



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ng'ang'a v NIC Bank Limited & 4 others (Civil Case 7 of 2019)  
[2024] KEHC 996 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 996 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITALE  
CIVIL CASE 7 OF 2019  
AC MRIMA, J  
FEBRUARY 8, 2024**

**BETWEEN**

**PETER NUGI NG'ANG'A ..... APPLICANT**

**AND**

**NIC BANK LIMITED & 4 OTHERS & 4 OTHERS & 4 OTHERS & 4  
OTHERS ..... RESPONDENT**

**RULING**

**Introduction**

1. This ruling relates to an application by way of a Notice of Motion filed by the 1<sup>st</sup> Defendant herein, NIC Bank Limited. It is dated 21<sup>st</sup> March, 2023 and was filed on 28<sup>th</sup> March, 2023.
2. Among the prayers sought in the application is the revival of the suit which has since abated due to the death of the Plaintiff.
3. The application was vehemently opposed by the NIC Bank Limited (the 1<sup>st</sup> Defendant). The rest of the Defendants did not take part in the application.

**The Application:**

4. The application was brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 1 Rule 10, Order 8 Rule 3, 5(1) and 7, Order 24 Rule 1, 3, 7 and Order 51 Rule 1 of the *Civil Procedure Rules* and Article 50(1) and 159 of the *Constitution*.
5. The following prayers were sought: -
  1. That this application be certified urgent and same be heard forthwith ex-parte.
  2. That the suit herein which has abated be revived.



3. This Honourable Court be pleased to extend time and Order substitution of the deceased plaintiff with his legal representative namely Margaret Njeri Nugi out of time.
4. Leave be granted to the plaintiff to file and serve an amended plaint to reflect the substitution within such time the court shall deem necessary.
5. Costs of this application be provided for.
6. The application was supported by the Affidavit sworn by one Margaret Njeri Nugi, the personal representative of the Estate of the Plaintiff herein, Peter Nugi Ng'ang'a. As said, the Plaintiff died on 8<sup>th</sup> December, 2020 due to Covid-19 related complications.
7. The said Margaret Njeri Nugi averred that the Plaintiff had only one son who was reluctant to take out the Plaintiff's representation with a view of continuing the instant suit since the cause of action survived the Plaintiff's death. That, in order to protect the estate in this suit, she eventually had to, and she successfully applied for and was granted a Grant of Letters of Administration *Ad Litem* on 8<sup>th</sup> February, 2023. She then filed the instant application.
8. It was the Applicant's position that the Plaintiff had began negotiations with the 1<sup>st</sup> Defendant herein amid having raised serious legal issues and that there was need to be allowed to pursue the matter further since the landscape had even changed after the death of the Plaintiff.
9. The Applicant filed written submissions in further support to the application wherein Counsel referred to several decisions in countering the 1<sup>st</sup> Defendant's objection and in urging this Court to allow the application.

**The 1<sup>st</sup> Defendant's/Respondent Response:**

10. The 1<sup>st</sup> Defendant's response was two-fold. It filed a Replying Affidavit sworn by one Jackson Nyaga King'ori, the Defendant's Legal Counsel on 19<sup>th</sup> May, 2023, and a Notice of Preliminary Objection dated 27<sup>th</sup> June, 2023.
11. The Notice of Preliminary Objection challenged the application as follows: -
  1. That the application is incurably defective and incompetent as it offends the statutory edicts of Order 24 Rule 3 and 7 of the *Civil Procedure Rules* for failing to conform to the logical procedure that provides that an application for extension of time should precede the revival and joinder proceedings.
  2. That Order 24 Rule 3 of the *Civil Procedure Rules* provides that an order for joinder and/or revival shall only be made when the prayer for extension of time has been granted.
12. Through the Replying Affidavit, the Respondent posited that the application was unmerited since it did not conform to the law and was only meant to delay the matter in which there is no denial that the Plaintiff was advanced some money by the Respondent.
13. It was argued that no sufficient cause was demonstrated for any extension of time.
14. The Respondent filed written submissions. It reiterated its above position and referred to several decisions on the legal incompetence of the application.
15. In the end, the Respondent urged this Court to dismiss the application.



## Analysis:

16. This Court has considered the application, the response, the written submissions and the decisions referred to therein.
17. There seems to be two main issues for determination in this application. They are: -
  - i. Whether the application is incompetent;
  - ii. If the answer to (i) above is in the negative, then whether the application be allowed.
18. This Court will deal with the issues in seriatim.

### a. Whether the application is incompetent:

19. It was submitted in detail that the application procedurally offended Order 24 Rules 3 and 7 of the [Civil Procedure Rules](#) in that the Applicant ought to have, in the first instance, sought for an order for the extension of time and, if allowed, then the joinder and revival prayers be sought.
20. Order 24 Rule 3 of the [Civil Procedure Rules](#) is tailored as follows: -
  3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 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.
21. Order 24 Rule 7 of the [Civil Procedure Rules](#) states as follows: -
  7. Effect of abatement or dismissal [Order 24, rule 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.
22. The interpretation of the above provisions is by now well settled by several binding decisions. For instance, and as rightly so submitted by the Respondent, the decision by the Court of Appeal in [Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others](#) [2017] eKLR remains one of the locus classicus decisions on this arena.



23. In that case, the Appellate Court reproduced Order 24 Rules 3 and 7 of the [Civil Procedure Rules](#) and then rendered the following precise discussion: -

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.

24. The above decision sums up the law. The instant application must be made sequentially. First, there must be an extension of time. Second, once time is extended, the joinder of the legal representative follows. And, lastly, the revival of the suit.
25. The Court went further and expressed its position on how the above three prayers may be sought. The Court stated thus: -

..... 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.



26. With the above guidance, this Court will now ascertain whether the application is incompetent. The prayers in the application have already been captured above verbatim. The Applicant sought for the extension of time, joinder, revival and an order for amendment of the Plaint. The Applicant, therefore, duly complied with the requirements of the law.
27. This Court, hence, remains at pains in trying to understand the Respondent's objection since the application clearly sought for all the three prayers and, as decreed by the appellate Court, such an application is not procedurally fatal.
28. To this Court, therefore, the objection lacks any legal leg to stand on and is for rejection.

**b. Whether the application be allowed:**

29. Having settled the preliminary objection, the focus now shifts to the merits of the application. Any application for extension of time depends on its peculiar circumstances.
30. In this case, the Applicant alleged that the Plaintiff had only one son who was not keen in taking out the representation to an extent that the Applicant had to step in and ensure that the estate was duly represented in the suit. To that end, she successfully applied for a Grant of Letters of Administration *Ad Litem*. She then filed the instant application without any further delay.
31. The above facts were not largely controverted. This Court notes that the Plaintiff died at the height of the Covid-19 pandemic. That was on 8<sup>th</sup> December, 2020. Whereas the Applicant did not give the reasons that led to the reluctancy on the part of the Plaintiff's son to take over the conduct of the suit, this Court remains alive to the fact that the death of a Chargee has serious legal repercussions on any recovery proceedings more so given the fact that a charge is ordinarily secured by the Chargee's personal life insurance cover.
32. It is this Court's position that despite the time the matter has been in Court, which is now around 4 years, the ends of justice will be better served by according the Applicant an opportunity to be heard in her capacity as the legal representative of the Plaintiff. The Court also takes note of the fact that an injunction had been issued in a formal ruling after parties took part in an inter partes hearing.
33. Consequently, this Court affirms the position that allowing the application will be in keeping with the provisions of Articles 50(1) and 159 of the Constitution. The Court will, however, have to fast track the sooner determination of the suit.
34. With such a finding, the Court believes it has said enough and the discussion ought to come to an end.

**Disposition:**

35. Drawing from the above, the following final orders do hereby issue: -
  - a. The Notice of Preliminary Objection dated 27<sup>th</sup> June, 2023 is hereby dismissed.
  - b. The Notice of Motion dated 21<sup>st</sup> March, 2023 is allowed.
  - c. For clarity, time is hereby duly extended, the suit is hereby revived and the Applicant is hereby enjoined as the personal representative of the deceased Plaintiff.
  - d. Leave is hereby granted to the Applicant to file and serve a duly Further Amended Plaint within 14 days of this ruling. In the event the Applicant fails to do so, both the Notice of Motion dated 21<sup>st</sup> March 2023 and the suit shall automatically stand dismissed with costs.



- e. In the event of compliance, the Defendants shall file and serve their amended pleadings, if need be, within 14 days of service.
- f. The parties shall thereafter comply and/or further comply with the provisions of Order 11 of the *Civil Procedure Rules*.
- g. This matter shall be fixed on a date to issue today for purposes of ascertaining compliance and for further orders and directions.
- h. Costs of the application shall be in the suit.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT KITALE THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. C. MRIMA**

**JUDGE**

**Ruling No.1 virtually delivered in the presence of:**

Mr. Wanyonyi, Learned Counsel for the Applicant/Plaintiff.

Mr. Nyanjwa, Learned Counsel for the 1<sup>st</sup> Defendant/Respondent.

No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Duke – Court Assistant.

