



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 629 OF 2011**

**PAULINE NJERI THANDE.....PLAINTIFF**

**VERSUS**

**SOLOMON KIRAGU THANDE.....1<sup>ST</sup> DEFENDANT**

**ELIZABETH WAMBUI MUIGAI.....2<sup>ND</sup> DEFENDANT**

**MATHEW NGUGI MURIGI.....3<sup>RD</sup> DEFENDANT**

**JOTHAM KAHARA NDIANGUI.....4<sup>TH</sup> DEFENDANT**

**IRENE WAIRIMU GICHUNGO.....5<sup>TH</sup> DEFENDANT**

**WALTER NGUGI MWANIKI.....6<sup>TH</sup> DEFENDANT**

**FAITH NKATHA MAKEBU KIUNGA.....7<sup>TH</sup> DEFENDANT**

**ANTHONY WAWERU NDERU.....8<sup>TH</sup> DEFENDANT**

**BENSON NGUGI NJERI.....9<sup>TH</sup> DEFENDANT**

**EVAH NYAMBURA NGUGI.....10<sup>TH</sup> DEFENDANT**

**SIMON NG'ANG'A.....11<sup>TH</sup> DEFENDANT**

**PERIS WAHINYA.....12<sup>TH</sup> DEFENDANT**

**MAINA ISAAC MURAGE.....13<sup>TH</sup> DEFENDANT**

**SYLVIA ANYANGO OHAGA.....14<sup>TH</sup> DEFENDANT**

**JAMES MWANGI KARIUKI.....15<sup>TH</sup> DEFENDANT**

**SARAH WAIRIMU.....16<sup>TH</sup> DEFENDANT**

**GEORGE KYALO MACHENZIE.....17<sup>TH</sup> DEFENDANT**

**DOMINIC NJENGA KIRUTHI.....18<sup>TH</sup> DEFENDANT**

**GERALD MBUGUA NGIGI.....19<sup>TH</sup> DEFENDANT**

**ZAKAYO KURIA.....20<sup>TH</sup> DEFENDANT**

JANE MAINA.....21<sup>ST</sup> DEFENDANT  
GRACE WAHU IKINYA.....22<sup>ND</sup> DEFENDANT  
JOHN NDUNGU.....23<sup>RD</sup> DEFENDANT  
GATHIGIA GATHERU.....24<sup>TH</sup> DEFENDANT  
MUTHONI NYOIKE.....25<sup>TH</sup> DEFENDANT

AND

JEREMIAH MATOKE NYANGWARA &

21 OTHERS.....INTERESTED PARTIES

### RULING

What is before me is a Notice of Motion application dated 16<sup>th</sup> May, 2019 brought by the interested parties seeking an order that this suit be dismissed for want of prosecution and in the alternative on the ground that the same has abated. The application that was brought under Order 12 Rule 2 (sic) of the Civil Procedure Rules and Sections 3A and 1B of the Civil Procedure Act, Chapter 21 Laws of Kenya was supported by the affidavit of the 1<sup>st</sup> interested party, Jeremiah Matoke Nyangwara. The application was brought on the grounds that the 1<sup>st</sup> defendant Solomon Kiragu Thande died on 19<sup>th</sup> October, 2013 and that the plaintiff and one, Kariuki Peter Thande were appointed as the administrators of his estate on 30<sup>th</sup> May, 2017. The interested parties contended that the plaintiff had refused to substitute the deceased 1<sup>st</sup> defendant so that she could proceed with the suit. The interested parties averred that the plaintiff's suit as against the 1<sup>st</sup> defendant had abated and that it was only fair and just that the suit be dismissed.

The application came up for hearing on 8<sup>th</sup> October, 2020 when Mr. Babu appeared for the interested parties/applicants while Mr. Mwangi appeared for the 2<sup>nd</sup> to 25<sup>th</sup> defendants. Mr. Babu urged the court to allow the application since the same was unopposed. Mr. Mwangi supported the application by the interested parties. He argued that the plaintiff had lost interest in the suit.

I have considered the interested parties' application together with the affidavit filed in support thereof. I am of the view that the application was brought under the wrong provisions of the Civil Procedure Rules. An application for dismissal of a suit for want of prosecution should have been brought under Order 17 Rule 2 of the Civil Procedure Rules while the alternative prayer seeking the dismissal of the suit on the ground that the same had abated should have been brought under Order 24 Rule 4 of the Civil Procedure Rules. On the merit of the application, I am of the view that there is no basis for the dismissal of the suit for want of prosecution. The interested parties' application was filed on 18<sup>th</sup> May, 2019. As at the time the application was filed, the suit had come up before the court for the last time on 11<sup>th</sup> March, 2019 for the parties to inform the court of the progress of the out of court settlement negotiations that they were engaged in. As at the time the application before the court was filed, it was barely two (2) months from the time the suit was last in court. Under order 17 Rule 2 of the Civil Procedure Rules, an application for the dismissal of a suit for want of prosecution can only be brought where a plaintiff has not taken action in a suit for at least one (1) year. As I have shown above, that is not the case in the matter before me. Due to the foregoing, the interested parties' application was filed prematurely to the extent that it sought the dismissal of the suit for want of prosecution.

With regard to the limb of the application that sought the dismissal of the suit on account of abatement following the death of the 1<sup>st</sup> defendant, I find merit in the same but only as concerns the plaintiff's claim as against the 1<sup>st</sup> defendant. It is not disputed that the 1<sup>st</sup> defendant died on 19<sup>th</sup> October, 2013 and that no steps have been taken to substitute him in this suit by his legal representatives. Under Order 24 Rule 4(3) of the Civil Procedure Rules, the plaintiff's suit as against the 1<sup>st</sup> defendant abated by operation of law after the expiry of one year from the date of his death. The plaintiff's suit as against the other defendants has however not abated.

Due to the foregoing, the interested parties' application dated 16<sup>th</sup> May, 2019 succeeds in part. I decline to dismiss the suit for want of prosecution. I however order that the plaintiff's suit as against the 1<sup>st</sup> defendant has abated. The costs of the application shall be in the cause.

**Dated and Delivered at Nairobi this 19<sup>th</sup> Day of November 2020**

**S. OKONG'O**

**JUDGE**

**Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:**

N/A for the Plaintiff

Ms. Mwangi h/b for Mr. Ngugi for the 2<sup>nd</sup> to 25<sup>th</sup> Defendants

Mr. Ochieng h/b for Mr. Babu for the Interested Parties

