



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC NO. 228 OF 2015**

**PAUL WAMBUGU NDIRANGU .....**

**PLAINTIFF**

**-VERSUS-**

**1. ANDREW PETER NGIRICI**

**2. PURITY WANGU KURIA**

**3. GIRIAMA CENTRAL ASSOCIATES & PROPERTY  
MANAGEMENT LIMITED**

**4. WANGECI NDUMO**

**5. COUNTY LAND REGISTRAR, KILIFI COUNTY**

**6. THE HON. ATTORNEY GENERAL**

**.....DEFENDANTS**

**RULING**

1. The Plaintiff instituted this suit on 10 December 2015. The 4th Defendant died several years later on 31 March 2022. No substitution was sought until January 2024, when John Kamunya, through the firm of Lumatete Muchai & Company Advocates, filed a notice of motion application dated 19 January 2024 seeking to substitute the 4th Defendant.
2. In that application, which was brought pursuant to Order 24, Rule 3(1) and 7(2), Order 50, Rule 1 and 6 of the Civil Procedure Rules, and Sections 1B and 3A of the Civil Procedure Act, the said John sought the following orders:
  - a) **That the Defendant herein, Wangeci Ndumo, deceased, be substituted with John Kamunya.**
  - b) **That the pleadings be amended to join John Kamunya, the legal representative of the estate of Wangeci Ndumo, as the 4th Defendant in this case instead of Wangeci Ndumo, deceased.**
  - c) **That the costs of this application be provided in the cause.**
3. The application was supported by an affidavit sworn by John Kamunya, who exhibited a copy of the 4th Defendant's death

certificate and a copy of the grant of letters of administration issued to him on 29 November 2023 in respect of Esther Wangeci Kiteto, said to be an alias of the 4th Defendant.

4. Because that application had not yet been determined, the Plaintiff filed a notice of motion application dated 15th September 2025, under Order 24, seeking the following orders:

**a) The claim against the 4th defendant and the 4th defendant's counterclaim, as amended on 19 January 2024 and filed on 26 January 2024, have abated by operation of law.**

**b) The name of John Kamunya, added without leave of court, is struck out of the 4<sup>th</sup> defendant's amended statement of defence and counterclaim.**

**c) The Plaintiff is allowed to set down the consolidated suit for hearing notwithstanding the above abatement.**

5. In his affidavit in support of the application dated 19th September 2025, the Plaintiff deposed that the 4th Defendant had died, whereupon the suit against her abated by operation of law, and that the counterclaim filed in her name likewise

abated. He further averred that no lawful substitution was effected within the prescribed period and that the attempted amendment of the pleadings and the filing of subsequent applications were undertaken by a person who had neither been properly joined nor entered an appearance, thereby rendering those steps procedurally incompetent.

**6.** The Plaintiff further stated that he had personally conducted a search at the National Registration Bureau and established that Wangeci Ndumo, whom he had sued, was not the same person as Esther Wangechi Kiteto; that Esther Wangechi Kiteto was not related to Mary Nyawira Ndumo or John Kamunya; and that neither Mary Nyawira Ndumo nor John Kamunya was related to Wangeci Ndumo, the 4th Defendant herein.

**7.** John Kamunya submitted a replying affidavit sworn on November 11, 2025, opposing the Plaintiff's application. He explained that he is the grandson of the 4th Defendant, also known as Esther Wangeci Kiteto and sometimes Wangeci Ndumo. He claimed that she held letters of administration for the estate of Mary Nyawira Schmidt, his mother, to facilitate

the suit, as he and his sister were minors at the time and required her to act on their behalf.

8. He further deposed that his minority caused the delay in seeking substitution, and that upon attaining majority, letters of administration *ad litem* were obtained and an application for substitution was filed. He urged the Court to exercise its discretion under Order 24 of the Civil Procedure Rules and Article 159(2)(d) of the Constitution.
9. Both applications were canvassed through written submissions, which I have carefully considered alongside the applications and affidavits submitted.
10. Order 24, rule 4 of the Civil Procedure Rules provides:

**4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4]**

***(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.***

**11.** The law is clear about what happens when one of the Defendants dies and the cause of action survives or continues. Upon application, the Court shall cause the deceased Defendant's legal representative to be made a party or substituted for the deceased Defendant to proceed with the case. However, the application for substitution must be made within one year, or the suit shall abate as against the deceased Defendant.

**12.** In the instant case, no application for substitution was made within one year of the 4th Defendant's death. Therefore, by operation of law, the suit against her abated on or about the 31 March 2023, meaning no suit subsisted in which substitution could be made. The application dated 19 January 2024 seeking substitution was filed long after abatement had already occurred. Notably, no application for an extension of time had been made prior to that.

**13.** The Court of Appeal, while discussing the import of Order 24 and specifically the procedure to be followed in such circumstances, in the case of **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] KECA 544 (KLR)**, explained as follows:

***“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative***

**is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted...After time to apply has been enlarged and the legal representative has been joined,**

***the focus and burden shifts to him to show cause why the abated suit should be revived...”***

**14.** As already established, no application for an extension of time had been made before the application for substitution. It is thus clear to me that the applicant (John Kamunya) omitted a very important step before making the application for substitution.

**15.** The reliance on Article 159(2)(d) of the Constitution cannot avail the applicant redress. Procedural timelines governing substitution and abatement implicate the Court's jurisdiction to entertain proceedings against a deceased party. They cannot be cured by the invocation of substantive justice alone, as the applicant herein seeks to do. The High Court in **Kenya Farmers Co-Operative Union Limited v Charles Murgor (Deceased) T/A Kaptabei Coffee Estate [2005] KEHC 3370 (KLR)** held as follows:

***“The suit having abated on or about 23<sup>rd</sup> April, 1996, as seen above, the order of substitution of 5<sup>th</sup> March, 1998 was a nullity in law and of no effect... But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except***

**in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction...**

**16.** Further, the amended statement of defense and counterclaim, filed on January 26, 2024, were lodged without leave of court and without lawful substitution. At the time of filing, the 4th Defendant was deceased, and the suit against her had abated. The pleadings were therefore filed without legal capacity and are a nullity.

**17.** In the circumstances, I find that the application dated 19 January 2024 is incompetent and incurably defective, and there is no basis for effecting substitution.

**18.** As a result, the Notice of Motion dated 19 January 2024 is hereby dismissed, and the Plaintiff's Notice of Motion dated 15 September 2025 is allowed. Each party shall bear its own costs.

**Dated, signed, and delivered electronically in Malindi on December 17, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the presence of:**

**Mr. Kimani for the Plaintiff**

**Mr. Oduor for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant**

**Ms. Ziwa for the 4<sup>th</sup> Defendant**

**Happy: Court Assistant**