



REPUBLIC OF KENYA



KENYA LAW
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**Gitana v Waruguru & another; Gichobi (Applicant) (Civil Appeal
15 of 2020) [2025] KEHC 6474 (KLR) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL 15 OF 2020
EM MURIITHI, J
MAY 15, 2025**

BETWEEN

NYAGA GITANA APPELLANT

AND

FLORENCE WARUGURU 1ST RESPONDENT

LILIAN WAMBUI 2ND RESPONDENT

AND

REGINA WANJIRU GICHOBI APPLICANT

RULING

1. The applicant filed a Notice of Motion dated 9th October, 2024 seeking the following
 1. That the honourable court be pleased to grant leave for the applicant herein, Regina Wanjiru Gichobi to apply for the substitution of the deceased appellant, Nyaga Gitana(deceased) out of time.
 2. That upon granting of prayer Number 1, the honourable court be pleased to substitute the deceased appellant, Nyaga Gitana(deceased) With Regina Wanjiru GichobI the applicant herein.
 3. That the honourable court be pleased to revive the appeal which has since abated.
 4. That the costs of this application be provided for.
2. The applicant's Supporting Affidavit of 31/8/2023 sets out the applicant's case that the appellant died on 30th April 2022 while this matter was still pending in court. She obtained Limited Grant of Letters of Administration Ad Litem to the estate of the late Nyaga Gitana (deceased) who died during the pendency of this case. She has legal capacity to be substituted as the appellant in this matter. Further,



the suit abated on 30th April 2022 and the same ought to be revived. The delay in filing the application was occasioned by delay in the issuance of the grant of letters of administration which were issued on 17th May, 2023. Lastly, the delay was not inordinate and the court should enlarge the time to file the application for substitution of the deceased appellant and further allow the appeal to be revived.

3. The Respondents filed a Replying Affidavit sworn on 5th November, 2023 in opposition to the application. The respondents aver that they are fully opposed to the Application herein dated 31st July 2023 and filed in court on 1st August 2023. The Appeal herein was filed on 27th February, 2020 but the Appellant then never took any action to fast-track the same until his demise on 30th April 2022. When the deceased Appellant passed on the Appeal had already been pending for over two years without being prosecuted. Further, to prove the Applicant's indolence she seems to have applied for the limited Grant Ad litem long after the passing on of the Appellant. Lastly, the Applicant is seeking to be substituted first before the appeal can be revived which is impossible as the Appeal ought to be revived first.

Applicant submissions

4. The applicant submits that the applicant has given sufficient reason to warrant extension of time and for revival of the suit. The applicant has already obtained the grant of letters of administration and is ready and willing to prosecute the appeal to its conclusion.
5. The Petition for letters of administration ad litem was filed on 15th February 2023 way before the appeal had abated on 30th April 2023. The applicant was only issued with the grant ad litem on 16th May 2023 and proceeded to file this application in August 2023 just a few months away. Therefore, the application was filed without inordinate delay. The Respondents have not demonstrated any prejudice that they shall suffer if the application will be allowed.

Respondent submissions

6. They submit that there's no evidence that the grant was applied for within good time and that there was delay in its issuance. This is notwithstanding the fact that it is always possible for limited grant to be issued within two weeks of filing the Application. Further, it cannot be said that the delay herein was not inordinate in light of the foregoing.
7. They submit that the Applicant is supposed to first apply for revival of the suit before he can apply for joinder therein and as such this cannot be made in an omnibus Application but rather in different Applications. *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR is cited.

Issue

8. Whether the application for extension of time to bring and application for substitution of a deceased appellant; the application for joinder, of the personal representative of the deceased appellant; and the revival of the abated appeal may be granted.

Analysis

9. The applicant seeks for the Honourable Court to grant leave for the applicant herein, Regina Wanjiru Gichobi to apply for the substitution of the deceased appellant, Nyaga Gitana (deceased) out of time and that the court be pleased to revive the appeal which has since abated.



10. The appellant herein passed on 30th April, 2022. The Applicant was issued with the grant of letters of administration ad litem on 17th May 2023 which by that time the one year within which to file an application for substitution had lapsed on 30th April 2023.
11. The Respondent filed his replying affidavit sworn on 6th November 2023 opposing the said application.

Abatement of suit

12. The Petition for letters of administration ad litem was filed on 15th February 2023 way before the appeal had abated on 30th April 2023. The applicant was only issued with the grant ad litem on 16th May 2023 and proceeded for file this application in August 2023 just a few months away. Therefore, the application was filed without inordinate delay.

13. Order 24 Rule 3 (2) of the Civil Procedure Rules 2010 provides as follows:

“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.”

14. Order 24 Rule 7 of the Civil Procedure Rules 2010 provides as follows:

“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 for good reason on application, extend the time.”

15. The applicant submits that the respondents have not demonstrated any prejudice that they shall suffer is the application will be allowed.

16. The respondents submit that the Applicant is supposed to first apply for revival of the suit before he can apply for joinder therein and as such this cannot be made in an omnibus Application but rather in two different Applications.

17. In the decision of the Court of Appeal (MSA Makhandia, W. Ouko (as he then was), K M'Inoti, JJA.) in Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR, which is, surprisingly, cited by the Respondent, it is clear that the three applications for extension of time, joinder of the personal representative and finally for revival of the abated suit, and in that order, may be made in one application as follows:

“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.”

18. I respectfully note the decision in *James Mwaniki Kinuthia v Hemed Iddi Mukui & another* [2019] eKLR, where J. G. Kemei J. cited the case *Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others* [2012] eKLR, (Koome, JA as she then was) where the application was made two years and eight months after the appeal had abated, and the Court of Appeal allowed the application citing *Leo Sila Mutiso Vs Rose*, CA NAI 255 OF 1997 (unreported) that:

“It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant an extension of time are, first, the length of delay; secondly, the reason for the delay; thirdly (possibly), the chances of the appeal succeeding if the application is granted and fourthly; the degree of prejudice to the respondent if the application is granted.”

19. In the present case, the application for extension of time, joinder and revival of appeal was filed under four months of abatement. The necessary application for appointment as administrator ad litem was filed before the appeal had abated but grant made under a month after abatement. There was no inordinate delay. In paragraph 7 of the Supporting Affidavit, the applicant states that “the delay I filing the application was occasioned by delay in the issuance of grant of letters of administration which were issued on 17th May 2023.”

20. The Court finds the explanation for the short delay to be understandable and excusable, and the prejudice to the respondent in the delay in final determination of the dispute may be compensated by an award of damages under the general rule of Order 50 Rule 6 of the Civil procedure Rules proviso that –

“6. Power to enlarge time [Order 50, rule 6]

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice



of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

Orders:

21. Accordingly, for the reasons set out above, the Court finds merit in the application for extension of time, joinder of the personal representative of the deceased appellant and the revival of the Appeal.
22. As with all applications for extension of time, the applicant shall pay the costs of the application to the respondent.
23. The Appeal shall be mentioned for directions as to hearing on a date to be fixed in consultation with the counsel for the parties.

Order accordingly.

DATED AND DELIVERED THIS 15TH DAY OF MAY 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Otieno of the Applicant.

Mr. Andande for the Respondent.

