

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KISII
ELCC NO. 41 OF 2013

ELKANA MOGIRE MARUCHA PLAINTIFF

VERSUS

RICHARD ONCHARI MARUCHA 1ST DEFENDANT

ALFRED MARUCHA NYAMARI 2ND DEFENDANT

AND

JULIUS ONSERIO MOGIRE APPLICANT

RULING

(Application to substitute deceased plaintiff after abatement of suit; no application made for revival; good practice would entail filing an application for enlargement of time to substitute together with an application for revival of the abated suit; need to provide good reason to substitute after abatement; factors that the court may consider to determine whether good reason has been provided; in the case at hand, court persuaded that the nature of the dispute is a good reason to allow for substitution after abatement; application allowed)

1. The application before me is that dated 22 May 2025 filed by one Julius Onserio Mogire (the applicant). The applicant is seeking the following orders :

(1) That the Honourable Court be pleased to enlarge time for abatement of this suit as against the late ELKANA MOGIRE MARUCHA, the plaintiff herein.

(2) That JULIUS ONSERIO MOGIRE, the applicant and Legal Representative of the estate of the late ELKANA MOGIRE MARUCHA, be substituted in place of the deceased plaintiff.

(3) That consequent to prayer (2) herein above being granted, the applicant be deemed as the plaintiff and suing on behalf of the estate of the

deceased plaintiff herein with view to proceeding with the hearing and determination of this matter.

(4) The costs of this application be provided for.

2. The application is opposed.
3. To put matters into perspective, this suit was filed by Elkana Mogire Marucha (the deceased) on 4 February 2013 through a plaint. In the plaint the deceased contended to be the registered proprietor of the land parcel Nyaribari Chabe/B/B/Boburia/1707. He wanted the defendants evicted from the suit land. The matter actually proceeded for hearing *ex parte*, as no appearance nor defence had been filed, culminating in a judgment delivered by Okong'o J on 11 July 2014 which judgment was in favour of the deceased. That judgment however remained unexecuted until an application was filed by the 2nd defendant on 20 November 2020 to set aside the judgment. The 2nd defendant stated that he was never served, and that he only came to know of the judgment when a burial dispute ensued over the suit land which led to filing of the suit Kisii CMCC No. 89 of 2020. It was said that this burial dispute arose when the plaintiff wanted to bury a brother of his, Francis Nyangoto Marucha, on the suit land. The application was allowed and the 2nd defendant filed his defence. More or less, his position was that his late father was a brother to the plaintiff and that the plaintiff held title to the suit land on behalf of his father. He further urged that what the plaintiff ought to own was the land parcel Nyaribari Chache/B/B/Boburia/1709 and this is where the late Francis Nyangoto ought to be buried. There was indeed filed an application within this suit to stop the burial of the said Francis Nyangoto on the suit land and an order was issued on 13 July 2021 to stop that burial. It is not very clear to me whether the said Francis Nyangoto has ever been buried.

4. The plaintiff died on 2 August 2021 before the case could be heard. In a twist of fate, his death also sparked a dispute over where he is to be buried. This led to an application being filed against 7 persons (who I believe to be children of the deceased plaintiff) to stop them from interring the deceased plaintiff on the suit land. It was also sought that they be joined as interested parties. Among those cited as intended interested parties is the applicant herein. The application was heard and dismissed through a ruling dated 31 August 2021. Nothing much transpired in the matter and I marked it as abated on 23 February 2023. Again nothing happened in the matter until an application dated 12 September 2024 was filed by one Hellen Kerubo Mogire, who mentioned that she is the legal representative of the deceased and wished to substitute him. She had a grant of letters of administration issued on 7 May 2024 in the suit Kisii CMCC Succession Cause No. E314 of 2023. That application was however withdrawn and the subject application filed.
5. In his supporting affidavit, the applicant avers that he obtained letters of administration intestate on 20 March 2025 after replacing his mother as the administrator of the estate of the plaintiff. He avers that the delay in seeking substitution was occasioned by disagreement between the family members on who was to be administrator, owing to the poor health of their mother, accompanied by delay in the area chief issuing the letter of identification. He has mentioned the fact that his mother had earlier filed an application for substitution which was withdrawn owing to her ill health.
6. The application is opposed through grounds of opposition. It is pointed out that it is 4 years since the plaintiff died and yet substitution needs to be done within one year of death. It is urged that the suit has abated and there is no application for revival of the abated suit.

7. I directed the application to be urged through written submissions and I have taken note of the submissions filed.

8. The operative law is Order 24 Rule 3 which provides as follows :

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff

(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

9. From the above it will be seen that where a sole plaintiff dies, as it is in this case, an application for substitution needs to be made within one year of death or else the suit will abate. There is however a proviso giving court discretion to extend the time where good reason is demonstrated. There is also Rule 7 of Order 24, which provides for revival of abated suits. It is drawn as follows :

7. Effect of abatement or dismissal

(1) 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 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. First it will be seen that where a suit abates, no fresh suit may be brought over the same cause of action. Secondly, it will be seen that the court has discretion to revive an abated suit, if the applicant proves that he was prevented by any sufficient cause from continuing the suit. Order 24 Rule 7 is of course a corollary to the proviso to extend time to file an application for substitution out of time provided in Order 24 Rule 3.
11. The application before me has inter alia cited Order 24 Rule 3 but has not cited Order 24 Rule 7. In his submissions, Mr. Sagwe, learned counsel for the 2nd defendant/respondent, urged that the application ought to be dismissed because it does not call for revival of the abated suit. He referred me to the case of *Julius Maina Kabiru vs Kabiru Kang'ara & Another (Muranga ELC, Miscellaneous Application No. 6 of 2019) (2022) eKLR*. In that case, the deceased plaintiff died on 25 February 2020. An application for substitution was filed on 27 August 2021 which was certainly beyond the one year provided for substitution and there was no application for revival of suit. Gacheru J, dismissed the application holding that the applicant cannot substitute in a suit that has abated without revival. Counsel also cited the decision of Kibunja J, in the case of *Nassor Mohamed (Deceased) vs Mohamed Said Abdalla & Others, Mombasa ELC No. 194 of 2014 (2024) KEELC 79 (KLR) (24 January 2024) (ruling)*. In it the good judge delved into the debate regarding revival of an abated suit and substitution and made reference to the Court of Appeal decision in the case of *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Limited & 2 Others (2017) KLR*. I observe that Mr. Bosire Gichana, learned counsel for the applicant also cited the same case i.e that of *Rebecca Mijide (supra)* in support of this application. He also submitted that his client has demonstrated sufficient cause to have the application allowed.

12. In the *Rebecca Mijide* case, the court of appeal more or less held that time to apply for substitution must first be sought to be enlarged and after the legal representative is joined, the focus would now shift to him to show cause why the abated suit should be revived. The Court pronounced itself as follows :

“After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived.”

13. In other words, what the Court of Appeal was saying is that one first seeks an order to enlarge time for substitution, and if this is granted, then the applicant can apply for revival of the action. The court of appeal further held that :

“in our view there is nothing objectionable to making an omnibus application for all the three prayers.”

14. On my part, I would think that a well drafted application, where substitution has not been made within one year, would incorporate the prayer to substitute out of time, an order for revival of the abated suit, and an order for amendment of the pleadings to reflect the substitution. One could of course seek only to enlarge time for substitution, in which event, if it is allowed, then a second application for revival and amendment may subsequently be made, but this would mean that two applications are filed yet all prayers are capable of being incorporated into one. The best practice in my opinion would be to file a single application for all the requisite prayers.

15. As I observed earlier, the application before me mentions under Order 24 Rule 3 and not Order 24 Rule 7 for revival of the abated suit. Indeed, there is no prayer for revival of the abated suit, but only a prayer for extension of time for substitution. I will therefore consider this purely as an application for leave to substitute the deceased plaintiff out of time and nothing more.

There is nothing wrong in such application as may be discerned from a reading of the *Rebecca Mijide* decision. If I am persuaded to allow the application for substitution out of time, then a second application for revival of the abated suit will have to be made and considered on its merits. However, if I am not inclined to allow this application then the suit will remain abated.

16. An application for extension of time to file substitution should never be considered a routine application that must be allowed. This is because the suit has already abated, and the other party is fully entitled to consider the suit as one that is a thing of the past. That is why the law requires that one demonstrates 'good reason' so as to have the time extended. An assessment of 'good reason' is one that is to be determined on a case by case basis depending on the surrounding circumstances of the matter. On my part, I would think that the following factors are important for consideration :

- (i) The time taken to file the application after abatement of the suit.
- (ii) The reasons why the application for substitution was not filed within one year of death.
- (iii) The nature of the dispute before court.
- (iv) The level of prejudice that may be suffered to the other party if extension of time to substitute is allowed.

17. Starting with the time taken, the law requires that an application be filed within one year of death. The time taken to file the application following the abatement of the suit is an important consideration because with effluxion of time, the other party may very well form the assumption that the estate of the deceased is no longer interested in the suit and has abandoned it. There is a parallel right on his part to consider that the estate of the deceased is not keen to pursue the matter given the demise of the substantive party. In addition, the longer the time, the more the likelihood that witnesses will no longer be available or their memories will have faded. In essence, with the

passage of time, the greater the likelihood of prejudice to the surviving party especially where that party is a defendant.

18. The reasons why the application was not filed within one year of death is of course critical. Indeed, the law requires that 'good reason' be provided and that would include the very reason for the delay. If the applicant simply went to sleep while the opportunity to apply was ever present, then the court needs to take that into consideration.

19. The nature of the dispute is also important. Sometimes you have a dispute that truly cries out for determination. In other cases, with the death of the principal party, though the cause of action survives his death, the suit is not one that will affect other people, so that life can in fact move on without continuing the dispute, and it is not very necessary to drag the parties back to litigation. There are however some cases that go beyond the rights of the parties or truly demand that a decision be made for purposes of closure. In such cases, if there is no recall of the case, the dispute continues to linger over the surviving party and other persons, and has potential to disrupt peace or the social fabric. There are some cases which can only be brought to closure by a court decision and in such situations, the court should endeavour to go out of its way to preserve the same and not shut the door on the parties.

20. The level of prejudice to the other party also needs assessment. The court ought to hear from the other party on the amount of prejudice that he stands to suffer if substitution is allowed out of time. Depending on his pronouncement, the court can assess it in order to determine whether it would be just, given those reasons, to extend the time for substitution.

21. In our case, the plaintiff died on 2 August 2021. I see that the beneficiaries of the estate of the deceased plaintiff filed a substantive succession matter in 2023. I am not very sure of the date when the cause was filed but it was

certainly filed in 2023, for it bears the number Kisii CMCC Succession Cause No. E314 of 2023. There was a lapse of about two or so years to the filing of this succession cause. The applicant has mentioned that the area Chief delayed in providing the letter of introduction to file the succession cause and that there were some family wrangles. I have not seen a replying affidavit to contest this position and on this point I will give the applicant benefit of doubt.

22. I see that once the grant was obtained on 9 April 2024, in the name of Hellen Mogire, there was an application filed by her to substitute the deceased plaintiff, which is the application 12 September 2024. There was a change of administrator, which gave rise to a new grant issued on 25 May 2025, and as a consequence the application dated 12 September 2024 was withdrawn and this application filed.

23. There was certainly some lapse of time there but the respondent has not pointed out to any prejudice that he stands to suffer because of this lapse of time.

24. But what strikes me most is the nature of the dispute before court. The deceased plaintiff filed suit for eviction of the 2nd defendant/respondent and the 1st defendant on the basis that he is the registered proprietor of the suit land. The respondent's defence is that the deceased plaintiff fraudulently obtained title or the deceased held it in trust. In his defence, he wanted the title of the deceased plaintiff cancelled. The deceased plaintiff was uncle to the respondent and the parties herein are therefore close relatives. From the description of the land parcel where the deceased plaintiff is said to have lived and the suit land, they must have been living in very close proximity. It will be recalled that there was mention of a brother of the deceased plaintiff and uncle to the respondent not having been buried because of the dispute over the ownership of the suit land. It is not very clear to me if he has been

buried or if the presence of this case is still holding back his burial. There was also a burial dispute when the plaintiff died. If I am to decline substitution, this dispute over who is supposed to own the suit land will continue haunting the parties and has potential to keep on rearing its head any time there is an issue within the family. They may never have any closure if the case is not determined. Given that the respondent in his defence called for the cancellation of the title of the deceased plaintiff, I would think that it is also in his best interest that the suit continues, so that if the suit is decided in his favour, he can get title to the suit land. This is one of those disputes that you do not want to leave undecided as the question of who should own the suit land will remain hanging above the heads of the parties like the proverbial sword of Damocles and even to their successors. If for nothing else, I would be inclined to allow for substitution out of time because of the nature of the case.

25. From the above, it will be seen that I am persuaded to allow this application for substitution out of time. I hereby allow it. For the avoidance of doubt, I have only allowed the application for substitution as there is no prayer for revival of suit. Given the reasoning by the court of appeal in the *Rebecca Mijide* case, the applicant will need to file an application for revival of the abated suit for consideration.

26. The last issue is the costs of this application. In my discretion, I make no orders as to costs.

27. Orders accordingly.

DATED AND DELIVERED THIS 7 DAY OF OCTOBER 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in presence of :

Ms. Bosire for the applicant

Mr. Sagwe for the 2nd defendant/respondent

Court Assistant – Michael Oyuko