



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 352 OF 2005**

FRANCIS MUREITHI GITUKU.....PLAINTIFF

VERSUS

STEPEHEN MUSA.....1<sup>ST</sup> DEFENDANT (DECEASED)

JOYCE WANGUI IGUANYA )

MARY WANJIRU WANJOHI ).....1<sup>ST</sup> INTENDED DEFENDANT

MARTIN MUGO IGUANYA )

BARCLAYS BANK OF KENYA LTD.....2<sup>ND</sup> DEFENDANT

EMMANUEL G. NGANGA

T/A SHEFLO AUCTIONEERS.....3<sup>RD</sup> DEFENDANT

THE DISTRICT LAND REGISTRAR

NYANDARUA DISTRICT.....4<sup>TH</sup> DEFENDANT

**R U L I N G**

1. This is a ruling on the plaintiff's application dated 21/10/2020. It is brought under **Order 21 Rule 4, Order 50 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, Constitution of Kenya 2010 and All Other Enabling Provisions Law.**
2. The application sought an order *inter alia* for orders for enlargement of the time within which to make the application and for the substitution of **Joyce Wangui Iguanya, Mary Wanjiry Wanjohi and Martin Mugo Iguanya** as defendants in place of **Stephen I. Musa (deceased)**.
3. The application was supported by the affidavit of **Francis Mureithi Gituku** sworn on 21/10/2020. The applicant's case was that the deceased died intestate on 11/12/2018. He was unaware of this demise until 25/2/2019 when he was notified vide a letter addressed to his Advocate dated 22/2/2019. The deceased's kin delayed in applying for Letters of Administration Intestate thereby frustrating the process of substitution of the 1<sup>st</sup> defendant.
4. This forced him to file a Citation on 13/12/2019 prompting **Joyce Wangui Iguanya, Martin Mugo (Citees)** to accept or refuse Letters of Administration Intestate. On 10/9/2020, the three lodged a Petition for Grant of Letters of Administration Intestate vide **Succession Cause No. 171 of 2020.**
5. In the premises, the applicant prayed that the court enlarges the time within which substitute the deceased with the three proposed defendants who are his personal representatives. That the land the subject matter of this suit is valuable and the plaintiff intends to prosecute the suit. That the defendants will suffer no prejudice if the application is allowed.
6. In opposition to the application, the 2<sup>nd</sup> defendant filed Grounds of Opposition dated 24/11/2020. It contended that the application offends **Order 24 Rule 4.** That the Intended defendants are not legal representatives of the 1<sup>st</sup> defendant. That the applicant should have applied to

revive the abated suit before applying for substitution. That the court has no jurisdiction to determine the application as the suit abated by operation of law on 11/12/2019.

7. The intended defendants filed a replying affidavit dated 25/11/2020. They stated that the deceased died on 11/12/2018 and no substitution had been done. That the suit had therefore abated. That the applicant had not explained the inordinate delay in prosecuting the matter. That there can be no substitution until and unless the suit was revived.

8. They faulted the applicant for not showing that the respondents were legal representatives of the deceased. The process of identifying the assets of the deceased had delayed their applying for succession. They had since petitioned for grant of Letters of Administration in the **Succession Cause No. 171 of 2020 in the Chief Magistrate's Court at Gatundu.**

9. In a supplementary affidavit, the applicant averred that the Chief Magistrate's Court at Gatundu had on 4/11/2020 issued the intended defendant with a Grant of Letters of Administration Intestate. That if the application was declined, he will suffer untold loss.

10. The applicant filed his submissions dated 2/2/2021 and 10/2/2021, respectively while the respondents filed theirs dated 30/12/2020. The Court has carefully considered the depositions on record and the said submissions as well as the authorities relied on.

11. **Order 24 rule 4 (4) of the Civil Procedure Rules** provides: -

***“(1) Where one of two or more defendants dies and the cause of action does not 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) ...

***(3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.***

12. It is clear from the foregoing that when one of the defendants in a suit dies and the cause of action survives or continues, on application, the Court has jurisdiction to substitute the deceased party with his/her personal representative(s).

13. **Section 2 of the Civil Procedure Act** defines a Legal Representative as ‘a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.’

14. The record shows that after the applicant had filed a Citation on 19/12/2019, They filed a Petition for Letters of Administration in respect of Estate of the deceased **in Succession Cause No. 171 of 2020**. It was not denied that a Grant of Letters of Administration Intestate was issued on 4/11/2020 to **Joyce Wangui Iguanya, Mary Wanjiru Wanjohi and Martin Mugo Iguanya**. These are the intended 1<sup>st</sup> defendants. Accordingly, I thus find that the intended 1<sup>st</sup> defendants are the legal representatives of the deceased.

15. An application for substitution is required to be made within 1 year of the demise of a party failing of which a suit abates. The present application was made out of time. It however, seeks the extension of time within which the application is to be brought and for substitution of the deceased defendant.

16. The application is opposed on the ground that the suit is already abated and no substitution can be made. That the applicant had not prayed for the revival of the suit before seeking substitution.

17. There is no dispute that the applicant was informed of the demise of the deceased in good time. He however took over 8 months before taking steps to have the estate take out grant of letters of administration. I consider that the applicant would not have made the application before legal representatives of the estate of the deceased had been appointed. He had to cite intended defendants for them to take out the requisite grant.

18. In **Soni v. Mohan Dairy [1958] EA. 58**, it was held that:-

***“For an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period ...”***

19. In the present case, it was not in the control of the applicant to appoint legal representatives of the estate of the deceased. He had to wait for them to either apply for the grant. They did not. It is after they failed that he cited them whereby they ultimately agreed to petition for letters of administration. In this regard, I am satisfied that there was good reason for the delay in making the application for substitution.

20. In **Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd [2018] Eklr**, where the applicant seeking to substitute a deceased plaintiff quoted the wrong law and the suit had similarly abated, the court held: -

***“I understand the Defendants grounds of opposition (1) & (3) to fault the application for failure to cite the relevant law that govern the substitution of a party on behalf of a deceased party.***

...

*Clearly it cannot be Order 1 Rule 10 Civil Procedure Act. It is equally cannot be grounded under the inherent powers of court under Section 3A of the Act but is governed by the provisions of Order 24 Rule 3 of the Rules...*

*I understand that law to say that upon death of sole plaintiff or the only surviving plaintiff and on application the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time.*

*In this matter it cannot be denied that the suit has abated. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.*

*I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived.*

*That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits.*

*I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea.*

*Answering to that call, I allow the application to have the applicant substituted for the deceased plaintiff. Having done so I further order that the suit be revived for purposes of being heard on the merits”.*

21. I fully adopt the foregoing and apply the same here. Although the applicant did not seek orders for the revival of the suit, that *per se* is not fatal to the application. I believe that the very existence of a Court of law is to do justice to the parties. I will invoke the inherent jurisdiction of the Court and the overriding objective of the Civil Procedure Act and, under prayer no 5 of the motion, grant an order for the revival of the suit. **See the case of Olympic Sports House Ltd v School Equipment Centre Ltd [2012] Eklr.**

22. There is no prejudice that has been shown that will be suffered by the defendants if the application is allowed. To the contrary, if the same is denied the plaintiff's only chance of being heard on his case will terminate for no fault of his own. The subject matter is also important. It is land. Land is a very emotive issue in this country and a party should not be prevented from agitating his claim on land on a technicality.

23. Further, the time from when the deceased passed on and the filing of the application is not inordinate.

24. For the foregoing reasons, I hereby revive the suit and allow the application as prayed. As to costs, they shall be in the cause.

It is so ordered.

**DATED and DELIVERED at Nairobi this 13<sup>th</sup> day of May, 2021.**

**A. MABEYA, FCI Arb**

**JUDGE**