

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 57 OF 2018

MAULID MOHAMED OGONA.....
PLAINTIFF

VERSUS
JIKOMI SAID MARO.....
DEFENDANT

RULING

1. By a notice of motion dated 21.05.2025 filed pursuant to *Sections 1A, 1B and 3A of the Civil Procedure Act (Cap 21), Order 24 Rule 3 and 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law*, the plaintiff's advocate sought the following orders;
 - a) *That the suit has abated by virtue of Order 24 Rule 3 of the Civil Procedure Rules as the plaintiff is now deceased and the cause has not survived him thus there is no continuity.*
 - b) *That the costs of this application be provided for.*
2. The application was based upon the grounds set out on the face of the motion and the contents of the affidavit of the plaintiff's advocate, Jane Akinyi Onyango, sworn on even

date. The gist of the application was that the plaintiff's cause of action did not survive his death hence the suit had abated under Order 24 of the Civil Procedure Rules. Annexed to the affidavit was a copy of a death certificate which showed that the plaintiff died on 24.04.2025.

3. The defendant filed a replying affidavit sworn on 23.06.2025 in opposition to the application. The main grounds were that the suit had not abated since once year had not lapsed since the death of the plaintiff and that she (the defendant) had a counter-claim which she was desirous of prosecuting.
4. When the application was listed for directions it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their submissions. The record shows that the defendant's submissions were filed on 02.10.2025 whereas the plaintiff's submissions were not on record by the time of preparation of the ruling.
5. The court has perused the notice of motion dated 21.05.2025, the defendant's replying affidavit in response

thereto as well as the submissions on record. The court is of the view that the main issue for determination is whether or not the suit has abated. The ancillary issue is the question of costs.

6. Order 24 Rule 3 of the Civil Procedure Rules stipulates as follows;

(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.

7. It is evident from the application and supporting affidavit that the plaintiff died on 24.04.2025. It is also evident from a reading of rule 3 (2) that a suit does not abate until one year

has lapsed upon the death of a plaintiff without an application for substitution being made. The court is thus of the view that the instant application was filed prematurely before the window of 1 year had expired.

8. Although the plaintiff's advocate contented in the application that the plaintiff's cause of action did not survive his death, the advocate did not cite any statutory or precedent authority to that effect. Survival of causes of action is primarily governed by the Land Reform Act (Cap 26). Section 2(1) of the said Act stipulates as follows;

Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate:

Provided that this subsection shall not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of adultery.

9. A perusal of the plaint reveals that the plaintiff had sued the defendant to vindicate his property rights over the suit

property. It was a claim seeking an eviction order against the defendant and a permanent injunction. It had nothing to do with defamation, seduction of a spouse, or damages on account of adultery. The court is thus of the view that the plaintiff's cause of action survived him.

10. The court is further of the view that even if the plaintiff or his estate does not wish to pursue the suit, the defendant has a counterclaim which is in the nature of a cross-suit. The defendant is legally at liberty to pursue her counter-claim as long as she complies with the provisions of Order 24 of the Civil Procedure Rules on substitution of the deceased plaintiff and the joinder of his personnel representative.
11. The upshot of the foregoing is that the court finds no merit in the notice of motion dated 21.05.2025 for a declaration that the suit has abated. As a result, the said motion is hereby dismissed. Costs of the application shall be costs in the cause.

Orders accordingly.

12. **Ruling dated** and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this **9th day of October 2025**.

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Y. M. ANGIMA

JUDGE

In the presence

Court assistant Gillian

Ms. Mubasu for the plaintiff

Mrs. Chesaro for the defendant