bringing the instant application is inordinate, I find that the same has been sufficiently explained.
28. On the Defendants contention that the suit property has been transferred to third parties, that is an issue that can only be handled after the suit has been revived and the deceased Plaintiffs substituted accordingly. This court is enjoined under article 159 of the *Constitution* to do justice to all and without undue regard to technicalities. The Applicants should have their day in court. I therefore allow their application in the following terms;
  - a. An order be and is hereby issued enlarging time within which the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's suit shall be revived.
  - b. An order be and is hereby issued reviving the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff's suit.
  - c. Leave is hereby granted to substitute the 1<sup>st</sup> plaintiff, with the 1<sup>st</sup> Applicants, who are jointly the legal representatives and administrators of the 1<sup>st</sup> Plaintiff's Estate.
  - d. Leave is hereby granted to substitute the 2<sup>nd</sup> plaintiff, with the 2<sup>nd</sup> Applicants, who are jointly the legal representatives of the 2<sup>nd</sup> Plaintiff's Estate.



- e. The Applicants and the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs shall be at liberty to make any necessary amendments to the Plaint in view of the substitution in the next 21 days.
- f. That costs of the application be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF JULY 2022.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:-

Ms. Akoth Aluoch for the 1<sup>st</sup> & 2<sup>nd</sup> Applicant & the Plaintiffs.

Ms. Karita holding brief for Mr. Kihara for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

No appearance for the 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants.

Court Assistant- Hilda

**M.D. MWANGI**

**JUDGE**

