



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MURANG'A**  
**ELC NO. 89 OF 2018**

**MOSES MBATIA**

**GEORGE WAKABA (suing as administrator of the estate of**

**GAKOBO MBUTHIA).....INTENDED PLAINTIFF/APPLICANTS**

**VS**

**JOSEPH WAMBURU KIHARA.....DEFENDANT/RESPONDENT**

**RULING**

1. In this application filed on the 13/11/19, the Applicants have sought for the revival of the suit as well as substitution of the intended plaintiffs in place of Gakobo Mbuthia who died on the 22/6/18.
2. The application is supported by the grounds thereto and the affidavit of Ashioya Biko, Advocate and counsel for the Applicants who deponed that the delay in effecting substitution was caused by the delay in obtaining letters of grant of administration for the estate of the deceased. The deponent urged the Court to revive the suit and order substitution so that the matter may be heard on its merits.
3. The application is opposed by the Respondent who contended that the suit abated on the 22/6/19 when no substitution was made within 12 months of the death of the Plaintiff. That the Applicants have not explained the reasons for the delay and in his opinion have showed no interest in prosecuting the suit.
4. The Applicants filed written submissions which I have read and considered.
5. Order 24 rule 3(1) and (2) 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”.
6. Under Order 24 rule 3(2) there must be an application for revival of the suit after abatement before substitution. An order for substitution before revival of the suit is a nullity. See the case of **Kenya Farmers Coop Union Limited Vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eklr**.
7. Order 24 rule 7(2) allows the legal representative of a deceased party to apply for revival of a suit that has abated or to set aside the dismissal orders whichever is applicable. If sufficient cause is given the Court shall order the revival of the suit or set aside the dismissal orders with terms as it may deem fit.
8. The Applicants have explained the delay in filing for substitution within one year and attributed it to the delay in obtaining letters of representation of the deceased Plaintiff. The Defendant has not shown any prejudice that it is likely to suffer if the application is granted.
9. The court is satisfied that the reasons advanced by the Applicants show sufficient cause. I hold the view that the Court's duty is to uphold the right to be heard and I am inclined to exercise my discretion towards the realization of that right so that the parties may have their day in

court.

10. In the upshot the application is allowed and I make the following orders, in addition;

- a. The suit be and is hereby revived.
- b. The Applicants be and are hereby substituted in place of the deceased, Gakobo Mbuthia.
- c. The plaintiffs to amend the plaint within 30 days from the date of the ruling and file and serve upon the Defendant.
- d. The matter to be fixed for directions and further orders.
- e. The cost of the application shall be in the cause.

**DELIVERED, DATED AND SIGNED VIA EMAIL THIS 7<sup>TH</sup> DAY OF MAY 2020**

**J G KEMEI**

**JUDGE**

**ORDERS**

In light of the declaration of measures restricting court operations due to the COVID - 19 pandemic and following the practice directions issued by his Lordship, the Chief Justice dated 20th March 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice No. 3137, this ruling has been delivered to the parties by electronic mail/video conferencing. In this case the parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court.

**J.G. KEMEI**

**JUDGE**