



Njenga (Suing as the Administrator of the Estate of Faith Njeri Njogu – Deceased) v Ototo & another (Civil Suit E014 of 2023) [2024] KEMC 147 (KLR) (10 September 2024) (Ruling)

Neutral citation: [2024] KEMC 147 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
CIVIL SUIT E014 OF 2023
PA NDEGE, SPM
SEPTEMBER 10, 2024**

BETWEEN

**MICHAEL NJOGU NJENGA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF FAITH NJERI NJOGU
– DECEASED**

AND

**JOSEPH ABUGA OTOTO 1ST DEFENDANT
JOSEPH KAGO 2ND DEFENDANT**

RULING

1. By a Notice of Motion Application dated 10th July 2024 brought under Order 24 Rules 1 and 2, and Order 8 Rule 3 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Rules*, the Applicant herein Michael Njogu Njenga, has sought to substitute the Plaintiff/ Applicant who is now deceased, with Lucy Njeri Ngugi, being the personal representative of the Estate of Michael Njogu Njenga - Deceased.
2. The application is based on the 7 ground on the face of its and the annexed Supporting Affidavit of Naftaly Rubua Ngure, the counsel on record for the plaintiff. It is averred that plaintiff herein died on 08/05/2023. That his wife has since obtained grant of letters of administration Ad Litem. That the suit herein is a straightforward one and the Defendants/ Respondents herein will not suffer any prejudice at all if the suit is revived, heard and disposed of on merit. That this honorable court has unfettered discretion to order such substitution where justice of the case so demands.
3. There was no response to the application. Be that as it may, it is not that every such unopposed application must be allowed as a matter of cause. As a court of law, I still have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any ex parte or unopposed application, the court will as a matter of cause grant the sought orders. As held by the Supreme Court



of Kenya in *Gideon S. Koncellah v Julius L. Sunkuli And 2 Others*[2018] eKLR, it behoves the court to be satisfied that prima facie, with no objection, the application is meritorious and prayers may be granted.

4. In the Application, the Applicant has sought to be substituted with Michael Njogu Njenga (Deceased) who was her husband. The Applicant has produced in evidence letters of Administration confirming that she has authority as the administrator of the estate of the Deceased plaintiff (Michael Njogu Njenga). Order 24 of the *Civil Procedure Rules, 2010* comprehensively outlines what ought to happen if a party or parties to a suit dies; Order 24, rule 3 provides for procedure in case of death of one of several Plaintiffs or of sole Plaintiff t 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 sub rule (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.

5. Further Order 24, rule 7 provides for effect of abatement or dismissal of the suit as follows;

7. (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.

6. The Applicant has sought for substitution but it is not in doubt that by the time the Application of substitution was being sought, the suit had already abated as one year had already lapsed from the date of the Deceased's demise and therefore in accordance to the provisions of Order 24 Rule 7 (2), the Applicant ought to first have sought for the revival of the suit since the suit had abated before seeking to be substituted. The provisions of law provide that a revival must first be sought and prove to the Court that sufficient cause has been shown before a substitution is done.

7. An order for substitution without a revival would be a nullity in law and what ought to have happened was to seek a revival and substitution in the same Application. See the case of *Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd*[2018] eKLR, where the court held thus;

I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them



being heard on the merits. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea.

8. The Applicant has only sought for substitution without revival of the suit and from the above holding of the Court, it is not in doubt that the Applicant cannot be substituted in a suit that has abated without revival. Consequently, the Court finds and holds that the Application is not merited and the same is struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 10TH DAY OF SEPTEMBER, 2024.

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Plaintiff's counsel: Kamau

Defendant's counsel: N/A

Applicant:

1st Respondent:

2nd Respondent:

Kamau: Praying for a copy of the ruling

CT: Certified copy of the ruling be supplied to the Counsel upon payment of any requisite fee.

