

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL NO. E059 OF 2023**

**SAMUEL NGUMBA NGARUIYA .....**  
**APPELLANT**

**VERSUS**

**LIZA WAIRIMU.....1<sup>ST</sup>**  
**RESPONDENT**

**MAGDALENE WANGUI NDUNGU.....2<sup>ND</sup>**  
**RESPONDENT**

**JOSEPH THUKU WANENE.....3<sup>RD</sup> RESPONDENT**  
**LAND REGISTRAR, KIAMBU.....4<sup>TH</sup>**

**RESPONDENT**

(Being a appeal against the ruling of the the Senior Magistrate’s Court at Kikuyu in ELC Case N0. 70 of 2018 delivered by Hon. Jacinta Orwa (S.P.M) on 9.10.2018)

**JUDGMENT**

1. This appeal emanates from the ruling of Hon. Jacinta Orwa (SPM) in respect of an application dated 3.8.23 filed by Samuel Ngaruiya, the Appellant herein and a Preliminary Objection dated 23.8.23 raised by Lisa Wairimu Iraki, the 1<sup>st</sup> Respondent herein.
2. In order to appreciate the appeal, it is necessary to give a brief background of the matter.

3. Peter Mwaura Iraki (deceased) who was the 1<sup>st</sup> Plaintiff in the lower court had filed suit against the 1<sup>st</sup> Respondent being **Thika ELC No. 767 of 2017 Peter Iraki Mwaura & Another v Magdalene Wangui Ndungu & Another** and **Kikuyu SPM ELC No. 70 of 2018 Peter Iraki Mwaura & Another v Magdalene Wangui Ndungu & Another**. However, Peter died on 21.4.21 during the pendency of the said suits.
4. Following his demise, the Appellant filed an application dated 28.9.2022 seeking the following orders:
  - a) That the entire suit as contained in the Amended Plaint dated 18<sup>th</sup> May 2022 and filed on 29<sup>th</sup> May 2022 be struck out with costs to be borne jointly by the 1<sup>st</sup> Plaintiff and the estate of the 2<sup>nd</sup> Plaintiffs.
  - b) The cost of this application be provide for.
5. The said application was based on the fact that following the death of Peter Mwaura Iraki, he had not been substituted within a period of one year.
6. The 1<sup>st</sup> Respondent who is the widow of the deceased obtained an Ad Litem Grant of Letters of Administration dated 13.4.23 after which she filed an application dated 9.6.23 seeking the following orders:
  - a) *Spent*
  - b) *Spent*
  - c) *Spent*

*d) This Honourable court be pleased to extend the statutory limitation period within which to apply to substitute the deceased 2<sup>nd</sup> plaintiff.*

*e) Upon order No. 4 above being granted, the 1<sup>st</sup> Plaintiff/Applicant as the legal representative of the estate of the deceased 2<sup>nd</sup> Plaintiff be granted leave to substitute the 2<sup>nd</sup> Plaintiff.*

*f) Upon order No. 5 above being granted, the 1<sup>st</sup> Plaintiff/Applicant be granted leave to amend her plaint as per the draft Amended Plaint annexed hereto.*

*g) The costs of the application be provided for.*

7. In a ruling delivered on 21.7.23, the Court declined to issue the orders for extension of time or substitution of the deceased on the grounds that there was no prayer for revival of suit and if the said orders were granted, the same would be in vain.

8. Following the delivery of the said ruling, the 1<sup>st</sup> Respondent filed another application dated 3.8.23 seeking the following orders:

*i. This Honourable court be pleased to extend time for the substitution of the deceased 2<sup>nd</sup> Plaintiff with his personal representative.*

*ii. Liza Wairimu Iraki ( in her capacity as the Administratrix of the estate of the 2<sup>nd</sup> Plaintiff) be joined as a party to this sui.*

*iii. The suit herein be revived in accordance with the provisions of Order 24 Rule (7) of the Civil Procedure Rules.*



- iii. Lisa Wairimu Iraki (in her capacity as the Administratrix of the estate of the 2<sup>nd</sup> Plaintiff) be substituted as the 2<sup>nd</sup> Plaintiff.
  - iv. The Applicant/1<sup>st</sup> Plaintiff to ensure compliance on account of substitution within 7 days from the date of this ruling.
  - v. The defendants are granted 14 days within which to file the Amended Statements of Defence if need be from the date of service.
  - vi. The costs of the application to the 2<sup>nd</sup> Defendant/respondent.
11. It is the said ruling that prompted this appeal in which the Appellant raises the following grounds:
- i. *The learned Magistrate erred in law and in fact in determining the 1<sup>st</sup> Respondent's application dated 3<sup>rd</sup> August 2023 (the application) yet the application was not he matter before her for determination as it had not been heard on the merits and/or submitted to by the parties.*
  - ii. *The learned Magistrate erred in law and in fact in unlawfully determining the application while at the same time disregarding and going against her own directions given on 25<sup>th</sup> August 2023, to wit, that as proposed by the Appellant and in agreement with the Respondent, the Preliminary Objection dated 3<sup>rd</sup> August 2023 ( the P.O) against he application be heard and determined first and parties exchange written submissions on the P.O an ruling on he P.O to be delivered on 6<sup>th</sup> October 2023.*
  - iii. *The learned Magistrate erred in law and in fact by jumping the gun and making a determination on matters*

and issues that were yet to be canvassed before here and which matters and issues were not lawfully the subject of her impugned ruling as parties had only filed written submissions to the P.O as per her directions of 25<sup>th</sup> August 2023.

- iv. The learned Magistrate erred in law and in fact in failing to give directions on how the application should have been disposed of on its merits or canvassed after dismissing the P.O.
- v. The learned Magistrate erred in law and in fact in effectively denying the Appellant the chance to properly oppose the application on merit after dismissing the P.O by the Appellant.
- vi. The learned Magistrate erred in law and in fact in in effectively denying the Appellant the chance to be heard on the merits on the application and consequently turning the Appellant away from the seat of justice.
- vii. In determining the P.O as she did, the learned Magistrate erred in law and in fact in failing to adhere to the stare decisis principle and refusing to be bound by case law provided by the Appellant from the High Court of Kenya on the exact similar matter as that which was before her to wit Judge Edward Muriithi's decision in **Timothy Limo & 2 Others v Joel Kinyanjui Muchiri ( suing as the legal representative of the estate of Jacob Muchiri Kinyanjui ( 2020) eKLR** which decision was made in reliance on previously decided Court of Appeal decision therefore arriving at the wrong decision.
- viii. The learned Magistrate erred in law and in fact in failing to properly consider and apply the guiding case law provided by the Appellant or at all and further in failing to

*disclose the reasons for her not being bound by such case law thus arriving at the wrong decision.*

- ix. The learned Magistrate erred in law and in fact in ruling that the application was not res judicata and effectively holding that revival of the suit therein had not been an issue in her previous ruling of 21<sup>st</sup> July 2023, which simultaneously determined the Appellant's motion to strike out the suit and the 1<sup>st</sup> Respondent's application to substitute the deceased 2<sup>nd</sup> Plaintiff in the lower court matter thus arriving at a wrong decision.*
  - x. The learned Magistrate erred in law and in fact in effectively ruling that order 24 (7) (2) of the Civil Procedure Rules, 2010 being subsidiary legislation could take precedence over the express provisions of statute being section 7 of the Civil Procedure Act that encapsulates the doctrine of res judicata and thus arriving at a wrong decision.*
  - xi. In all the circumstances of the case, the learned Magistrate erred in failing to observe and adhere to very clear provisions of statute and binding case law and ultimately she failed to do justice.*
10. He concluded by proposing that the appeal be allowed and the ruling of the trial Magistrate be set aside and be substituted with an order upholding the Appellant's Preliminary objection dated 3.8.2023.
11. This being a first appeal, section 78 of the Civil Procedure Act mandates this court to re-evaluate, re-assess and re-consider the evidence that was adduced before the trial court and arrive at its own findings.

12. In the case of **Selle and Another v Associated Motor Boat Company Ltd and Others ( 1968) E.A 123**, the court held as follows:

*'This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, re-evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect'.*

13. After examining the impugned ruling, the proceedings of the lower court, the Memorandum of Appeal and the entire Record of Appeal as well as the parties' submissions and relevant case law, the following issues emerge for determination:

- i. Whether the application dated 3.8.23 was res judicata.
- ii. Whether the trial Magistrate erred in dismissing the Preliminary Objection and granting the application.
- iii. Whether the appeal ought to be set aside.

14. In the application dated 9.6.23 the Respondent applied for extension of time and substitution of the deceased without praying for revival of the suit which had already abated. In her ruling dated 21.7.23 the trial Magistrate was clear that granting the application would be in vain as the Respondent had not sought to revive the suit.

15. The subsequent application dated 3.8.23 sought to set aside the orders of 21.7.23, extend time for substitution of the deceased and revive the suit. Having ruled that substitution could not be done since the suit had abated, could the court set aside its decision? The answer is in the negative.
16. I have read the decision of **Limo v Joel Kinyanjui Muchiri (suing as the legal representative of the estate of the late Jacob Muchiri Kinyanjui 2020 eKLR** where the court observed as follows:

***“In its decision which is binding on this court, the Court of Appeal in Rebecca Mijide Mungole & Another v Kenya Power and Lighting Company Limited & 2 Others ( 2017) eKLR held:***

***The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues is plain. Speaking generally, by operation of the law, a suit will automatically abate one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.....***

***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 in which 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 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 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 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'.***

17. Drawing the principle for the Court of Appeal decision in the **Rebecca Migide Mungole** case which is on all fours with the instant suit, it is clear that the trial magistrate ought not to have allowed the application for revival of the suit without first having extended time in the earlier application. Since the prayer for extension was raised in the earlier application and declined, the same was res judicata.

18. I am therefore constrained to agree with counsel for the Appellant that the Preliminary Objection was merited and it ought to have been upheld. The court fell into error by allowing the revival of the suit after it had previously dismissed the application for extension of time.
19. Having carefully considered the impugned ruling, the Memorandum of appeal, the proceedings of the lower court and the applicable law and jurisprudence, I have come to the conclusion that the appeal is merited and I hereby allow it.
20. The ruling and order of Hon. Jacinta Orwa, SPM made on 9.10.2023 are hereby set aside and vacated and substituted with an order upholding the Preliminary Objection dated 23.8.2023.
21. Consequently, the entire suit as contained in the Amended Plaint dated 21.7.2022 is hereby dismissed. Each party to bear their costs.

**Dated, signed and delivered virtually at thika this 30<sup>th</sup> day of January 2026.**

**J. M ONYANGO  
JUDGE**

**In the presence of :**

Mr. Njagi for the Appellant

Mr.Mbogori for the Respondent