



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 56 OF 2017**

FRANCIS KYENGO KALOKI .....1<sup>ST</sup> PLAINTIFF  
HARRISON MUTHOKA KALOKI .....2<sup>ND</sup> PLAINTIFF  
PHILOMENA KAMIA .....3<sup>RD</sup> PLAINTIFF  
FIDELIS NZOMO KALOKI .....4<sup>TH</sup> PLAINTIFF  
DAVID KALOKI .....5<sup>TH</sup> PLAINTIFF

**VERSUS**

PETER MAKENZIE KALOKI (*Deceased*).....1<sup>ST</sup> DEFENDANT  
HOMEWARD AGENCIES LTD.....2<sup>ND</sup> DEFENDANT

**AND**

CHRISTINE NZULA MAKENZIE.....1<sup>ST</sup> INTENDED CO-DEFENDANT  
TITUS NDILO KINGESI.....2<sup>ND</sup> INTENDED CO-DEFENDANT

**RULING**

1. In the amended Notice of Motion dated 17<sup>th</sup> June, 2019, the Plaintiffs have prayed for the following orders:

*a. That this Honourable Court be pleased to revive the Plaintiffs'/Applicants' suit.*

*b. That this Honourable Court be pleased to order the substitution of the 1<sup>st</sup> Defendant Peter Makenzie Kaloki who is now deceased with Christine Nzula Makenzie and Titus Ndilo Kingesi who are the legal representatives of the Estate of Peter Makenzie Kaloki as the new Co-Defendants in this suit.*

*c. That the costs of this Application be in the cause.*

2. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that pending the hearing and determination of the suit, the 1<sup>st</sup> Defendant died intestate and Christine Nzula Makenzie and Titus Ndilo petitioned to be administrators of his Estate in Machakos HC P&A 680/2013. According to the 1<sup>st</sup> Plaintiff, the said persons were appointed by the court to be the administrators of the 1<sup>st</sup> Defendant's Estate on 5<sup>th</sup> November, 2013.

3. The 1<sup>st</sup> Plaintiff gave an explanation why the Application for substitution that was filed in the year 2014 could not be heard expeditiously. The 1<sup>st</sup> Plaintiff deponed that since the period for substitution of the 1<sup>st</sup> Defendant has since lapsed, the court should enlarge the time within which the Application should be heard and determined.

4. The 2<sup>nd</sup> Defendant's Director deponed that the suit against the 1<sup>st</sup> Defendant abated in July, 2014; that as at now, there is no suit as against the 1<sup>st</sup> Defendant and that this court cannot reinstate a suit that does not exist.

5. In his submissions, the Plaintiffs' advocate stated that under Order 24 Rule 7(2) of the Civil Procedure Rules, the court has discretion to revive a suit that has abated; that the initial Application was not heard and determined within the time frame provided for by the law for reasons which were beyond the reach of the Applicants and that the court should be guided by a great sense of justice and fairness. The Respondents' counsel relied on the Replying Affidavit on record.

6. The record shows that on 25<sup>th</sup> February, 2014, the Plaintiffs filed an Application in which they sought for an order to substitute the 1<sup>st</sup> Defendant who died on 28<sup>th</sup> July, 2013 with Christine Nzula Makenzie and Titus Ndilo Kingesi. To support their Application, the Plaintiffs annexed on the Affidavit the Grant of Letters of Administration which shows the people he wanted to substitute the 1<sup>st</sup> Defendant, who had been appointed as administrators by the court on 20<sup>th</sup> December, 2013.

7. The Application for substitution dated 25<sup>th</sup> February, 2014 was filed within one (1) year of the death of the 1<sup>st</sup> Defendant. When the Application came up for hearing on 25<sup>th</sup> February, 2014, the same was certified as urgent. For one reason or another, the Application was never heard.

8. The suit having abated after the lapse of one (1) year from the date of the death of the 1<sup>st</sup> Defendant, the Plaintiffs amended the Notice of Motion of 25<sup>th</sup> February, 2014 seeking for an order reviving the suit and for substitution. The amended Application is what is before this court.

9. Order 24 Rule 7(2) of the Civil Procedure Rules gives the court the discretion to revive a suit that has abated. The Order reads as follows:

***“(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.”***

10. In the case of ***Soni vs. Mohan Dairy (1958) E.A 58***, it was held that for an Applicant to succeed in having the suit revived, he has to prove that there was sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period of one (1) year.

11. As I have stated above, the Plaintiffs filed the Application for substitution of the deceased 1<sup>st</sup> Defendant before the lapse of one (1) year. The Plaintiffs have explained that the Application could not be heard as the file was moved from the Environment and Land Court, Nairobi to Machakos, and before the file could reach in Machakos, it was misplaced.

12. Considering that the Application for substitution was filed timeously, the delay in having the Application prosecuted within one (1) year of the death of the 1<sup>st</sup> Defendant cannot be attributed to the Plaintiffs. The movement of the file from Nairobi to Machakos, and the disappearance of the file, contributed to the delay in prosecuting the matter, thus necessitating the filing of an amended Application.

13. The Plaintiffs have given sufficient reasons why this suit should be revived. The Plaintiffs have also annexed a copy of the Letters of Administration for the Estate of the deceased 1<sup>st</sup> Defendant. The administrators of the deceased are the persons named in the Application, and are the right people to substitute the deceased 1<sup>st</sup> Defendant.

14. For those reasons, I allow the amended Notice of Motion dated 17<sup>th</sup> June, 2019 as prayed.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 15<sup>TH</sup> DAY OF MAY, 2020.**

**O.A. ANGOTE**

**JUDGE**