



**Njuguna v Kimani & another (Environment and Land Appeal  
E148 of 2024) [2025] KEELC 8196 (KLR) (25 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 8196 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E148 OF 2024**

**JG KEMEI, J**

**NOVEMBER 25, 2025**

**BETWEEN**

**JOSPAT NJOROGE NJUGUNA ..... APPELLANT**

**AND**

**ISMAEL JUMA KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING CO LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal against the Ruling of Hon. Lucy Njora  
SPM in MCELC NO E377 OF 2021 delivered on 23/4/24)*

**JUDGMENT**

1. On 12 10 21, the Plaintiff (the appellant herein) sued the Defendants (the respondents herein) for inter alia; a declaration that the Plaintiff is the sole legal owner of Nbi Block1136 10003 (the suit land herein); declaratory orders that the 1<sup>st</sup> Defendant's claim to the suit land is illegal; and an order that the Land Registrar rectifies the register and all records to reflect the Plaintiff's ownership proprietorship of the suit land.
2. Vide a notice of motion dated the 13 4 2022, Counsel for the 1<sup>st</sup> Respondent sought orders that the 1<sup>st</sup> Defendant, who died on 4 1 22, be substituted by Adinnah Ismael Kimani as the legal representative of the estate of Ismail Juma Kimani, deceased vide the grant of letters of Administration ad litem issued on 17 3 2022.
3. It was the case of the 1st Defendant that, although the 1st Defendant had passed away, the cause of action, being the recovery of land, survived the 1st Defendant's demise. Therefore, the plea for substitution was made to allow the legal representative to defend the suit, who had obtained letters of grant of administration ad litem issued two months later on 17 3 2022.



4. According to the proceedings on record, it would appear that the 1<sup>st</sup> Defendant failed to prosecute the said application. While the application of 13 4 22 remained pending, the 1<sup>st</sup> Defendant moved the court vide the notice of motion dated 15 6 23, seeking orders declaring that the suit had abated against the 1<sup>st</sup> Defendant.
5. The said application was based on the grounds that: the 1st Defendant died on 4 1 2022, and more than one year had lapsed, and consequently and by operation of law, the suit against the 1st Defendant abated on 4 1 23. Additionally, the application for substitution was filed but has never been heard, and no substitution can be made before reviving the suit.
6. The application was supported by the supporting affidavit of Veronica Wambui Muiruri, Counsel for the 1st Defendant, who reiterated the contents on the face of the application and added that she informed the court via a letter dated 16 3 22 of the demise of the 1st Defendant. She stated that on 7 2 2022, the Plaintiff filed a request for judgement against the 1st Defendant, a month after his demise. That upon obtaining letters of grant of administration ad litem on 17 3 22, the 1st Defendant filed an application seeking orders for substitution on 13 4 22, which application was not heard. That more than one year had lapsed after the death of the 1st Defendant and no substitution had been made; hence, the suit against the 1st Defendant had abated on 4 1 2023. The court was therefore urged to declare the suit abated for the reasons above.
7. While opposing the application dated 15 6 23, as referenced in the Replying affidavit sworn on 7 7 23, Josphat Njoroge Njuguna, the deponent, stated that he purchased shares in the 2nd Defendant's company and was issued with a certificate of membership.
8. He further explained that he was allocated plot No. C1609 and a bonus plot of C1620 in 1992, located in Map C, measuring a quarter of an acre.
9. Subsequently, he was shown the beacons by the company's surveyor, his name was entered into the register, and he was advised to await the processing of the titles. In the meantime, he took possession of the two adjoining parcels of land and commenced fencing the lands with barbed wire.
10. Following the completion of the survey, the identification of the two plots, and the issuance of a confirmation form, the 2nd Defendant proceeded to register the two plots in the register under his name for the purpose of processing the titles thereto.
11. However, trouble began in 2020 when it was discovered that the 2nd Defendant had altered its register of members regarding the property allocation and illegally substituted his name with that of the 1st Defendant without his consent, leading to the filing of the suit dated 12 10 21.
12. That following the death of the 1st Defendant, despite informing the court of his demise and the filing of the application to substitute via an application dated 13 4 22, the application remains unprosecuted and no substitution was made in the suit.
13. The deponent stated that the abatement of the suit against the 1st Defendant means that no new suit can be initiated based on the same cause of action. He explained that since an application for substitution filed by the legal representative of the 1st Defendant was still pending in court, he could not have sought for the substitution of the 1st Defendant. He faulted the legal representative of the 1st Defendant for filing an application for substitution, neglecting to pursue it for over a year, and then using that same failure to claim abatement of the suit, thereby completely barring the Plaintiff's claim. Additionally, he stated that although he had commenced formal proof proceedings against the 2nd Defendant, no date could be set due to the ongoing substitution application.



14. That he stands to suffer great injustice if the suit against the 1st Defendant abates through no fault of his, and he urged the court to decline granting the orders of abatement as sought.
15. Upon determining the application, the court delivered its ruling on 23 4 24, noting that the suit had abated by operation of law.
16. Aggrieved by the decision of the court, the Plaintiff, now appellant, appealed on the grounds that;
  - a. The Learned Magistrate erred in law and fact by failing to take into account the evidence on record.
  - b. The Learned Magistrate erred in law and fact by failing to take into account the submissions of the appellant.
  - c. The Learned Magistrate erred in law and fact by failing to consider the prejudice occasioned to the appellant by the abatement of the suit, which leads to the loss of their property, which was fraudulently acquired by the 1<sup>st</sup> Respondent.
  - d. The Learned Magistrate erred in law and fact by failing to take into account the diligent efforts made by the appellant in prosecuting the case against the 1st Respondent, who filed the application for substitution and failed to ensure that the application was heard and the 12th month occasioned was of no fault of the Plaintiff.
17. The appeal was admitted and, by consent of the parties, was canvassed through written submissions. Both parties complied. The Appellant's submissions are dated 16 5 2025, whereas the 1st Respondent's submissions are dated 18 8 2025. Contrary to the court's directions, the 2nd Respondent failed to comply and, by the time the judgement was written, had not filed any submissions.

### **The Appellant's submissions**

18. The Appellant cites the provisions of Order 24 Rule 4 (1) and (3) as well as Rule 7 (1) of the Civil Procedure Rules. The Appellant argues that the 1st Respondent filed an application dated 13 4 2024 for the substitution of the deceased Defendant. The Appellant therefore identifies the main issue for determination as whether the learned Magistrate erred in declaring that the suit against the 1st Respondent had abated.
19. The Appellant asserts that the 1st Respondent died on 4 1 2022, and the court was informed of his death on 16 3 2023. The Legal Representative of the 1st Respondent then applied for and was granted Letters of grant of Administration ad litem, with which he sought to substitute the Defendant via an application dated 13 4 2023. He contends that the conduct of the legal representatives and their actions aimed to continue the prosecution of the suit by applying for the substitution of the deceased 1st Defendant. He further argues that this application prevented the Appellant from filing a similar application for substitution, as doing so would amount to multiplicity or duplicity of proceedings.
20. The Appellant further faults the 1st Respondent for seeking an equitable remedy, despite not coming to court with clean hands. They had failed to ensure their application for substitution was prosecuted. He asserts that he made considerable efforts to have the application for substitution listed for hearing and has indeed worked diligently to advance his case against the Respondents in an attempt to achieve a fair and just resolution of the dispute. He urges the court not to hold him accountable for the failures of the 1st Respondent's legal representatives.



## **The 1<sup>st</sup> Respondent's submissions**

21. The 1st Respondent submits that the issue for determination is whether the Learned Magistrate erred in granting orders for abatement of the suit during the pendency of the application for substitution dated 13 4 2023. The 1st Respondent cites the provisions of Order 24 Rule 4 (4) of the Civil Procedure Rules.
22. It is submitted that the 1st Respondent died on 4 1 2022, and the 1st Respondent's counsel informed the court via a letter dated 16 3 2022, together with the Appellant's Advocate, and sought to substitute the deceased with a Legal Representative and file a Defence thereon. It is argued that the Appellant, via the letter dated 7 2 2022, filed a request for judgment against the 1st Respondent, a month after his death. That their application for substitution, dated 13 4 2022, was not heard as the matter had been set down for formal proof hearing.
23. The 1<sup>st</sup> Respondent's counsel argues that the suit against the 1st Respondent abated on 4 1 2023 by operation of law. Therefore, no substitution could be made before the suit was revived. Since the Appellant failed to seek prosecution of the application for substitution or revival of the abated suit, the Learned Magistrate did not err in granting orders for the abatement of the suit. They urge the court to uphold the Ruling of the trial magistrate and declare that the suit abated against the 1st Respondent. They also request costs of the appeal.

## **Analysis and determination**

24. I have considered the appeal, the record of appeal, and the rival submissions. I am of the considered view that the only issue to be determined is whether the appeal is merited.
25. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, it was held that an appellate court should not readily interfere with the exercise of judicial discretion by the court appealed from unless: the judge misdirected himself in law; or the judge misapprehended the facts; or the judge took into account considerations which he should not have taken into account; or that he failed to consider considerations he should have considered; or that his decision, albeit a discretionary one, was plainly wrong.
26. In determining this appeal, the court shall determine whether the trial court exercised its discretion judiciously by declaring the suit against the 1st Respondent abated.
27. The legal framework on substitution of a deceased plaintiff is contained in Order 24 Rules 1, 2, and 3 of the Civil Procedure Rules which provide as follows:
  - “ 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 defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the defendants dies 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.
  - 3.



- (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.”

28. Order 24 rule 4 of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

1. 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.

29. It is evident from the said provisions that a suit abates by operation of law when no substitution is made within one year of the death of a Defendant. Order 24 Rule 7 contains a framework on revival of an abated suit. It provides as follows:

- “(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.”

30. The Court of Appeal in *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others* [2015] eKLR held as follows;

“There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the court may in its discretion for “good reason”



determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the Plaintiff’s legal representative to the suit. (Emphasis mine) Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action. Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff”.

31. It is common ground that the 1st Respondent died on 4 1 2022, and the 1st Respondent's counsel informed the court via a letter dated 16 3 2022, together with the Appellant's Advocate. Counsel sought to substitute the deceased with a Legal Representative and file a Defence accordingly. However, at that time, the Appellant had requested the entry of default judgment via the letter dated 7 2 2022 against the 1st Respondent. This request was clearly made a month after his death.
32. Subsequently, the 1st Respondent’s counsel submitted an application for substitution dated 13 4 2022. The application was not heard as the matter had been scheduled for a formal proof hearing.
33. It is submitted that the 1st Respondent’s counsel contends that the suit against the 1st Respondent abated on 4 1 2023 by operation of law. According to the provisions of Order 24 of the *akn ke act 1924 3 Civil Procedure Act*, upon the death of a defendant and on application, the court has the discretion to substitute the deceased defendant. If no application is made after one year, the suit abates.
34. In this case, it is clear that the 1st Respondent’s legal representative sought for orders of substitution through the application dated 13 4 2022. It is apparent that the application for substitution was submitted only three months after the death of the 1st Respondent. The suit had not abated at the time the application was made.
35. Order 12 (7) of the Civil Procedure Rules allows a plaintiff to substitute a deceased defendant. However, given the history of the case as outlined in the preceding paragraphs, I agree with the Appellant that it would have created a duplicity of proceedings if he had also filed an application for substitution. The Appellant had approached the court for the entry of a default judgment against the 1st Respondent via the Letter dated 7 2 2022. He was only notified of the 1st Respondent’s demise through the Letter dated 16 3 2022. Clearly, the Appellant was intent on pursuing his suit. It would be unreasonable to fault him for not filing an application for substitution when the Legal Representatives had already applied to the court for those very orders.
36. It therefore follows that the suit abated during the pendency of the application for substitution. The court only confirmed the abatement, but the suit automatically abated on 4 1 2024. In the case of *Titus Kiragu vs. Jackson Mugo Mathai* (2015) eKLR, it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”



37. The Appellant has a right to have his claim determined on its merits. Article 159(2)(d) mandates courts to administer justice without undue regard to procedural technicalities. Article 159(2)(d) states: -
- “ 159 (2) (d) In exercising judicial authority, the courts and tribunals shall be guided by the ...  
(d) justice shall be administered without undue regard to procedural technicalities.”
38. Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit.
39. The Court of Appeal in the case of the Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011 stated that:
- “Sufficient cause or good cause in law means: the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused. (See Blacks Law Dictionary, 9<sup>th</sup> Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”
40. In the case of Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR, the court held 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.
41. In the instant appeal, the suit before the 1st Respondent abated in the pendency of an application for substitution that was brought by the 1<sup>st</sup> respondent . The Appellant has demonstrated good faith in his efforts to prosecute the case
42. In my view, unless revived, the effects of abatement of a suit are far reaching as provided under rule (1) of Order 24. That Rule states that:
- “Where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action.”
43. I have reviewed the Plaintiff, and the claim of the plaintiff relates to land. In my view, dismissing the appeal would result in denying the 1st Defendant access to justice through no fault of their own. Likewise, the 1<sup>st</sup> respondent should not benefit from their failure to proceed with the application for substitution. The legal principle that no one should profit from their misconduct applies in this case.
44. I therefore exercise my discretion and direct that the suit against the 1st Respondent be revived and substitution with his Legal Representative be undertaken accordingly. Since the legal representative of his estate obtained grant of letters ad litem on 17 3 2022, it would be unjust to burden the Appellant with the need to file another application for the revival of the suit. Doing so would cause unnecessary delays in the trial court's determination of the matter on its merits.
45. This application when contextualized in terms of the provisions of Articles 48, 50 and 159 of Kenya's Constitution and Sections 1A and 1B of the *akn ke act 1924 3 Civil Procedure Act*, I find that the ends of justice and the unique circumstances of this case justify the exercise of my discretion to allow



automatic substitution revival of the suit in line with the provisions of Order 24 Rule 3 of the Civil Procedure Rules.

46. Final orders for disposal

In the end the appeal is allowed in the following terms;

- a. The 1st Defendant Respondent shall be substituted with his Legal Representative(s) as per the grant of letters ad litem issued on 17 3 2022.
- b. The suit as against the 1st Respondent that abated on 4 1 2023 is hereby revived.
- c. The Appellant is awarded costs of this appeal.

47. Orders accordingly

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER 2025 VIA MICROSOFT TEAMS.**

**J. G. KEMEI**

**JUDGE**

Delivered Online in the presence of:

Mr Kamaara for the Appellant

Ms Mururi for the Respondents

CA- Ms Yvette Njoroge

