



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 27 OF 2015**

GODFREY KAMAU KIMANI.....PLAINTIFF/RESPONDENT

VERSUS

1. RUTH WAMBURA
2. CHRISTINE WAMBURA
3. MONICA WAMBURA (*sued in their capacity as the Administrator of the Estate of the late THOMAS WAMBURA(Deceased)*).....DEFENDANT/APPLICANTS
4. OKUYOSI E. TIMOTHY)
5. LAURENT PETER ).....DEFENDANT/RESPONDENTS

**RULING**

1. By way of **Notice of Motion** dated **11<sup>th</sup> December 2020**, the **1<sup>st</sup>, 2<sup>nd</sup>** and **3<sup>rd</sup>** Defendants/Applicants have moved this court seeking the following orders: -

1. **Spent;**
2. ***THAT*** this Honourable Court be pleased to grant leave to the firm of **M/S Kanyi J. and Company Advocates** to come on record for the Applicants in the place of **M/S Kiprop Cheruiyot & Co. Advocates;**
3. ***THAT*** this Honourable Court be pleased to set aside and/or vary its orders on **22<sup>nd</sup> day of January, 2020**, and set aside directions as to the delivery of the ruling on the **Bill of Costs dated 27<sup>th</sup> May 2020** pending the hearing and determination of this Application;
4. ***THAT*** this Honourable Court be pleased to set aside and/or vary its order of **22<sup>nd</sup> day of January, 2020**, and set aside directions as to the delivery of the ruling on the **Bill of Costs dated 27<sup>th</sup> May 2020** pending the hearing and determination of this suit;
5. ***THAT*** this Honourable Court be pleased to reopen the Applicant's case;
6. ***THAT*** the costs of this Application be provided for.

2. The Application is brought under **Section 1A, 1B, 3A and 63(e)** all of the **Civil Procedure Act (Cap. 21), Order 9 Rules 9 & 10, Order 12 Rule 7, Order 24 Rule 4 and Order 51 Rule 1**, all of the **Civil Procedure Rules** and all other enabling provisions of the law.

3. The grounds adduced in support of the application are that: -

- a) ***The suit against the deceased abated on 27<sup>th</sup> March 2016 against the deceased.***

- b) *The 2<sup>nd</sup> Applicant has never taken out letters of administration against the Estate of the deceased.*
- c) *Judgment entered against the Applicants on 22<sup>nd</sup> January 2020 the foregoing illegalities notwithstanding.*
- d) *The Plaintiff has since filed its party and party Bill of Costs dated the 27<sup>th</sup> day of May 2020 and the same is slated for ruling.*
- e) *The Applicants defence on record, raising the serious legal issues was never ventilated upon at the instance of the Applicant's erstwhile Advocates.*
- f) *The mistake of the Applicant's erstwhile Advocates should not be visited upon the Applicants.*
- g) *That this Honourable Court has the opportunity to put right that which would otherwise be a clear injustice.*
- h) *Equity does not suffer a wrong without a remedy.*
- i) *This Honourable Court is vested with unlimited jurisdiction grant the orders sought "ex debito justitiae."*
- j) *Unless the Orders sought issue, the instant Application will be rendered nugatory, and the Applicant will suffer immense loss.*

4. The application is further supported by the affidavit of **Ruth Wambura**, the 1<sup>st</sup> Defendant/Applicant herein, sworn on the **11<sup>th</sup> December 2020**. In the said affidavit, the 1<sup>st</sup> Defendant/Applicant has deponed that the original suit was against the 1<sup>st</sup> -3<sup>rd</sup> Defendant/Applicant's father, **Thomas Wambura** as the 1<sup>st</sup> Defendant who died on **27<sup>th</sup> March 2015**.

5. It is the 1<sup>st</sup> Defendant's/Applicant's averment that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Applicants were not aware of whether he had legal representation in the matter herein nor the matter before the **Business Premises Rent Tribunal (BPRT)**.

6. The 1<sup>st</sup> Defendant/Applicant has stated that it was not until the of **3<sup>rd</sup> May, 2017**, that letters of administration were issued for the estate of the late **Thomas Wambura** in her favour and that of the 3<sup>rd</sup> Defendant/ Applicant.

7. It has been deponed that the suit as against the 2<sup>nd</sup> Defendant/Applicant was a non-starter for want of letters of administration in her favor. It is further stated that the suit against the late **Thomas Wambura** abated on the **26<sup>th</sup> March, 2016** and that as at **30<sup>th</sup> November, 2018**, when the 1<sup>st</sup>-3<sup>rd</sup> Defendant/Applicants were sued vide the Amended Plaint, there was no suit whose cause of action that survived after the demise of the said late **Thomas Wambura**.

8. The 1<sup>st</sup> Applicant has deponed that they were represented by the firm of **M/S John Bwire & Co. Advocates** who raised the issue on the abatement of the suit.

9. That further, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants changed advocates to **M/S Kiprof Cheruiyot & Co. Advocates** to act for them but the said Firm of Advocates never updated them on the progress of the matter. They were not aware that their case was closed on **16<sup>th</sup> October, 2019** without their instructions and yet they had a good defence with very high chances of success.

10. The 1<sup>st</sup> Applicant states that they learnt that Judgment had been delivered in the matter herein on the **4<sup>th</sup> December, 2020** after they made a curious visit to the their then advocates, **M/S Kiprof Cheruiyot & Co. Advocates** and learnt that the Plaintiff/Respondent has already filed and prosecuted a Party and Party Bill of Costs dated **27<sup>th</sup> May, 2020** which was slated for delivery of Ruling on the **9<sup>th</sup> December, 2020**.

11. It has been deponed that the instant application could not be made on time due to the Covid-19 Pandemic, hence the 1<sup>st</sup> Applicant urges this court not to visit their erstwhile Advocates mistake on them.

12. The 1<sup>st</sup> Applicant has further deponed that the suit property was the only estate left by **Thomas Wambura** (deceased) and that the events of this matter have since exposed the 1<sup>st</sup>-3<sup>rd</sup> Defendant/Applicant to imminent danger of being disinherited unjustly.

13. In opposing the application, **Mr. Godfrey Kamau Kimani**, filed a **Replying Affidavit** on **22<sup>nd</sup> January, 2021** which was sworn on even date. He argues that the issue raised on the abatement of the suit was already addressed before Hon. Justice P.J. Otieno and thus it is *res judicata*.

14. He has deponed that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants have not challenged the Judgment as delivered on **22<sup>nd</sup> January, 2020** and thus they cannot challenge the taxation of the Party and Party Bill of Costs.

15. The Plaintiff/Respondent has stated that the 1<sup>st</sup> - 3<sup>rd</sup> Applicants filed an application dated **2<sup>nd</sup> May, 2019** seeking leave to file a Defence. The said leave was granted, however, the 1<sup>st</sup> - 3<sup>rd</sup> Applicants failed to file the said Defence. The 1<sup>st</sup> -3<sup>rd</sup> Applicants representative further told court that they would not be calling any witnesses and proceeded to file their closing submissions on the **10<sup>th</sup> December, 2019**.

16. According the Plaintiff/Respondent, the 1<sup>st</sup> - 3<sup>rd</sup> Applicants having closed their case and filed submissions are estopped from raising issues which were raised and determined before the matter was heard and issues they ought to have raised before close of their case.

17. It is the Plaintiff's/Respondent's contention that the Applicants ought to have been vigilant enough to consult their former Advocates so they would have been informed that they were enjoined in the proceedings vide an order of court which was never challenged.

18. He argues that the application is an afterthought and an abuse of the court process as the Applicants have not given any reason for not attending court to defend the Bill of Costs dated 27<sup>th</sup> May, 2020 even after they had been notified of the same vide a notice dated 7<sup>th</sup> September, 2020.

19. The Plaintiff/Applicant has stated that the Applicants are only intent on delaying the execution process to deny him the fruits of his Judgment. He stated that he has been in court since 2012 seeking for justice and that the application should be dismissed.

20. The 1<sup>st</sup> Defendant/Applicant filed a **Supplementary Affidavit** with Leave of Court on the 5<sup>th</sup> February, 2021 and elucidated similar issues as raised in her **Supporting Affidavit**.

21. The court gave directions on 25<sup>th</sup> January, 2021 that the application be canvassed by way of written submissions. The 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants filed their submissions on 5<sup>th</sup> February, 2021. The Plaintiff/Respondent did not file any submissions despite being given time to do the same.

22. The 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants opted to rely on their written submissions.

### **ANALYSIS AND DETERMINATION**

23. I have considered the Application filed herein, the grounds on its face together with the Affidavit filed in support thereof and Replying Affidavit thereto. I have also considered the written submissions by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Respondents, the statute and the case law cited. I find the issues that fall for determination being:-

*i. Whether this court can grant leave for the firm of M/S Kanyi J. & Co. Advocates to come on record on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants in the place of M/S Kipro Cheruiyot & Co. Advocates;*

*ii. Whether the suit herein abated as at the 26<sup>th</sup> March, 2016;*

*iii. Whether this court can set aside its orders issued on 22<sup>nd</sup> January, 2020 and be pleased to re-open the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants case*

**i. Whether this court can grant leave for the firm of M/S Kanyi J. & Co. Advocates to come on record on behalf of the 1<sup>st</sup> -3<sup>rd</sup> Defendants/Applicants in the place of M/S Kipro Cheruiyot & Co. Advocates**

24. The 1<sup>st</sup> -3<sup>rd</sup> Defendant/Applicants have stated that their relationship with the Firm of Advocates **M/S Kipro Cheruiyot & Co. Advocates** has irretrievably broken down that they are unable to communicate and are thus seeking leave that **M/S Kanyi J. & Co. Advocates** do come on record to protect their interests in the matter herein.

25. I wish to point out that the proper procedure for an advocate to come on record after Judgment has been entered as is the case herein, is provided for under **Order 9 Rule 9** of the **Civil Procedure Rules**, which states:-

***“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.***

26. In view of the provisions above, after Judgment has been passed, an advocate can only come on record upon an application with notice to all the parties or upon a consent being filed between the outgoing Advocate and the proposed incoming Advocate.

27. In the matter herein, the firm of **M/S Kanyi J. & Co. Advocates** has filed an application to come on record on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Applicants and notice issued to all parties. However, there has been no objection to the said application.

28. I therefore find no reason to deny the firm of **M/S Kanyi J. & Co. Advocates** to come on record on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants as they have a right to be represented by an Advocate of their choice.

**ii. Whether the suit herein abated as at the 26<sup>th</sup> March, 2016**

29. The Defendants/Applicants have claimed that the suit as determined on the **22<sup>nd</sup> January, 2020** abated on the **26<sup>th</sup> March, 2016** as against their father, **Thomas Wambura** who had been sued as the 1<sup>st</sup> Defendant and died on the **27<sup>th</sup> March, 2015**.

30. According to the Defendants/Applicants, the Plaintiff/Respondent herein did not seek leave to continue with the suit after it abated as against them in accordance with **Order 24 Rule 4(1)** of the **Civil Procedure Rules**. Further, the Defendants/Applicants have stated that the suit herein abated as it was not stayed pending the appointment of legal representatives. It has been stated that the 1<sup>st</sup> and 3<sup>rd</sup> Defendants/Applicants were appointed legal representatives of **Thomas Wambura** (deceased) on the **3<sup>rd</sup> May, 2017** and thus the suit had abated as at **26<sup>th</sup> March, 2016**.

31. It is further the Defendants'/Applicants' contention that the Plaintiff/ Respondent should not be allowed to mislead the court that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants were granted leave to file a Defence but they did not. That indeed a Defence was filed on the **9<sup>th</sup> May, 2019** and therein at paragraph 4, they raised an objection that suit had abated since the cause of action as against **Thomas Wambura** (deceased) was *in personam* and did not survive his death.

32. It is not in contention that the original Defendant, **Thomas Wambura** died on the **27<sup>th</sup> March, 2015** when the suit was still ongoing. The law on abatement is found under **Order 24** of the **Civil Procedure Rules**. That is indicative that there are causes of actions that survive or continue even after death of a Plaintiff or Defendant.

33. The said **Order 24 Rule 4** provides for the procedure that parties ought to follow when one or a sole Defendant dies. The provision states as follows: -

*Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]*

*(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) 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 subrule (1), the suit shall abate as against the deceased defendant.*

34. The above Order provides that one can only be substituted by a legal representative if the cause of action survives him or her and that the said application for substitution should be made within one year.

35. I have considered the 1<sup>st</sup> - 3<sup>rd</sup> Defendants'/Applicants' contention that the suit had abated as at **26<sup>th</sup> March, 2016**. A look at the court's proceedings, it is evidently seen that the Plaintiff/Respondent was not aware of the death of the original 1<sup>st</sup> Defendant, **Thomas Wambura** until sometime in **2016**. On the **4<sup>th</sup> of August, 2016**, as per the court's proceedings, the Plaintiff/ Respondent who was acting in person protested to the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Applicants decision not to inform and the court at an opportune time of the death of the original 1<sup>st</sup> Defendant, **Thomas Wambura**. Further, a reading of **Order 24** shows that the same does not require that a suit be stayed pending the substitution.

36. It is unreasonable for the 1<sup>st</sup> - 3<sup>rd</sup> Defendant/Applicant to require the Plaintiff/Respondent to have known that the original 1<sup>st</sup> Defendant, **Thomas Wambura** died without them informing him and the court. Further, the fact that the suit abated as at **26<sup>th</sup> March, 2016** was not in contention when the suit was heard.

37. As for whether the suit needed to be stayed before the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Applicants became the legal representative of the deceased, I find that after the court became aware that the original 1<sup>st</sup> Defendant, **Thomas Wambura** had died, the court stood over the matter on several dates between **4<sup>th</sup> August, 2016** and **3<sup>rd</sup> May, 2017** as it awaited for an update on the confirmation of the Grant.

38. As regards leave to proceed with the suit after it had abated, I find it is strange that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants waited for the application dated **16<sup>th</sup> October, 2018** and filed on **24<sup>th</sup> October, 2018** for substitution and the suit therein to be heard. They did not raise an objection as to the fact that the Plaintiff/Respondent had not sought for leave to proceed with the suit. I wish to point out that litigants must always be mindful of their rights and ensure that they raise them at the opportune time since equity only aids the vigilant and not the indolent.

39. Further, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants claim that they filed a Defence on the **9<sup>th</sup> May, 2019** in which they stated that the suit had abated and the cause of action did not survive the original 1<sup>st</sup> Defendant, **Thomas Wambura**. I have perused the whole file and find that there is no defence filed by the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants on record as alleged.

40. However, the record shows that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants sought leave to respond to the **Amended Plaint** vide an application

filed on the 2<sup>nd</sup> May, 2019 through the firm of M/S John Bwire & Co. Advocates, which leave was granted and they were directed to file the same on or before the 7<sup>th</sup> May, 2019, but directions were never complied with nor the defence filed.

41. The court record also shows that on 16<sup>th</sup> May, 2019 after M/S John Bwire & Co. Advocates ceased acting for the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants and M/S Kiprop Cheruiyot & Co. Advocates came in as the Advocates on record who never filed any document in favour of the 1<sup>st</sup> - 3<sup>rd</sup> Defendant/ Applicants. It is thus improper for the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants to suggest that their ground on abatement stands whilst there is no such defence on record.

42. Further, I find that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants were duly heard so that if this court re-opens the suit herein, it will amount to sitting on Appeal on the Judgment as delivered on 22<sup>nd</sup> January, 2020 by Hon. Justice P.J. Otieno, presiding over of a court of concurrent jurisdiction.

**iii. Whether this court can set aside its orders issued on 22<sup>nd</sup> January, 2020 and be pleased to re-open the 1<sup>st</sup> -3<sup>rd</sup> Defendants/Applicants case.**

43. The 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants are seeking that this court sets aside the orders issued on 22<sup>nd</sup> January, 2020 and re-open their case as per the provisions of **Order 12 Rule 7** of the **Civil Procedure Rules** which provides that:-

**Order 12 – Hearing and Consequence of Non-attendance**

***“(7) Where under this order Judgment has been entered or the suit had been dismissed, the Court on application, may set aside or vary the Judgment or order upon such terms as may be just.”***

44. My reading of **Order 12** of the **Civil Procedure Rules** is that it deals with non-attendance of parties in a matter. My understanding of **Order 12 Rule 7** of the **Civil Procedure Rules** is that one can only approach the court to remedy a situation where a Judgment has been entered or a matter dismissed due to the non-attendance of a party.

45. In the instant case, the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants had representation of **M/S Kiprop Cheruiyot & Co. Advocates** who were present during the hearing of the suit. I have looked at the proceedings of the case herein and find that on the 10<sup>th</sup> October, 2019 when the suit was heard, both appointed Advocates for the Plaintiff and Defendants were present in court and the Defendants’ Advocates clearly stated that they did not intend to file any documents in the case.

46. I have also gone through the Judgment of Hon. Justice P.J. Otieno and find that the same was delivered to the parties after they were heard and therefore premising the application herein on the provisions of **Order 12 Rule 7** of the **Civil Procedure Rules**, is a misguided venture.

47. From the upshot of the above, I find that the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/ Applicants are intent on misleading this Court to re-open their case. If the 1<sup>st</sup> - 3<sup>rd</sup> Defendants/Applicants are dissatisfied with the Judgment delivered on the 22<sup>nd</sup> January, 2020, there are proper procedures and or channels set under the law to challenge such a Judgment.

48. In view of the above findings, the application dated 11<sup>th</sup> December, 2020 lacks merit and is hereby dismissed.

49. Costs to the Plaintiff/Respondent.

It is hereby so ordered.

**DATED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF AUGUST , 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**DELIVERED VIRTUALLY AT MOMBASA THIS 2<sup>ND</sup> DAY OF SEPTEMBER , 2021.**

**J. N. ONYIEGO**

**JUDGE**