



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC CASE NO. 224 OF 2008**

GERALD MUTURI MAINA.....PLAINTIFF (DECEASED)

=VERSUS=

MARGARET NJERI GACHOKA.....1<sup>ST</sup> DEFENDANT

BANK OF BARODA (K) LTD.....2<sup>ND</sup> DEFENDANT

CAPE SUPPLIES LIMITED.....3<sup>RD</sup> DEFENANT

DIAMOND TRUST BANK (K) LTD.....INTERESTED PARTY

AND

EUNICE WAIRIMU MUTURI.....1<sup>ST</sup> APPLICANT/LEGAL REPRESENTATIVE

WASHINGTON MUCHIRI MUTURI...2<sup>ND</sup> APPLICANT/LEGAL REPRESENTATIVE

**RULING**

1. This is the Notice of Motion dated 6<sup>th</sup> October 2020 brought under order 24 rules 3(2) and 7(2) and order 50 rule 6 of the Civil Procedure Rules 2010.

2. It seeks orders:-

*1. Spent.*

*2. Spent.*

*3. That the honourable court be pleased to revive the suit herein.*

*4. That, the honourable court be pleased to extend time within which the deceased plaintiff's legal representative may apply to be substituted as the plaintiffs in the suit herein.*

*5. That the legal representative of the deceased plaintiff be substituted as the plaintiffs in the suit herein.*

*6. That the costs be in the cause.*

3. The grounds are on the face of the application and are set out in paragraphs (i) to (xv).

4. The application is supported by the affidavit of Oyugi Stephen Okero sworn on the 6<sup>th</sup> October 2020 and that of Washington Muchiri Muturi sworn on 6<sup>th</sup> October 2020.

5. The application is opposed. There are grounds of opposition filed by the 2<sup>nd</sup> defendant dated 2<sup>nd</sup> February 2021. There is also a replying affidavit sworn by Peter Kimaru, a director of the 3<sup>rd</sup> defendant sworn on the 16<sup>th</sup> April 2021. There is also a replying affidavit sworn by

Harshil Shah Advocate, for the Interested party (Diamond Trust Bank).

6. I have considered the Notice of Motion, the affidavit in support and the annexures. I have also considered the grounds of opposition and the replying affidavits. The issue for determination is whether this application is merited.

7. **Order 24 rule 3(2)** of the Civil Procedure Rules provides

*“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.”*

*Rule 7 (2) of the Civil Procedure Act*

*“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.”*

8. I have gone through the affidavits in support of the application. I find that the applicants have failed to demonstrate sufficient cause as to why the suit should be revived.

9. Stephen Oyugi Okero, the advocate, on his affidavit sworn on the 6<sup>th</sup> October 2020, states in paragraph (v):-

*“The court file went missing since 2<sup>nd</sup> November 2011 and the Applicants were unable to file an application for substitution within the stipulated period.”*

I find that the Applicants have failed to place any material before the court to confirm that the file was missing. They ought to have attached a letter from the Deputy Registrar confirming that the file could not be traced.

10. It is not in dispute that the Plaintiff was not substituted within one year of death. Having found that the Applicants have failed to demonstrate sufficient cause as to why this cause should be revived, I decline to grant the orders sought.

11. In the case of **Kenya Farmers Cooperative Union Ltd vs Charles Murgor t/a Kaptabei Coffee Estate [2005] eKLR**, Judge H. P. G Waweru held that:-

*“.....But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit)? Where the suit has already abated by operations of the law, obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operations of the law? Certainly not. If a suit has abated, it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time”.*

I am guided by the above authority.

12. I also find that the 3<sup>rd</sup> defendant who is an innocent purchaser for value will be greatly prejudiced if the suit is revived.

13. In conclusion, I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Manyara for the Applicants

Mr. Ondieki for the 2<sup>nd</sup> Respondent

Mr. Kiiro for the 3<sup>rd</sup> Defendant/Respondent

No appearance for the Interested party

No appearance for the 1<sup>st</sup> Defendant

Steve - Court Assistant