

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. E013 OF 2023

SALAT SOMO AHMED:.....PLAINTIFF

VERSUS

JADAVJI GOVIND VARSANI:.....1ST DEFENDANT

PREMBAI JADAVJI VARSANI:.....2ND DEFENDANT

**THE CHIEF LAND REGISTRAR:.....3RD
DEFENDANT**

**THE REGISTRAR OF LANDS, MAVOKO:.....4TH
DEFENDANT**

VIPUL JADAVJI GOVIND VARSANI:.....5TH DEFENDANT

RULING

The application is dated 25th April 2025 and is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 1 Rule 3 and Rule 10, Order 8 Rule 3(1) and Rule 7 of the Civil Procedure Rules, 2022 seeking the following orders;

1. THAT the court be and is hereby pleased to order that Jadavji Govind Varsani and Prembai Jadavji Varsani, sued as the 1st Defendant and 2nd Defendant respectively be substituted by Vipul Jadavji Govind Varsani as their legal representative.

2. THAT the Plaintiff be and is hereby ordered to amend the Plaint to substitute the 1st and 2nd Defendants within fourteen (14) days of making the order.
3. THAT the costs of this application be provided for.

It is based on the following grounds that this suit was instituted by the Plaintiff on 21st February 2023.. That the 1st Defendant died on 29th January 2017 way before the Plaintiff filed this suit in 2023.. That the 2nd Defendant died on 1st August 2024 while the suit was pending.. That the Applicant herein was issued with the Grant of Probate in respect of the Estate of the 1st Defendant on the 14th January 2025. that the Applicant was also issued with the Grant of Probate in respect of the Estate of the 2nd Defendant on 14th January 2025. that it is necessary to substitute the deceased 1st and 2nd Defendant with Vipul Jadavji Govind Varsani as their legal representative. That the Estates of the 1st and 2nd Defendants stands to suffer substantial loss and prejudice if this application is not allowed. That no prejudice will be occasioned to the Plaintiff herein if the application is allowed as the instant suit and Counter-claim have not been heard.

The Respondent states that the application is an abuse of the court process. That the record shows active participation of the Defendants well after their purported deaths including filing pleadings and responses in the matter. That these inconsistencies expose mischievous deceptive and nature of the present application which is intended to sanitize procedural improprieties, conceal

material facts and obstruct the fair progression of the matter. That the suit against the Defendants has abated.

I have considered the application and the submissions therein. Order 24 Rule 4 (1) of the Civil Procedure Rules provides as follows:

“Where one of two 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” Emphasis added

A legal representative is defined in Section 2 of the Civil Procedure Act as:

“..... a person who in law represents the Estate of a deceased person and where a party sues or is sued in a representative character, the person on whom the Estate devolves on the death of the party so suing or sued”.

Section 2 of the Law of Succession Act on the other hand defines a *personal representative* as:

“..... the executor or administrator of a deceased person”.

An *administrator* is defined in the same provision as:

“..... a person to whom a grant of letters of administration has been made under this Act”

It is trite that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues. This suit being in respect to land rights, the cause of action survived the death of the 1st and 2nd Defendants. On the issue of the suit having abated is provided for under Order 24 Rule 4(1) – (3);

“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 subrule (1), the suit shall abate as against the deceased Defendant.”

The application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In *Kenya Farmers’ Cooperative Union Ltd. vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) Eklr* the Court held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.

It is however not lost on the Applicant that a party can apply for leave under Order 24 Rule 7(2) to revive a suit which has abated and if he proves to the Court that he was prevented by any sufficient cause from continuing the suit, the Court may revive the suit upon such terms as to costs or otherwise as it thinks fit. There must be a revival of suit after abatement before substitution. An Order for substitution without revival would be a nullity in law and of no effect. See Kenya Farmers' Cooperative Union Ltd above.

I have perused the court file and find that this suit was instituted by the Plaintiff on 21st February 2023 as per documentary evidence produced by the Applicant. 1st Defendant died on 29th January 2017 way before the Plaintiff filed this suit in 2023. The 2nd Defendant died on 1st August 2024 while the suit was pending. Documentary evidence shows that the Applicant herein was issued with the Grant of Probate in respect of the Estate of the 1st Defendant on the 14th January 2025. that the Applicant was also issued with the Grant of Probate in respect of the Estate of the 2nd Defendant on 14th January 2025. the Applicant now seeks to substitute the deceased 1st and 2nd Defendant with Vipul Jadavji Govind Varsani as their legal representative.

It is the finding of the Court that the suit against the 1st Defendant abated on the 29th January 2017 long before this suit was filed and no orders to revive it have been sought and obtained. The suit against the 1st Defendant is a nullity and does not exist. Resultantly, I have no jurisdiction to grant any orders respecting

the substitution of the proposed 1st Defendant. The 2nd Defendant died on 1st August 2024 while the suit was pending. Documentary evidence shows that the Applicant herein was issued with the Grant of Probate in respect of the Estate the 2nd Defendant on 14th January 2025. this application was filed on the 25th April 2025 within one year and hence the suit as against the 2nd Defendant had not abated. I find that the application succeeds in part and I grant the following orders;

1. That Prembai Jadavji Varsani, sued as the 2nd Defendant be substituted by Vipul Jadavji Govind Varsani as his legal representative.
2. That the costs of this application be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY
OF DECEMBER 2025.**

**N.A. MATHEKA
JUDGE**