



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO. 1661 OF 1985

TITUS KIRAGU.....PLAINTIFF/APPLICANT

-VERSUS -

JACKCKSOM MUGO MATHAI.....DEFENDANT/RESPONDENT

RULING

This suit was instituted in 1985. It was heard by Waki JA (as he then was) before he was elevated to the Court of Appeal. On 9th November 2004, he directed from the upper bench that albeit this suit was part heard before him, it could conveniently be finalized before the High Court under order 17 Rule 10 of the Civil Procedure Rules. He also ordered for the typing of proceedings and directed that the file be placed before any Judge of the High Court for final disposal as a matter of priority. To date, the suit is still pending disposal.

The record shows that Justice Mary Mugo reserved a date for judgment for 1st December 2006 on 20th September 2006. That judgment has never been delivered to date is not a new issue. In 2011, the Respondent filed an application seeking to have the suit herein dismissed for having abated in that the defendant Jackson Mugo Mathai had died on 24th March 2008 and no legal representative of his estate had been appointed to substitute him within the stipulated period of one year. The Deputy Registrar before whom the application was brought declined to grant the order and being dissatisfied with that order of refusal by the Deputy Registrar, the defendant filed an appeal (Reference to the Judge to review the orders of the Deputy Registrar. In a ruling rendered on 6th November 2013 Hon, Onyancha J allowed the appeal to the extent that the suit, with or without a judgment had abated on 23rd March 2009 and any judgment written or based on it in its abated status, shall be null and void.

On 21st November 2013, by an application under certificate of urgency dated 21st November 2013, the applicant Titus Kiragu filed a Notice of Motion under order 24, Rule 7(2), order 51 Rule 1 of the CPR and other enabling provisions of the Law seeking orders;

1. ***That this matter be certified as of utmost urgency and its service thereof be dispensed with in the first instance.***
2. ***That the Honourable court be pleased to revive the suit.***
3. ***That upon reviving this suit, the Honourable court be pleased to substitute the Defendant herein Jackson Mugo Mathias (now deceased) with Mary Wanjiku Mugo (the legal representative of the deceased).***
4. ***That the costs of this application be borne by the Defendant/Respondent.***

The application is predicated on the grounds that:-

1. **The suit filed way back in 1985.**
2. **The suit has been pending in court for the last 28 years.**
3. **Both parties closed their case in 2006 September.**
4. **That judgment was expected to be delivered after expiry of sixty days from September 2006.**
5. **That the deceased passed on in the year 2008 March.**
6. **That at that point in time, the court file was before the Presiding Judge awaiting judgment.**
7. **That in 2010, the respondent filed an application seeking to have the suit declared to have abated but the declaration was denied.**
8. **That the respondent appealed and it was through that appeal that this suit was declared to have abated.**
9. **That in the circumstances it was only fair and just that this application is allowed.**

The said application is supported by the affidavit sworn by Titus Kiragu, the plaintiff herein. His depositions mirror the grounds upon which the application is brought, emphasizing that the parties closed their respective cases and the file went before Justice Mugo for writing of judgment but the defendant predeceased the said judgment which has never been written. Further, that he believed that his then Advocates had filed the necessary application. That he is desirous of getting his fruits of judgment in the suit and that it would be unfair and unjust to have a suit in court for 28 years and go home on the ground that it abated, when the same was pending for judgment for a period of over 4 years and that no prejudice will be suffered if the application is allowed.

The application was opposed by the Respondent Mary Wanjiku Mugo the deceased defendant's legal representative who filed Notice of Preliminary Objection dated 4th February 2014 on the same day contending that;

1. ***The said application is bad in law, misconceived, and fatally incompetent and unsustainable.***
2. ***The court has no jurisdiction to hear and determine the said application.***
3. ***The court is functus officio with regard to the subject of the said application.***
4. ***The plaintiff is estopped by law from making the said application.***

The respondent also filed a sworn replying affidavit on 4th February 2014 deposing that the suit had abated in 2009 and the applicant was guilty of inordinate delay. Further, that the plaintiff had not come to court with clean hands, is guilty of perjury by his affidavit dated 24th November 2010 filed on 25th November 2010 hence he is unworthy of the court's favorable discretion. The respondent also contends that there is no reason advanced why the substitution of the defendant was not done within the period stipulated by law and why it was being done now.

It was further contended by the respondent that the applicant had appealed against the judgment of Onyancha J dated 6th November 2013 which declared the suit had abated hence he is estopped from making his present application.

The respondent further contended that the application is bad in law, incompetent, unmerited, unsustainable and an abuse of the court process and urged the court to dismiss it with costs.

The plaintiff applicant filed a supplementary affidavit sworn on 10th February 2014 contending that prior to the declaration that the suit had abated it had been heard on merit and was only pending judgment before Hon Justice Mary Mugo and that he waited patiently for judgment from 1st December 2006 at noon but on the said date, the Judge had been transferred to another station with several other transfers that took 4 years before Hon. Justice Mugo eventually disqualified herself from writing judgment on the grounds of intimidation by the defendant's counsel. He also deposed that he even complained to the Chief Justice on 26th November 2011 over the delayed judgment despite his advanced age of 82 years.

The Plaintiff also annexed several documents that provide the history of this old case. He further deposed

that to the best of his knowledge, his previous advocates Khaminwa & Khaminwa advocates filed an application for substitution of the defendant on 5th February 2009 as shown by their letter of 24th May 2010 recognized in the ruling of R.E.Ougo (Deputy Registrar) dated 11th September 2011. In the plaintiff's view, the failure to prosecute the application for substitution of the defendant was occasioned by the plaintiff's counsel, which mistake should not be visited upon him as he is not responsible for the delay.

The parties' advocates canvassed the application orally on 25th June 2015 following the directive of this court made on 16th June 2015 revisiting the order of 4th May 2015.

Miss Esther Mwangi representing the plaintiff/applicant submitted relying on the grounds on the face of the applications, the supporting and supplementary affidavits sworn by the applicant and the annexed documents. She also cited several authorities to support her proposition. In her submissions, Miss Mwangi vividly gave the history of this suit passionately emphasizing that justice will best be served if the application is allowed since the applicant has been diligently seeking justice from the courts since 1975 when the matter was transferred to Nairobi from Nakuru and he waited for judgment for 5 years without success. Counsel maintained that under order 24 Rule 7 of the Civil Procedure Rules, an abated suit can be revived as long as sufficient reason is shown, urging the court to revive the suit so that judgment can be written. She relied on several authorities including **ELC 155/2012 – Nakuru, C.A 67/2010- Nyeri, HCC 138/2004 – Kisii** and **HCCC 370/1994 – Nakuru** where the court revived suits that had abated upon sufficient grounds being shown so that justice is done and shown to be done.

Counsel for the plaintiff maintained that her client had not delayed as he believed his former counsel had filed an application for substitution of the defendant after instructing him to do so and that the application was not filed because the file was pending before Hon. Murugi J for judgment. She also submitted that this court has jurisdiction to hear the application. Further, it was submitted that this court is not functus officio since it is the first time such an application is coming up for hearing. It was further submitted that the plaintiff had shown sufficient reason for seeking to revive an abated suit, that the file was pending the writing and delivery of judgment for 5 years and that he had instructed his advocate to file an application for substitution only to establish later that no such application had been filed. She urged this court to grant the orders as prayed.

Miss Gatu Magana advocate representing the respondent submitted in opposition to the plaintiff's application, relying on the preliminary objection, replying affidavit and 3 authorities. She submitted that the applicant had not satisfied the provisions of order 24 Rule (7) of the Civil Procedure Rules to warrant grant of the orders sought and that the reasons for the delay given were not relevant. In the respondent's counsel's view, what was relevant was that the deceased died in 2008 and no good reason was advanced for failure to substitute him after 2008. She relied on **ELC 548/2014 Nyeri Rukwaro Vs. Kinyutho Ritho** where a suit abated by operation of law a year after the demise of the deceased and without him having been substituted and the court dismissed an application for revival of the suit which had abated for lack of sufficient reasons. In Miss Magana's view, the court could not have written a judgment after the demise of the defendant and that Onyancha J ruling only declared the obvious, as it did not abate the suit which had already abated by operation of the law on 24th March 2009 one year after the defendant's demise.

The respondent's counsel also took issue with the plaintiff for misleading the court that he had filed an application for substitution of the defendant on 5th February 2009 and that both the Deputy Registrar R.E Ougo and Onyancha J dealt with that issue of whether or not the application for substitution had been filed. Counsel for the respondent maintained that the delay in the delivery of judgment was before the death of judgment and was before the death of the defendant. She maintained that there was no proof of fault by the plaintiff's advocate and his age is no excuse for delay.

Miss Magana also urged the court to look at the merits of reviving an abated suit in that in this particular case, the plaintiff had a judgment in a Nakuru court in his favour and instead of executing that decree he filed a separate suit herein which suit, in her view is void *ab initio*. She submitted that the suit is

incompetent based on limitation and *Res Judicata* hence it would not serve any useful purpose to revive it. She maintained that there was no application filed in 2009 for substitution and that the plaintiff filed Notice of appeal against Hon. Justice Onyancha's ruling which appeal is still valid as Notice of Appeal has not been withdrawn. Miss Magana urged the court to dismiss the application by the plaintiff/applicant.

In a rejoinder, Miss Mwangi for the plaintiff/applicant submitted that the applicant did not know of the demise of the defendant and that it had not been shown that he knew that the defendant had died when he was pursuing his judgment with Mugo J as at 2011. Further, that as at 16th September 2011, when Justice Mugo was still pushing the file to be handled by another Judge, the plaintiff had no idea that the defendant had died.

According to Miss Mwangi, albeit a suit abates upon expiry of 1 year after the death of a party thereto, as at 2009 the applicant was within his right to know the judgment or outcome since the Deputy Registrar had declined to declare that the suit had abated. In addition, that even Hon. Onyancha J alluded to the fact that the applicant had been misled by the decision of the Deputy Registrar when she declined to abate the suit.

Further, Miss Mwangi submitted that there was no application filed in 2009 for substitution of the defendant but that the plaintiff's advocate had advised him that an application for substitution had been filed.

Miss Mwangi also urged the court not to consider the merits of the suit at this juncture since a suit cannot be determined through submissions even if it was barred by the Limitation statutes. She also submitted that under section 82 of the Court of Appeal Rules, one is not required to file a formal application to withdraw a Notice of Appeal. She urged the court to find that this application is meritorious and allow it with costs.

Determination

I have carefully considered all the material availed to this court in support of and against the application for revival of suit and for substitution of the deceased defendant dated 21st November 2013. I have also considered the able oral submissions by counsels for the parties, together with decided cases relied on.

The law applicable to the revival of suit and substitution of parties to suits is Order 24 of the Civil Procedure Rules which provides:

24 (1). The –death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or defendant than one of them dies, and where the cause of action survives or continues to the surviving plaintiff alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

4 (i) 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 sub rule (1) the suit shall abate

as against the deceased defendant.

7(i) 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 the deceased plaintiff or the trustees or official receiver in the case of a bankrupt plaintiff may apply for an order to revive the 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 the such dismissal upon such terms as to costs or otherwise as it thinks fit.

From the foregoing provisions, it is trite that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. As stated earlier, the suit herein was instituted in 1985. But as was submitted by counsel for the plaintiff, the suit emanates from another suit in Nakuru High Court vide HCC 177/1975 which was transferred to Nairobi HCC 3082/78. Judgment in that suit was entered by consent of the parties to the effect that the plaintiff herein pays the defendant therein Kshs. 184,113 and the defendant returns all the attached items to the plaintiff which included 240 cows and which the defendant refused to return to the plaintiff even after the plaintiff had paid him Kshs. 205,000 thereby prompting the plaintiff to lodge this suit. The present suit was heard and finalized and a date for judgment reserved for 2/12/2006 but Hon. Murugi J did not write the judgment and she finally recused herself from writing judgment after learning that the defence counsel had petitioned the Chief Justice to appoint a tribunal to facilitate her removal from being a Judge, upon which Hon. Muchelule J was handed the file. Regrettably, the latter was also transferred from Nairobi. By the time Justice Murugi Mugo was recusing herself from writing the judgment, which was in 2011, the suit herein had already abated as the defendant had died in March 2008 and no substitution of his legal representative had been made within one year of the death of the defendant. It therefore that as at 13/10/2010 when the plaintiff's counsel was purporting to takes a mention date so that the court could fix a date for judgment, the suit had abated. No valid judgment could have been written after the suit had abated, and therefore the plaintiff's efforts to get the judgment delivered were all futile attempts that are not recognized by any law. It also follows that the various application before the Deputy Registrar seeking a declaration that the suit had abated, which culminated in an appeal and a decision by Hon. Justice Onyancha were futile exercises for reason that the suit had by law abated in 2009 and it did not require any court order or declaration to abate the suit.

This application to revive the suit and seeking for substitution of the deceased defendant was made in November 2013, three years after the abatement of the suit, and after the decision of Hon. Onyancha. On 6th November 2013 that indeed the suit had abated by operation of law. The plaintiff contends that the application is merited because the suit abated when it was pending judgment, and that the file was in the custody of the Judge for writing the judgment after parties had closed their case way back in 2006. It is further contended that the plaintiff was in no way to blame for the abatement of the suit and that blame lies squarely with the former Justice Murugi Mugo who failed to write the judgment and pushed the file to another Judge and in the process, 5 years passed. The plaintiff urges this court not to let him go home without a remedy as it is the court that procrastinated in giving him justice.

The defendant's legal representative on the other hand contends that there has been inordinate delay in applying for revival of suit and substitution, that there is no sufficient cause given for the delay and that the plaintiff had come to court with unclean hands, lied that he had filed an application on 5th February 2009 for substitution for the defendant and that the suit which is sought to be revived has no merit as it is *res judicata Hcc 3082/78*.

Balancing out the above two rival positions, first, there is no dispute that the suit was heard *inter partes* and judgment reserved for 2nd December 2006 by Hon. Murugi J who nevertheless never wrote or delivered that judgment, whether within 42 days, 60 days, 365 days or even 455 days when the defendant died.

The suit herein was alive until the defendant's death on 24th March 2008, upon which an application to substitute the defendant should have been made within one year of the deceased's death and it was that failure to apply to substitute the defendant within the stipulated one year that the suit abated, necessitating this application.

In my humble view, this battle between the parties was created by the court and in particular, the Judge who between 2nd December 2006 and 24th March 2008 did not give any reasons why she could not deliver the judgment. Parties having closed their cases and a judgment date having been reserved for 2nd December 2006. Albeit the said Judge eventually recused herself from writing the judgment claiming intimidation from the defendant's counsel, that only came on 2nd February 2011 and on 16th February 2011 Hon Gicheru CJ (as he then was) nominated Muchelule J to preside over the hearing of the case which was about 5 years from the initial date that the judgment ought to have been delivered. By that time and as at 24th March 2009 the suit had already abated.

In my view, had judgment been delivered within 365 days, this suit could not have required substitution of the defendant. A delay of 465 days was unconscionable and unreasonable and occasioned delayed justice for the parties. Justice is indeed for both parties who have a legitimate expectation that justice shall be dispensed fairly and expeditiously without undue delay, as delayed justice is denied justice.

I find that by the time the suit abated the plaintiff had already suffered delayed justice. This is not to say that he should not have followed the laid down procedures for substitution and or revival of the suit without unreasonable delay. I note that after the suit had abated, the plaintiff was still requesting for the pending judgment to be delivered.

Albeit the plaintiff's counsel attempted to submit that the plaintiff was unaware of the demise of the defendant that contention can possibly not be true. By an annexure "MWM 1a" filed in court on 23rd March 2009 before the suit abated, by Khaminwa & Khaminwa advocates, he states in his address to the Deputy Registrar Nakuru Law Courts as follows:

"RE: HC SUCC CAUSE No. 284/2008

IN THE MATTER OF THE ESTATE OF JACKSON MUGO MATHAI

The above refers.

We represent Mr. Titus Kiragu the plaintiff in HCC No. 1661 of 1985 Nairobi against the late Jackson Mugo Mathai in which matter judgment is still pending. However, due to the unfortunate demise of the said Jackson Mugo Mathai, the defendant therein, the purpose of this letter is to request to be furnished with a copy of the grant of letters of administration in the Estate of the late Mr. Mugo issued herein to enable us prepare an application to substitute the late Mr. Mugo with the legal representative of his estate in HCC No. 1661 of 1985.

We undertake to pay your costs.

Yours faithfully

Khaminwa and Khaminwa."

Again, on 24th May 2010 the plaintiff's counsel wrote to the Respondent's counsel claiming that she was improperly on record for the defendant since Mindo and Company Advocates were still on record representing the defendant and stating;

"We are aware that the defendant has since died and that his wife Mary Wanjiku Mugo was granted letters of administration in Hcc Succ Cause no 284 of 2008 Nakuru. Needless to mention, we made an application for substitution herein in February 2009 and shall serve you

with copies of the same as soon as you are properly placed on record. In any event, provisions of order XX III are not one sided to the effect that only the plaintiff should apply for substitution in exclusion of your clients. In essence your client was also obligated to apply for the same in these proceedings....

Yours faithfully

Khaminwa & Khaminwa.”

This court also notes from the old record that vide an application dated 2nd December 2010, the respondent Mary Mugo had applied under order 23 Rule 3 of the old Civil Procedure Rules seeking to be brought into the suit in place of the defendant who had passed on but the plaintiff opposed that application and even made an oral application to have the supplementary affidavit filed on 2nd December 2010 by the respondent herein struck out for being scandalous and oppressive. It is in the same application that the proposed substitute simultaneously sought for a declaration that the suit against the deceased Defendant had abated. The plaintiff also sought to move to the Court of Appeal to challenge the decision of the Deputy Registrar in regard to the ruling made on the said affidavit. In his Ruling made on 8th June 2011 Muchelule J rejected the plaintiff's application for leave to appeal against the Deputy Registrar's decision on 16th December 2010 on the alleged oppressive affidavit. The Hon. Judge observed correctly after considering the history of the matter that this was an old case and the interlocutory applications and appeals had the effect of delaying the matter further. On 26th November 2011 the plaintiff personally wrote to the Chief Justice complaining about delayed justice in this case and seeking for a solution that would speedily conclude his long standing case after Hon. Muchelule J was transferred to Bungoma leaving the matter to be allocated to another Judge.

From the foregoing, it is clear that albeit delivery of judgment in this matter was delayed from 2nd December 2006 until the defendant died in March 2008, there is clear evidence that the plaintiff was alive to all the facts including of the demise of the defendant and he also knew what action was to follow after the demise of the defendant. Before the suit abated, his advocate had sought for copy of grant of letters of administration to enable him file an application for substitution of the defendant.

Albeit there are bitter exchanges between the parties' advocates as to whether there was any application filed on 5th February 2009 seeking for substitution and albeit Hon. Ougo and Hon. Onyancha J alluded to that issue in their Ruling & Judgment respectively concerning abatement of the suit, it is clear that the same plaintiff in this application denies that an application for substitution was made on his behalf and he further states that he was only informed by his advocate, that it had been filed, and that he had instructed his advocates to file so if they did not file it, they are to blame for such failure.

I am in total agreement with Hon. Onyancha J in his judgment of 6th November 2013 that the fact of filing the application on 5th February 2009 for substitution by the plaintiff, had it been the case, was in the right direction and had it been prosecuted and substitution made before 24th March, 2009, the suit could have been saved. Further, that the act of filing the application alone without more, was not enough and could not fulfill or satisfy the requirement of order XX III Rule 4 (2) now order 24 Rule 4(2) of the Civil Procedure Rules.

With the above position, the plaintiff cannot now turn around and allege that he did not know when the defendant died. He knew that the defendant had died well before the suit abated and it was therefore his duty to apply for substitution of the deceased defendant with his legal representative, and cannot be heard to complain that it is the pendency of the judgment that led to the abatement of the suit. It is the suit that abated while judgment was pending, yes, but not that it is the pending judgment that led to the abatement of the suit.

The plaintiff and his former counsel appear to have taken a casual outlook of the matter herein and instead of curing the problem by application of the law, they sought to engage the defendant's legal representative in a futile legal battle over whether or not she should be substituted and or whether or not

the suit should be declared to have abated.

In my view, since the defendant had no counterclaim in the suit, his legal representative had no obligation to apply to be substituted as a defendant to continue the suit which survived her deceased husband. I note that the Deputy Registrar and Hon. Justice Onyancha did not address themselves to the issue of substitution since the suit had abated anyway and as there was no application to revive the suit, substitution would, in any event, have served no purpose at all.

From the foregoing, I am of the most considered opinion that the plaintiff has not shown sufficient cause or reason why no application for substitution was made within one year of the demise of the deceased. In addition, the plaintiff has also not shown sufficient cause or reason which prevented him from applying for revival of the suit after its abatement on 24th March 2009, having had full knowledge of the deceased's demise before the suit abated. The averment that the application was filed timeously after the Judge declared the suit as having abated is frivolous since it is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.

In addition, the application/prayer for substitution of the deceased defendant should have been made within one year of the demise of the defendant and where it is not made and the suit abates, then such an application for substitution must be preceded by an application for leave to file an application for substitution out of time. This is so far reasons that under order 24 Rule 4 (3) an application to substitute must be made within one year of the death of a defendant. If therefore follows that where such application is not made within 1 year as stipulated, leading to abatement of suit, then in order for the court to cause the legal representative of the deceased defendant to be made a party to proceed with the suit, leave extending the time within which the legal representative proposed as substitute with the deceased defendant ought to have been substituted with the deceased defendant must be sought and obtained. I am fortified on this position by the Court of Appeal decision in **CA 34 of 2014 Joseph Gachuhi Muthanji Vs. Mary Wambui Njuguna** where the Court of Appeal allowed an appeal from a decision of the High Court Serгон J in **Nyeri ELC 614/2014** wherein he allowed an application for substitution of the 2nd plaintiff and the defendant stating;

“We take note that the 2nd plaintiff died on 5th October 1998, the respondent obtained letters of administration over the 2nd plaintiff's estate on 7th July 2004; the application for substitution and revival of the suit dated 28th February, 2011 was filed on 1st March, 2011. Perhaps, the delay of filing the application for substitution from the date of the 2nd plaintiff's death to 7th July 2004 could be attributed to the delay in obtaining letters of administration. However, we note that the respondent did not give any explanation as to the delay from 7th July, 2007 to 28th February, 2011 a period of 7 years. That being the case we find that there was no reasonable cause upon which the learned Judge (Serгон J) exercised his discretion in favour of the Respondent. We find that the learned Judge misdirected himself in this case by allowing the application for substitution. Further, the Respondent conceded that an application for extension of time to revive the abated suit had never in fact, been made. The upshot of the foregoing is that he appeal herein has merit and is hereby allowed.”

Indeed, the plaintiff in this case focused on the delay in the delivery of the judgment, and not the reasons for failure to apply for substitution of the defendant within the stipulated time, having had knowledge of the death of the defendant before expiry of one year. He did not have to wait until the suit abated in order for him to apply for its revival and blame the court or his counsel for the abatement. He needed to apply for substitution within one year since he would be the one to suffer the negative effect of the abatement of the suit.

Further, even after the suit abated without an application for substitution, he was required not only to apply for revival of the suit, but also apply for leave to apply for substitution of the deceased defendant out of time. This requirement is as per Order 24 Rule 3 of the Civil Procedure Rules.

I therefore find that the application for substitution of the defendant is incurably and fatally incompetent

and this court shall not assume wide discretion to grant orders that are not available to the plaintiff as that would be tantamount to arrogating itself the jurisdiction that it does not possess.

As to whether there is sufficient cause for the revival of the suit, as I have stated above, there is no sufficient cause or good cause shown to the satisfaction of this court to warrant the exercise of the court's discretion. The burden of proving that sufficient cause exists is placed on the applicant to show why the request should be granted or an action excused. Sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. It should not leave unexplained gaps in the sequence of events.

From the record, the plaintiff knew that the defendant had died that is why he instructed his advocate to apply for substitution and or that he was informed by his advocate that an application for substitution had been made vide an application dated 5th February 2009, a month before the abatement of suit.

There is no plausible, logical, rational, and reasonable or truthful explanation for the delay. The attempted explanation leaves doubt in the mind of this court that the plaintiff is telling the truth. In view of the clear record, thereby ousting the discretion of the court from being exercised in his favour; and as it would have been an error of law if judgment would have been delivered against a deceased defendant.

On the issue that it is pointless to revive a suit that has no merit as the suit is res judicata the Nakuru case which was decided on merit in 1975 which was not executed and instead the plaintiff filed a separate suit for recovery of animals or their value, the plaintiff's response was that what was before the court is not the main suit but revival of the abated suit and substitution of a deceased defendant. Further, that merits of this suit cannot be determined through submissions.

In my view, it would be inappropriate at this stage to delve into the merits of the abated suit, which was nonetheless heard on merit and what had remained was delivery of judgment before it abated.

What I find relevant at this stage is that there is no suit capable of being declared res judicata. The suit abated and as no sufficient cause has been shown to warrant a revival thereof, to find that the abated suit is res judicata is tantamount to declaring that there is a suit and then delve into examining the pleadings, judgment in the Nakuru case, which particular material were not sufficiently placed before this court.

In addition, since the record shows that shields J pronounced himself on whether or not the suit herein was time barred, that issue could only be revisited if the suit had not abated and in the submission on the competency of the suit before judgment.

For the foregoing reasons, I decline to grant the orders seeking revival of the abated suit and or substitution of the defendant and dismiss the application.

On costs, I order that each party bear their own costs of the application and of the abated suit as the proposed substitute had nonetheless not become a party to the suit.

Dated, signed and delivered in open court at Nairobi this 15th day of October 2015.

R.E. ABURILI

JUDGE