

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC NO. E272 OF 2017

STEPHEN MWANGI KARUKU 1ST APPELLANT/APPLICANT
MARY WANJIRU KARUKU 2ND APPELLANT/ APPLICANT
JAMES NJENGA KARUKU 3RD APPELLANT/ APPLICANT

VERSUS

JOHN MWANGI KIRAGU INTENDED
RESPONDENT

RULING

Introduction

1. This court has been moved by a Notice of Motion application dated 21st July 2025 in which the applicant seeks the following Orders:
 1. *Spent...*
 2. *THAT this Honourable Court be pleased to reinstate Appeal Thika ELC No. 272 of 2017 so that it is fully heard and determined.*
 3. *THAT this Honourable Court be pleased to substitute Julius Kiragu Githuka (deceased) with John Mwangi Kiragu as the Respondent herein*
 4. *THAT pending the hearing and determination of this Application, this Honourable Court be pleased to issue status quo orders.*
 5. *THAT pending the hearing and determination of this Appeal, this Honourable Court be pleased to issue status quo orders.*

6. *THAT the costs of this application be in the cause.*

2. The application is premised on the grounds on the face of it and the supporting affidavit of Stephen Mwangi Karuku sworn on even date.
3. The applicants state that they instituted the suit against their uncle, Julius Kiragu Githutha (deceased), whom they assert had unlawfully entered and occupied their parcel of land known as KIAMBAA/KANUNGA/1038 (hereinafter the 'suit property').
4. The Applicants recount that following the death of Julius Kiragu Githutha (deceased) in 2016, his estate delayed the initiation of succession proceedings and failed to secure the appointment of an administrator, a lapse that resulted in the abatement of the suit.
5. The Applicants further assert that they made repeated efforts to prompt the appointment of an administrator for the estate of the deceased and, with persistence, ultimately succeeded in having the intended respondent obtain a grant of letters of administration.
6. The Applicants maintain that the prolonged delay in securing letters of administration for the estate of Julisu Kiragu Githutha (deceased) is the very circumstance that caused the suit to abate. They argue that this delay was not of their making and that, despite their sustained efforts, the estate remained without an administrator for several years.
7. In the Applicants' view, the absence of a duly appointed representative rendered it impossible to prosecute the matter to conclusion.

8. The Applicants now beseech the Court to reinstate the suit so that the dispute may be heard and resolved on its merits. They urge that a determination grounded in substance rather than procedural accident would best serve the ends of justice and permit a final and conclusive adjudication of the rights at issue.
9. In response, the intended respondent lodged a preliminary objection dated 4th August 2025, contending that the suit had abated.
10. The intended respondent also filed a replying affidavit sworn on even date in further support of that position and prayed that the application be dismissed with costs.
11. Both the application and the preliminary objection were canvassed by way of written submissions.

Issues for Determination

12. Having examined the application together with the annexures, the preliminary objection and the replying affidavit in opposition and the relevant authorities, the issues for determination are:
 - i. **Whether the preliminary objection has merit**
 - ii. **Whether the applicants have established sufficient cause to merit the reinstatement of their suit.**

Analysis and Determination

13. The Court turns first to the preliminary objection raised by the intended respondent. The immediate question is whether the objection, as framed,

discloses any merit capable of disposing of the suit at this stage.

14. The Court is guided by the controlling principles on the nature and scope of such objections. The Supreme Court reaffirmed the classic formulation set out in ***Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696** in ***Hassan Ali Joho and Another v Suleiman Said Shahbal and Two Others*, Petition 10 of 2013, [2014] eKLR** and pronounced itself as follows:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors (1969) EA 696:

‘a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion’.”

15. In essence, the preliminary objection before the Court must demonstrate that it turns solely on a point of law and that its resolution is not entangled in disputed factual terrain.
16. Order 24 of the Civil Procedure Rules provides the statutory framework for abatement. Under Rule 4, where a sole defendant

dies and no substitution is effected within one year, the suit shall abate as against the deceased unless the Court, upon application, directs otherwise. The provision presupposes that a party capable of substitution exists and that no external impediment prevents the timely filing of such an application. Abatement, therefore, is neither automatic nor divorced from the factual context in which the death occurs.

17. The intended respondent argues that the one year prescribed in Order 24 elapsed without substitution and that the suit abated by operation of law. Yet that argument must be reconciled with the applicants' position that, for years following the death of the original respondent, no administrator existed who could lawfully be brought on record. If accurate, this contention raises a material question as to whether substitution was possible at all within the period contemplated by the Rules.
18. The nature of the inquiry is therefore more complex than the respondent suggests. Determining whether abatement occurred requires the Court to evaluate the chronology of events, the status of the deceased's estate during the relevant period, and the efforts made by the applicants to facilitate the initiation of succession proceedings. These issues are plainly factual. They require examination rather than assumption, and they do not lend themselves to resolution on a preliminary objection framed as a pure point of law.

19. Once the objection demands factual verification, it falls outside the strict parameters set out in *Mukisa Biscuit* and reaffirmed by the Supreme Court in *Joho*.
20. A preliminary objection must stand or fall on the face of the pleadings without recourse to evidentiary interrogation. Where disputed facts lie at its core, it loses its character as a dispositive legal question.
21. In these circumstances, the objection anchored on Order 24 cannot be sustained. It rests upon contested factual ground and requires the Court to undertake an evaluative exercise inconsistent with the narrow function of a preliminary objection.
22. Accordingly, the preliminary objection is dismissed.
23. With the preliminary objection resolved, the Court now turns to the consequential question of whether the suit ought to be reinstated to allow the substantive issues to be heard and determined.
24. Order 24 of the Civil Procedure Rules governs abatement, substitution, and revival of suits following death or incapacity of parties. In particular, under Rule 4 of Order 24 states:

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

25. In the present matter, it is undisputed that Julius Kiragu Githutha (deceased), the original defendant, passed away in 2016 and that his estate remained without a duly appointed administrator for several years.
26. The Applicants assert that despite repeated efforts, they were unable to secure substitution until recently, at which point the intended respondent obtained letters of administration.
27. The Applicants submit made concerted efforts to ensure that the estate of Julisu Kiragu Githutha (deceased), appointed an administrator and have annexed sufficient evidence in the supporting affidavit of Stephen Mwangi Karuku (marked as **'SMK1-6'**) to demonstrate these efforts.
28. An examination of the supporting affidavit of Stephen Mwangi Karuku, together with the annexed documents, lends credence to the applicants' assertion that they acted diligently to prompt the succession process. The evidence substantiates their claim that the delay in appointing a legal representative was entirely beyond their

control, and that they were precluded from effecting substitution within the one-year period contemplated by Order 24 Rule 4(3).

29. Recent decisions provide guidance on the exercise of discretion under Order 24 Rule 4. In ***Kwenja & 2 Others v Kwenja, EL Case 7 of 2019 [2023] KEELC 22543***, the Court revived a suit that had abated following the death of the sole defendant, holding that sufficient cause existed where procedural and external impediments prevented substitution within the one-year period.
30. Similarly, in ***Karangi v Kibetu (Deceased) & Another; Mukami [2023] KEELC 21393***, the Court exercised its discretion to extend the period for substitution and revive the suit, emphasizing that the interests of justice favour adjudication on the merits rather than foreclosing a party's rights due to circumstances beyond their control.
31. Applying these principles, the Court is satisfied that the applicants have demonstrated sufficient cause for the delay.
32. The abatement was occasioned by the absence of a legally recognised administrator, and the subsequent appointment of the intended respondent as legal representative rectifies that procedural impediment.
33. In the exercise of the Court's discretion and in furtherance of justice, the Court finds it appropriate to revive the suit to ensure that the dispute over the suit property is resolved substantively ensuring that procedural misfortune does not preclude adjudication on the merits.

34. The upshot of the foregoing is that the application dated 21st July 2025 is allowed with costs.

It is so Ordered.

Dated, Signed and Delivered, at Thika this 11th day of December 2025

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J. M. ONYANGO
JUDGE

In the presence of:

1. Ms Masaba for Mr Rono for the Applicants
2. No appearance

Court Assistant: Hinga