



**Maiteri & another v Muhiiutuku & another (Suing as Legal Representatives of Joshua Kimani Kungu - Deceased) (Civil Case 108 of 2008) [2025] KEHC 10828 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10828 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE 108 OF 2008  
HI ONG'UDI, J  
JULY 23, 2025**

**BETWEEN**

**FREDRICK TUHOTO MAITERI ..... 1<sup>ST</sup> PLAINTIFF**

**BENSON KARIMI MWIHURI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**AGNES WANJIRU MUHIIUTUKU ..... 1<sup>ST</sup> DEFENDANT**

**ESTHER WANJIKU KIMANI ..... 2<sup>ND</sup> DEFENDANT**

**SUING AS LEGAL REPRESENTATIVES OF JOSHUA KIMANI KUNGU -  
DECEASED**

**RULING**

1. In the Notice of Motion dated 23<sup>rd</sup> March 2025 the applicants prays for the following orders;
  - i. Spent.
  - ii. That C. Mwangi Gachichio advocate be allowed to come on record for Agness Wanjiru Muthiiutuku and Esther Wanjiku Kimani the legal representatives of the estate of the above-named defendant Joshua Kimani Kungu (deceased) in place of M/s Gicheha Kamau & Company Advocates and the notice of change of advocates dated 8<sup>th</sup> March 2025 filed by the said C. Mwangi Gachichio advocate be deemed effectual.
  - iii. That Agnes Wanjiru Muthiiutuku and Esther Wanjiku Kimani being the legal representatives of the estate of the above-named defendant Joshua Kimani Kungu (deceased) be substituted in place of the defendant.



- iv. That the orders for execution issued in the above matter on 6<sup>th</sup> March 2025 pursuant to the consent dated 5<sup>th</sup> November 2024 signed and filed in the above matter by M/s Habashi Machafu & Company Advocates and M/s Naomi Murithi & Company advocates be vacated.
  - v. That the orders entered by the honourable court on 18<sup>th</sup> December 2024 adopting the consent dated 5<sup>th</sup> November 2024 be vacated.
  - vi. That there be a declaration that the suit herein abated on 13<sup>th</sup> November 2012.
  - vii. That there be a declaration that the judgement delivered in the above matter abated on 16<sup>th</sup> February 2023, 12 years having lapsed since its delivery date on 16<sup>th</sup> February 2011 without it being enforced in the statutory period provided.
  - viii. That costs of this application be provided for.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by Agnes Wanjiru Muthiutuku and Esther Wanjiku Kimani. They deponed that the defendant died on 13<sup>th</sup> November 2011 and no application was filed within one year of the death hence his case abated on 13<sup>th</sup> November 2012. They stated that judgment was delivered on 16<sup>th</sup> February 2011 in favour of the plaintiffs against the defendant for the sum of Kshs 326,480/= with costs and interest at court rates till payment in full. They further stated that at the time of the judgment the firm of M/s Gicheha Kamau & Company Advocates were on record for the defendant. Thus, the firm of M/s Naomi Muriithi & Co. Advocates had no legal capacity to transact any business in court on behalf of the defendant and the alleged consent dated 5<sup>th</sup> November 2024 was null and void and ought to be struck out.
  3. They further deponed that no action had been taken to enforce the judgement for 12 years from the date of delivery. Thus, pursuant to section 4(4) of The Limitation of Actions Act Chapter 22 of the Laws of Kenya the said judgment expired on 16<sup>th</sup> February 2023 and was not enforceable. They stated that their former advocates failed to advise them of the expiry of the case and judgment. They added that the purported consent was misleading to the court. He urged the court to vacate the orders adopting the said consent and the orders for execution.
  4. The 1<sup>st</sup> plaintiff in response filed a replying affidavit sworn on 7<sup>th</sup> April 2025. He averred that the defendant's advocates M/S Naomi Murithi & Co Advocates entered into a consent on his behalf and the consent was binding. He stated that the judgment debtors were trying to delay payment of the decretal amount to the decree holders. Further, that the firm of Naomi Murithi was properly on record as prayer 2 of the Notice of Motion dated 22<sup>nd</sup> August 2023 had been allowed by the court. He added that the firm of Gicheha Kamau & Co Advocates was no longer on record for the defendant as he was being represented by the firm of Naomi Muriithi & Company Advocates.
  5. He further averred that on 6<sup>th</sup> February 2025, the court ordered for execution against the legal representatives of the estate of Joshua Kimani Kungu due to failure to comply. He stated that ground (b) of the Notice of Motion dated 23<sup>rd</sup> March 2025 was false and misleading since the court had directed on 23<sup>rd</sup> April 2024 that the firm of Naomi Murithi serve the application dated 22<sup>nd</sup> August 2023 to all advocates. He deponed that the consent dated 5<sup>th</sup> November 2024 was not filed with the intention of defrauding the estate of the defendant. He added that the defendant died when judgment had already been entered against him on 16<sup>th</sup> February 2011.
  6. Naomi Kagwira Murithi an advocate practising as M/s Naomi Murithi & Company Advocates also filed a replying affidavit sworn on 7<sup>th</sup> April 2025. She averred that the applicants' application was an afterthought aimed at denying the plaintiffs the fruits of their Judgment and her firm costs. She stated



that her firm was properly on record and vide the application dated 22<sup>nd</sup> August 2023, she sought to be allowed to come on record for the applicants. She added that the applicants had not paid advocates fees to warrant the firm of C. Mwangi Gachichio come on record. She urged the court to dismiss the said application with costs in her firm's favour.

7. The application was canvassed by way of written submissions.

### **Applicant's submissions**

8. These were filed by C. Mwangi Gachichio Advocates and are dated 22<sup>nd</sup> April, 2025. Counsel placed reliance on Order 9 rule 9 of the [Civil Procedure Rules](#) and submitted that the notice of motion dated 22<sup>nd</sup> August 2023 did not indicate change of advocates from Gicheha Kamau and Company Advocates to Naomi Muriithi & Company Advocates but was simply an application for leave so that the latter firm can come on record. She stated that the said application was compromised by the consent dated 5<sup>th</sup> November 2024. She stated further that the firm of Gicheha & Company advocates were neither signatories nor parties to the said consent. Thus, the said consent was invalid as far as the change of advocates from Gicheha & Company Advocates to Naomi Murithi & company advocates was concerned.
9. Counsel further submitted that the plaintiffs' counsel never informed the court of the 2<sup>nd</sup> plaintiff's demise nor caused an entry to be made that the suit proceeds at the instance of the surviving plaintiff as required by order 24 rule 2 of the [Civil Procedure Rules](#). She stated that the M/s Naomi Murithi & Company advocates never filed a notice of appointment or change of advocates. Additionally, that the consent was between the said firm and Habashi Machafu and Company advocates who were not the advocates on record for the defendant at the time of judgement, contrary to Order 9. Rule 9 (b) of the [Civil Procedure Rules](#).
10. He placed reliance on the decision in [Aura v Trans-Nile Enterprises Limited](#) (Employment and Labour Relations Cause 2BO of 201: 120241 KEELRC 2612 KLR 25 at paragraph 5 of the judgment, where the honourable Environment & Land Court at Voi stated as follows, quoting the case of [S. K. Tarwedi v Veronica Muchmenn](#) [2019] eKLR:

“4. The matter is guided by Order 9 Rule 9 of [Civil Procedure Rules](#) which provides: - “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such a change or intention to act in person shall not be effected without an order of the court: a. Upon an application with notice to all the parties; orb. Upon a consent filed between the ongoing advocate and the proposed incoming advocate or party intending to act in person as the case maybe.”

5. In the case of [S. K. Tarwedi v Veronica Muchmenn](#) [2019] eKLR the court stated: “In my view, the essence of order 9 Rule 9 [Civil Procedure Rules](#) is to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed order 9 does not foresee how Rule 9 can be sidestepped hence the enacting of Rule 10 as follows.” Order 9 Rule 10 provides: - “9(10) An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”



See also;

*African Inland Church & Others v Mkanyika Anthony Mboje* Elc No. of 2024 (KLR).

11. He concluded by urging the court to allow the application as prayed.

#### **Plaintiffs' submissions**

12. These were filed by Habashi Machafu & Company Advocates and are dated 6<sup>th</sup> May, 2025. Counsel submitted that the court ordered that the application dated 22<sup>nd</sup> August 2023, by Naomi Muriithi be served on all advocates and the said application was allowed. Further, that the applicants were substituted as legal representatives of the estate of the defendant.
13. He cited Order 9 rule 9 of the *Civil Procedure Rules* which pertains to instances where there was a change of advocate or when a party decides to act in person, stating that a previously engaged advocate or party intending to act in person could not be affected without an order of the court. That the same could only occur upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate or party.
14. He further placed reliance on Order 24 Rule 2 of the said rules which dictates that if one or more of multiple plaintiffs or defendants dies, the cause of action survives to the surviving plaintiff(s) or against the surviving defendant(s). If it does not, the suit shall abate. Additionally, that Order 24 Rule 3 (2) specifies that if no application is made within one year of the death of a deceased plaintiff, the suit abates. Thus, the court may in such cases award costs to the defendant and may allow the defendant to recover any costs incurred in defending the suit from the estate of the deceased plaintiff.
15. Counsel further submitted that the defendant's advocates M/S Naomi Murithi & Co Advocates entered into a consent on behalf of the defendant and the consent was binding on their clients. Further, that the court granted enlargement of time to the said firm to file an application in the suit and the consent was adopted as the order of the court. He added that the suit herein was revived by consent of the parties on 5<sup>th</sup> November 2024. That thereafter, on 6<sup>th</sup> February 2025 the court ordered for execution against the legal representatives of the estate of Joshua Kimani Kungu due to failure to comply. He urged the court to dismiss the applicant's application with costs.

#### **Defendant/respondent's submissions**

16. These were filed by Naomi Murithi & Company Advocates and are dated 7<sup>th</sup> May, 2025. Counsel gave brief facts of the case and submitted that her firm lawfully acted on instructions from the deceased defendant's legal representatives to file applications for revival, substitution, and record the consent order. She argued that the claim that it had no legal capacity to represent them was unfounded. She placed reliance on the decision in *Kenya Commercial Bank v Specialized Engineering Co. Ltd* KLR 495.
17. Counsel further submitted that the revival of the suit was properly brought and granted, and the judgment delivered on 16<sup>th</sup> February 2011 remained valid until set aside. While relying on the decision in *Mwangi S. Kimenyi v Attorney General & Another* eKLR, she refuted the claim that the said judgment was unenforceable due to a lapse of 12 years, stating that the revival validated its enforcement.
18. She argued that it was an abuse of the court process for litigants to file notice to act in person and later appoint different counsel to overturn a consent. She added that her firm was entitled to costs for reviving the suit, filing applications and recording the consent. She placed reliance on the decision in *Patel v E.A Cargo Van Handling Services Ltd* EA 75.



19. She urged the court to affirm the validity of the consent entered on 5<sup>th</sup> November 2024 and find that her firm acted on the instructions of the defendant’s legal representatives. Further, to declare that the conduct of the said representatives in purporting to act in person only to repudiate the consent through new counsel as an abuse of process. Additionally, that her firm be awarded costs of the applications and all related instructions.

### **Analysis and determination**

20. I have considered the application together with the affidavit sworn in support, the replying affidavit and the submissions by the respective parties. The issues I find falling for determination are as follows;
- i. Whether the applicants should be allowed to substitute the defendant (deceased).
  - ii. Whether the Law Firm of C. Mwangi Gachichio Advocates has properly come on record in place of the law Firm of Gicheha Kamau & Company Advocates.
  - iii. Whether the orders of 18<sup>th</sup> December 2004 adopting the consent dated 5<sup>th</sup> November 2024 and the orders for execution issued 6<sup>th</sup> February 2025 pursuant to the said consent should be vacated.
  - iv. Whether a declaration should issue that the suit and the judgment in the said suit abated on 13<sup>th</sup> November 2012 and 16<sup>th</sup> February 2023 respectively.

### **Whether the Law Firm of C. Mwangi Gachichio Advocates has properly come on record in place of the law Firm of Gicheha Kamau & Company Advocates.**

21. Order 9 Rule 9 of the *Civil Procedure Rules*, 2010 provides as follows;
- “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court
- (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
22. In the case of *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR, the court held as follows:
- “It must be remembered that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* do not impede the right of a party to be represented by an advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus, a party so wishing to change his counsel must notify the court and other parties.
- Although the applicant has a constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality.”
23. In the present suit, it is not disputed that Judgment was rendered on 16<sup>th</sup> February 2011. The applicants argued that at the time of the Judgment the firm of M/s Gicheha Kamau & Company Advocates were on record for the defendant. Thus, the firm of M/s Naomi Muriithi & Co. Advocates had no legal



capacity to transact any business in court on behalf of the defendant. On the other hand, the 1<sup>st</sup> plaintiff contends that the firm of Naomi Murithi was properly on record as prayer 2 of the Notice of Motion dated 22<sup>nd</sup> August 2023 had been allowed by the court.

24. On her part, Naomi Kagwira Murithi an advocate practising as M/s Naomi Murithi & Company Advocates opposed the application and argued that her firm was properly on record. Further, that her firm vide the application dated 22<sup>nd</sup> August 2023 sought to be allowed to come on record for the applicants.
25. I have perused the notice of motion dated 22<sup>nd</sup> August 2023 and I am satisfied that the same shows that the firm of M/s Naomi Murithi & Company Advocates sought to come on record for the defendant. However, I note from the court records that there is no court order or consent recorded in respect of the said application allowing the said firm to come on record for the defendant. On 8<sup>th</sup> April 2025 Mr. G. Kamau who is the defendant's former advocate informed the court that he had signed a consent dated 25<sup>th</sup> March 2025 for Mr. Gachichio to come on record for the defendant.
26. In view of the above, it is clear that the provisions of Order 9, Rule 9 of the *Civil Procedure Rules* became applicable herein. The said provision of the law requires that any change of advocates after judgment can only be effected with the leave of the court on an application served on all the parties or upon the filing of a consent between the outgoing advocate and the proposed incoming advocate. I have perused the consent dated 25<sup>th</sup> March, 2025 and I am satisfied that it shows that the defendant's former advocates consented to the firm of C. Mwangi Gachichio advocates to come on record for the defendant. The absence of a court order or consent allowing the M/s Naomi Muriithi & Co. Advocates to come on record means that the said firm is not properly on record to act for the defendant. The consent dated 5<sup>th</sup> November 2024 has not touched on representation. For the said reasons, prayer 2 is allowed.

**Whether the orders of 18<sup>th</sup> December 2024 adopting the consent dated 5<sup>th</sup> November 2024 and the orders for execution issued 6<sup>th</sup> February 2025 pursuant to the said consent should be vacated.**

27. There is no doubt that the orders for execution issued on 18<sup>th</sup> December 2024 by this court was subject to non-compliance of the consent dated 5<sup>th</sup> November 2024. The said consent was entered into by the plaintiff's advocate and the firm of M/s Naomi Muriithi & Co. Advocates whom this court has found not to be properly on record for the defendant. In *Kenya Commercial Bank Limited v Benjob Amalgamated Limited* [2017] KECA 98 (KLR) the Court of Appeal held as follows:

“A consent judgment can only be entered into by a party personally or by their duly authorised advocate on record. An advocate not properly on record cannot bind a party to a consent.” (Emphasis mine)
28. This means that the firm M/s Naomi Muriithi & Co. Advocates not having legal capacity to act for the defendant could not enter into the consent dated 5<sup>th</sup> November 2024 on his behalf. Thus, I find the said consent to be defective and therefore the orders adopting it together with consequential orders of 18<sup>th</sup> December 2024 are hereby vacated.



**Whether a declaration should issue that the suit and the judgement abated on 13<sup>th</sup> November 2012 and 16<sup>th</sup> February 2023 respectively.**

29. The Civil Procedure Rules provide for continuity of a suit even at the demise of a defendant or defendants and specifically Order 24 (4) (1) which provides as follows:

- “ 4. Where one of two or more defendants dies and the cause of action does not
- (1) survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.
  - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
  - (3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

30. In light of the provision cited herein above, it is my considered view that the effect of abatement of a suit is that the suit, if it was by a plaintiff ceases to exist against a defendant who dies before judgment is entered and if an application to substitute him/her is not filed. In the instant suit, it is not disputed that the defendant died after Judgment had been entered against him. Thus, Order 24 (4) is not applicable in this instance.

31. Regarding the Judgment against the defendant having abated, The court in Rutto v Kugu; Keter (Applicant) (Environment & Land Case 123 of 2012)[2024] KEELC 4044 (KLR)(20 May 2024) (Ruling), held as follows;

“ A decree or order does not abate upon the death of a decree holder or judgment debtor. Its execution is only subject to the law of limitation of actions.....

It is clear from the provision above that since Order 24 Rules 3, 4 and 7 of the Civil Procedure Rules apply to the manner in which abatement occurs and the effects of abatement. These are exempted in their application to decrees, than decrees passed before death of a party. Such do not abate by the mere demise of the party. Moreover, the Rules do not provide for substitution of a debtor who dies before execution of the decree. This is also clarified by Section 37(1) of the Civil Procedure Act. It provides: -

“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”

23. When a judgment debtor dies, the decree holder merely applies to Court to execute against the Estate. In my considered view, it follows that there is no need for substitution where the judgment debtor dies. The decree holder can execute even upon any party who is intermeddling with the property of the deceased or the legal representative thereof as long as it is in relation to the deceased's property.”(Emphasis mine)



32. The said court cited with approval the decision in *Mueni Kiamba v Mbithi Kimeu Kimolo* [2017] eKLR where the Court held as follows: -

“I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties (emphasis mine). This goes a long way in ensuring the overriding objective of the Civil Procedure Act and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit...”

33. The application before this court seeks for orders of abatement of Judgement and not execution proceedings which in line with decisions cited herein above cannot be granted by this court. That being the position, I find prayers 3, 6 and 7 of the application to be misconceived and the same must fail. I will not tackle issue number 4 since the same has been subsumed under issue 3.

34. In the end, the application dated 23<sup>rd</sup> March 2025 is allowed only in terms of prayers 2, 4 & 5.

35. Each party shall bear its own costs.

36. Orders accordingly.

**DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 23<sup>RD</sup> DAY OF JULY, 2025 IN OPEN COURT AT NAKURU.**

**H. I. ONG’UDI**

**JUDGE**

