

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

HIGH COURT CIVIL SUIT NO. 42 OF 1995

RACHAEL

WAMBUI

GATHUTHI.....APPLICANT

VERSUS

ABEL WAHOME WAITHANWA.....1ST

DEFENDANT

FLORENCE WANJIKU MUBIA.....2ND

DEFENDANT

RULING

1. Before this Court is the Notice Motion dated **6th June 2024** by which the Applicant **RACHAEL WAMBUI GATHUTHI** seeks the following orders:-

“1. THAT the order issued on 21st August 2007 dismissing

the suit be set aside and the suit revived.

2. THAT the Applicant be substituted in place of the

Deceased Plaintiff.

3. THAT costs abide the outcome of the case.”

2. The application which was premised upon **Order 24 Rule 7**

(2) Civil

Procedure Rules and Sections 1A, 1B and 3A of the Civil

Procedure Act was supported by the affidavit of even date sworn by

the Applicant.

3. The 2nd Defendant **FLORENCE WANJIKU MUBIA** opposed the application through her Replying Affidavit dated **4th July 2025**.

The matter was canvassed by way of written submissions.

4. I have considered the application before this Court, the reply filed thereto

as well as the submissions on record.

5. This is a matter in which the plaintiff **MARGARET WAMBUI** (now

Deceased) filed a suit way back on **10th February 1995**. In that suit the plaintiff claimed a proprietary interest in the parcel of land known as **THEGENGE/KARIA/1095** (hereinafter the '**Suit Land**')

6. The original plaintiff passed away on **3rd July 2003 eight (8)** years after

filing her suit. The current plaintiff **Rachael Wangui Gathuthi** was on **9th August 2021** issued with Grant of letters Ad Litem in respect of the estate of the Plaintiff. She then filed application seeking to revive the suit.

7. The application was opposed.

8. I have perused the record of the proceedings in this matter. It seems

that after filing the suit the original plaintiff went to sleep and took no

further steps to prosecute the suit.

9. Following the demise of the original plaintiff it took the current plaintiff a

period of **eighteen (18)** full years before she bothered to apply for a Grant ad litem.

10. More pertinently on **28th February 1995** Counsel for the plaintiff

applied to withdraw the suit. The application was allowed and the court

marked the suit as withdrawn with costs to the Respondent.

11. Thereafter on **21st August 2007** the suit was dismissed for want of

prosecution. The question that would arise therefore is what is the

effect of withdrawal of a suit? Can a suit once marked as withdrawn

be revived.

12. **Order 24** of the **Civil Procedure Rules 2010** deals with Abatement

of suits **Order 24 Rule 3** provides that

“3(1) Where one or more of two 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 the 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.”

13. By operation of **Order 24 Rule 3(2)** this suit automatically abated one

(1) year **after** the demise of the original plaintiff. No application was

made to extend the time for substitution of the plaintiff. As stated earlier

the current plaintiff only came into the matter **eighteen (18) years**

after the demise of the original plaintiff. The position then is that this

suit abated in **July 2024** by operation of law **one (1) year** after the death of the original plaintiff.

14. **Order 25** of the **Civil Procedure Rules 2010** provides for **“Withdrawal Discontinuance and Adjustment of Suits”**

Order

25 Rule (1) provides that:-

“At any time before setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdrawal any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

15. From the above it would appear that the reinstatement of a suit after

withdrawal would lie at the discretion of the Judge. A party is not

entitled as of right to have a suit reinstated after withdrawal.

16. In the case of **SHAH -vs- MBOGO & Another 19676. A 116**
the

Court stated that

“The discretion is intended so as to be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice.”

17. This matter was filed by the Original Plaintiff in **February 1995**. No

action was taken thereafter. The original plaintiff died in **July 2003**. It was not until **eighteen (18)** years after the demise of the Original plaintiff that the current plaintiff obtained a Grant ad litem. In short this matter has been inactive before the courts for over **twenty five (25)** years!! This inaction cannot be taken to have been due to error, inadvertence or excusable mistake. This level of inordinate

delay can only have been due to indolence and a lack of interest in the suit.

18. The Applicant states that she was unable to pursue the suit due to lack

of funds. I note that the Applicant is represented by Counsel. He ought to have advised her that she was at liberty to apply to sue as a pauper if she was indigent.

19. In **PRISCILLA NYAMBURA NJUE -VS- GOVHEM MIDDLE EAST**

LTT EAST AFRICA KENYA BUREAU OF STANDARDS

(Interested

Party) [2021] eKLR the Court held that:-

“Withdrawal of a suit is itself its end. The right of a Plaintiff to withdraw his suit is not a divine right but a right expressly conferred upon him by Order 25 and no right is similarly conferred upon him to revoke or rescind the withdrawal..... Put differently there is no provision conferring the right to revoke the withdrawal and there is no jurisdiction for saying

that the right to withdraw includes in itself a right to revoke the withdrawal..... The withdrawal took effect immediately the court permitted it and as observed earlier order 25 has no provision permitting reinstatement of a suit once the withdrawal has taken effect.” [Own emphasis]

20. The withdrawal of this suit took effect on **28th February 1995**, when

the court marked the suit as withdrawn. No persuasive reason has been

advanced to allow this application to reinstate the suit. I find no merit

in this application. The same is dismissed and costs will be borne by the Applicant.

Dated in Nyeri this 28th day of November 2025.

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**MAUREEN A. ODERO
JUDGE**

ORIGINAL