



Paksons Enterprises Limited & another v Kenya Commercial Bank & another; Rotich & 2 others (Applicant) (Suing as the Legal Representative of the Estate of Anna Chebet Koech (Deceased)) (Civil Suit 4 of 2022) [2025] KEHC 10238 (KLR) (17 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10238 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 4 OF 2022
JK SERGON, J
JULY 17, 2025**

BETWEEN

PAKSONS ENTERPRISES LIMITED 1ST PLAINTIFF

WESLEY ROTICH 2ND PLAINTIFF

AND

KENYA COMMERCIAL BANK 1ST DEFENDANT

GARAM INVESTMENT AUCTIONEERS 2ND DEFENDANT

AND

WESLEY ROTICH APPLICANT

DAVID KIPRONO ROTICH APPLICANT

ROBERT KIPNGETICH APPLICANT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ANNA
CHEBET KOECH (DECEASED)**

RULING

1. The application coming up for determination is a notice of motion dated 2nd May, 2025 seeking the following orders;
 - (i) Spent
 - (ii) That this Honourable Court be pleased to extend the time within which the Applicants herein are to apply for the substitution of the 2nd Plaintiff (Deceased) with her personal legal representatives and revive the abated suit herein in respect to her.



- (iii) That this Honourable Court be pleased to substitute the 2nd Plaintiff (Deceased) with her personal legal representatives Wesley Rotich, David Kiprono Rotich and Robert Kipngetich, the Applicants herein and proceed with the hearing and determination of the suit.
 - (iv) That upon grant of prayer (ii) above, this Honourable Court be pleased to grant leave to the Plaintiffs to further Amend the Plaint herein to reflect the correct parties to the suit and plead the issues that will enable the court effectually and conclusively determine the dispute between the parties.
 - (v) That the costs of this Application be provided for.
2. The application is supported by the grounds on the face of it and the supporting affidavit of Wesley Kipkirui Rotich the Applicant well versed with the facts attending to this matter and being duly authorized by the 2nd and 3rd Administrators/Applicants herein, to make and swear this affidavit in support of the Application filed herewith.
 3. He avers that the Plaintiffs herein commenced this suit against the Defendants vide a Plaint dated the 1st of August, 2022 and later Amended on the 29th of August, 2022 seeking orders including inter alia; a declaration that the intended sale of the property known as LR No. 631/1582 and Kericho Municipality Block 2/80 is illegal, wrongful and unlawful.
 4. He avers that the 2nd Plaintiff was/is the registered proprietor of the suit property herein upon which a legal charge was registered to secure a facility advanced by the 1st Defendant to the 1st Plaintiff.
 5. He avers that unfortunately, before the suit could proceed to finality, the 2nd Plaintiff herein passed away on the 26th of September, 2022 and her suit as against the Respondents herein abated.
 6. He avers that they have since applied for and obtained a grant of letters of administration intestate dated the 5th of December, 2024 in respect to the Estate of the Deceased 2nd Plaintiff herein in Kericho High Court Succession Cause No. E023 of 2023 and thus wishes to be substituted with the deceased herein in order to protect the interests of her Estate, he attached a copy of the said grant of representation.
 7. He avers that the delay in applying for substitution of the deceased was occasioned by the process of succession and a delay in the grant of representation to the Applicants herein in the succession proceedings in respect to the Estate as the deceased had many beneficiaries and the family held numerous meetings in order to settle on the representatives that will protect the best interests of her Estate.
 8. He avers that they only received the grants and immediately thereafter moved this Honourable Court for substitution.
 9. He avers that the present suit concerns the intended sale of the deceased's properties pursuant to a loan facility issued to the 1st plaintiff and it is therefore in the interest of justice that the Applicants be substituted thereof with the deceased in order that they may protect her interests therein.
 10. He avers that upon revival of the abated suit and substitution the deceased with her legal representatives, the Applicants crave the leave of this Honourable Court to further amend the Plaint herein in terms of the draft amended Plaint attached to the instant application
 11. He avers that the amendments sought, seek to first reflect the correct parties to the suit pursuant to the unfortunate demise of the 2nd Plaintiff in the pendency of the hearing of this case and to enable the applicants plead with specificity and offer the particulars of the irregularity and illegality on the part of the 1st Defendant in exercising its statutory power of sale not only on the grounds that it did not issue



- and/or serve the 2nd Plaintiff being the guarantor and owner of the properties intended to be sold with the proper notices as required under the law but also that although there exists a floating charge over all the assets of the principal debtor, the 1st Defendant herein has deliberately and maliciously chose to pursue the guarantor's properties instead of first realizing the assets of the principal debtor.
12. He avers that no party stands to suffer any prejudice as a consequence of the orders sought as the same will enable the court to effectively adjudicate over and settle all the issues in dispute between the parties.
 13. The 1st Defendant/Respondent filed the following grounds of opposition in response to the Applicants' Application dated 12th May, 2025
 - (i) The Applicants' Application is barred by the doctrine of res judicata, which precludes relitigation of issues—whether actually decided or those which, with reasonable diligence, could have been raised—in a prior action. The very issues raised in the instant Application—namely, amendment of the Plaint, substitution of the 2nd Plaintiff and revival of the 2nd Plaintiff's suit—were expressly determined by this Honourable Court in its Ruling dated 30th April 2025. Having been adjudicated by a court of competent jurisdiction, these issues cannot be revisited under Section 7 of the Civil Procedure Act.
 - (ii) That in any event, and in relation to substitution of the 2nd Plaintiff: the 2nd Plaintiff passed away more than two years ago, yet the Applicants offer no good cause for such undue delay or the casual manner in which they have pursued this application. They have failed to demonstrate sufficient cause, diligence, or good faith to warrant extending time or granting leave to substitute the deceased party.
 - (iii) That the prayer to amend the Plaint, nearly three years after the original Plaint was filed in August 2022—breaches the rule that amendments must be made timeously. Further to this, the proposed amendments embody both approbation and reprobation, introducing allegations that directly contradict the Applicants' earlier assertions and rendering the amendments fundamentally dishonest. This tactic is calculated to confuse this Honourable Court, squander its time and resources, vex the 1st Defendant, and frustrate its statutory right of sale.
 14. In light of the foregoing, the 1st Defendant/Respondent urged this Honourable Court to dismiss the Applicants' Application with costs.
 15. This court directed the parties to canvas the application via written submissions.
 16. The applicant contended that in the ruling of this court delivered on 30th of April, 2025 indicates that the Court did not conclusively determine the issue as the Applicants had omitted to first seek revival of the abated suit before substitution and amendment and therefore the court could not consider the merits of these prayers within an abated suit and as such dismissed the same without consideration as the application was fundamentally flawed and therefore not res judicata.
 17. The applicant contends that is no doubt that the present application for substitution has been brought upon lapse of the period and hence the prayer by the Applicant for extension/enlargement of time and that it is trite law that the decision on whether or not to enlarge/extend time is normally purely at the court's discretion and which discretion it has long been settled, is exercised judiciously and in order that the ends of justice may be met. They cited the case of Paul Musili Wambua v Attorney General & 2 others [2015] eKLR, the Court of Appeal outlined that in dealing with an application for extension of time, the court ought to consider such factors as the length of the delay, the reason for the delay, the degree that the Respondent stands to suffer and whether or not can be compensated by an award of



- damages. The applicants reiterated that they applied for substitution of the deceased upon receiving a grant on the 5th of December, 2024 and therefore urged the court to find and hold that it is in the interest of justice that time be enlarged and the deceased be substituted with her legal representatives and the matter proceeds to hearing and is determined on merit.
18. The applicants reiterated that the prayer for amendments of pleadings ought to be allowed as these amendments will enable the court effectually and conclusively determine the issues in dispute between the parties and there is no prejudice whatsoever that the Defendants stand to suffer as the matter is yet to be heard and they will similarly have an opportunity to respond to all the grievances set forth by the Plaintiffs. They cited the case of *Mary Nanjala Muhalya v Ambrose Kipruto (Deceased) & another* [2018] eKLR, the court held as follows on amendment to pleadings before a suit is heard, "Secondly, the respondent has a corresponding right to raise the very defences he raises in his grounds in an amended pleading filed in response to the plaintiff's proposed amendments. In my view the defendant would not suffer any prejudice if the orders of amendment were granted..." The applicants reiterated that they had annexed the draft proposed further amended plaint in which they have set out the specific nature of the amendments that they intend to make and that the said amendments sought by the applicants only set forth with clarity and precision the particulars of the Defendants' unlawful actions which is already an issue that had been pleaded.
 19. The 1st Respondent's filed submissions in support of the Grounds of Opposition dated 12th May, 2025 and opposing the Applicants' Application dated 2nd May, 2025. The 1st Respondent reiterated that the Application is barred by the doctrine of *res judicata*, which allows a litigant only one "bite at the cherry" and precludes relitigation of issues—whether actually decided or those which, with reasonable diligence, could have been raised—in a prior action.
 20. The 1st Respondent reiterated that the application to substitute parties was characterised by inordinate delay. The 1st respondent was adamant that substitution of a party does not require a full Grant of Letters of Administration; a Grant *ad Litem* would have sufficed and hence reliance on Succession delays cannot justify this lapse.
 21. The 1st Respondent contended that, the court ought to first extend time to file the application for substitution before the Applicants could seek to substitute the 2nd Plaintiff (deceased) and therefore the attempt to compress the substantive prayers in one application may be deemed a material defect in itself. They cited the Court of Appeal case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, where it held that; "It is only after the time has been extended that the legal representative can have the 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..."
 22. The 1st Respondent reiterated that the instant application—nearly three years after the original Plaint was filed in August 2022 breaches the rule that amendments must be made timeously.
 23. I have considered the application, response and written submissions filed by parties and issues for determination are whether to enlarge time to revive the suit, substitute the parties and grant leave to amend the pleadings.



24. On the issue as to whether to revive the abated suit and allow substitution of parties pursuant to the grant of representation issued by this court on 5.12.2024 affording the applicants the capacity to represent the deceased plaintiff in these proceedings. This court has considered the circumstances preceding prior to filing the instant application, Anna Chebet Koech (the 2nd Plaintiff) instituted the instant suit against the Defendants and before the suit could proceed to finality, she passed away on the 26th of September, 2022. According to the provisions of Order 24 Rule 3 of Civil Procedure Rules, the legal representatives of the deceased ought to have made the application for substitution within a year of her death. However, the substitution is made once the legal representatives are granted letters of administration. In this suit, no such application was filed within one year of the plaintiff's death. It is not disputed that in this case, the plaintiff's legal representatives were issued with the letters Ad Litem 5th December, 2024. Given that the Applicants did not move this court for substitution within the timeframe stipulated under Order 24, the suit stood abated by operation of the law at the end of the one year. Therefore the Applicants have moved this court under the provisions of Order 7 Rule 4 seeking to revive the abated suit followed by substitution. Order 7 Rule 4 requires them to show sufficient cause why they did not file the application within reasonable time. In the case of *The Hon Attorney General v the Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 'sufficient cause' was defined as:- "Sufficient cause" or "good cause" in law means:the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused". See *Black's Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events." This court hereby finds that the applicants have offered a plausible explanation for the delay citing protracted succession proceedings given the vast estate of the deceased which resulted in delays in obtaining the grant of representation required to file for substitution.
25. On the issue as to whether to grant leave for the applicants to amend the plaint to reflect the correct parties and to allow the applicants to set forth with particulars of the Defendants' unlawful actions in exercise of the statutory power of sale with clarity and specificity. On one part, the applicants are adamant that the proposed amendments will enable the court to effectively and conclusively determine the issues in dispute between the parties. On the other part, the respondents maintain that the amendment of the plaint was raised in a prior application and having been adjudicated by a court of competent jurisdiction, cannot be revisited in light of section 7 of the *Civil Procedure Act*. This court having considered the assertions by the parties wishes to point out that in its ruling dated 30.4.2025 this court did not pronounce itself on amendment of pleadings having found that the suit had abated on account of the demise of the 2nd plaintiff with no efforts made to revive the suit and substitute the parties. The applicants having subsequently followed steps to revive the abated suit and substitute the plaintiff with her personal representatives, this court can therefore consider the prayer for amendment of pleadings. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held in the case of *Andrew Wabuye Biketi v. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others* [2015] eKLR, where the court in disallowing an application for amendment stated as follows; "...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs" whereas in *Daniel Ngetich & Anor v K-Rep Bank Limited* [2013] Eklr where it was stated that: "...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not



work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice.” In light of the foregoing, it is therefore the finding of this court that the applicants be allowed to amend their pleadings and given that this matter is at a preliminary stage, there is no prejudice that the Defendants stand to suffer as they will similarly have an opportunity to respond to the amended plaint.

26. Consequently, the notice of motion dated 2nd May, 2025 is merited and allowed on the following terms:

- a) The suit instant suit is hereby revived and the 2nd Plaintiff (Deceased) is hereby substituted with her personal legal representatives Wesley Rotich, David Kiprono Rotich and Robert Kipngetich, the Applicants herein.
- b) That the applicant be and is hereby granted leave to amend its plaint in terms of the draft amended plaint annexed to its application
- c) That the draft amended plaint be and is hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling.
- d) Upon service, the respondent be at liberty to file and serve an amended defence within 14 days. The applicant to file and serve if any a reply to the amended defence within 7 days from the date of service.
- e) The case to be mentioned in court on 25/9/2025 to confirm compliance with Order 11 of the Civil Procedure Rules and to take directions for hearing

DELIVERED, SIGNED AND DATED AT KERICHO THIS 17TH DAY OF JULY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Khaemba for the applicant

Maiga holding brief for Mbaya for 1st Respondent

