Wachira (Suing as the Legal Representative of Joseph Wachira Waithaka - Deceased) v Maingi & 13 others (Civil Appeal E034 of 2020) [2026] KECA 61 (KLR) (30 January 2026) (Judgment)

Neutral citation: [2026] KECA 61 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL E034 OF 2020

MA WARSAME, PM GACHOKA & JM NGUGI, JJA

JANUARY 30, 2026

BETWEEN

HENRY WAITHAKA WACHIRA (SUING AS THE LEGAL REPRESENTATIVE OF JOSEPH WACHIRA WAITHAKA - DECEASED) ..... APPLICANT

AND

CONSOLATA NJERI MAINGI & 13 OTHERS & 13 OTHERS ..... RESPONDENT

(Being an appeal from the ruling and order of the Environment and Land Court of Kenya at Nakuru (S. Munyao, J.) dated 30th September, 2019 in ELC Case No. 230 of 2018)

JUDGMENT

1. This appeal arises from the ruling and order of the Environment and Land Court at Nakuru delivered by Munyao, J. on 30th September 2019, wherein the learned Judge dismissed the appellant's Notice of Motion dated 18th February 2019 which sought, inter alia, revival of the suit, extension of time to substitute parties, and substitution of the appellant for the deceased plaintiff Joseph Wachira Waithaka.

2. This appeal arises from protracted litigation concerning land parcels in Dundori, Lanet, Nakuru County. The original suit was filed in the High Court at Nakuru as HCCC No. 195 of 2009 by Joseph Wachira Waithaka (the deceased) against Consolata Njeri Maingi and 13 others. The suit concerned three parcels of land: Dundori Lanet Block 5/257, Dundori Lanet Block 5/259, and Dundori Lanet Block 5/261 (the suit properties).

3. In his plaint filed on 13th July 2009, the deceased averred that he was the registered owner of the suit properties. He pleaded that on 16th June 1989, he entered into a sale agreement with the 1st respondent's late husband, Charles Maingi Macharia (now also deceased), for the sale of certain land plots at Kshs.500,000/=. The deceased contended that the agreement was unenforceable and that the 1st respondent's husband had fraudulently dealt with the properties and offered them for sale to other

parties including some of the respondents. The deceased sought orders restraining the respondents from dealing with the suit properties.

4. The respondents filed a joint statement of defence pleading that the plots had been properly sold to the 1st respondent's husband in 1989, that he had taken possession and made payment, and that any discrepancies in the agreement were honest mistakes. The 1st respondent's husband also filed a counterclaim seeking cancellation of the titles that the deceased had acquired and a declaration that he was the legal owner of the parcels.

5. Unfortunately, the progression of that suit was interrupted by the death of Joseph Wachira Waithaka on 26th March 2012. By operation of law, the suit abated one year thereafter, on 26th March 2013, when no application for substitution had been filed within the prescribed time under Order 24 Rule 3(2) of the Civil Procedure Rules.

6. The matter came up for mention for and hearing of several applications thereafter, despite the absence of a properly appointed legal representative for the deceased's estate. Of significance, was an application filed by the respondents on 15th July 2013 seeking to dismiss the suit on the grounds that it had abated. On 30th January 2015, Waithaka J. delivered a ruling which found inter alia that the main suit and the counterclaim had abated on or about 26th March 2013, and ordered that each party bear their own costs.

7. Subsequently, in 2016, the appellant, Henry Waithaka Wachira, claiming to act as the legal representative of the deceased, filed an application dated 11th May 2016 through M/s Waiganjo & Company Advocates seeking revival of the abated suit and substitution. However, this application remained unprosecuted and the court issued a notice to dismiss for want of prosecution. The appellant then changed counsel to M/s Kamau Kuria & Company Advocates who filed a Notice of Motion dated 18th February 2019 seeking various orders including: revival of the suit; extension of time to substitute the current applicant as plaintiff in place of his deceased father; substitution of the 1st respondent's husband who had also died in July 2016; joinder of several other parties; review or setting aside of Waithaka J's ruling of 30th January 2015; and orders restraining the respondents from further subdivision or dealing with the suit properties.

8. The application came before Munyao, J. who, after hearing submissions from the parties, delivered a ruling on 30th September 2019. The learned Judge found that the application had been brought close to 7 years, after the death of the plaintiff which was by any stretch, a long time. The Judge concluded thus:

> "I am not persuaded that the applicant has demonstrated to this court any sufficient cause" and that "the time lapse of more than 6 years or so... is certainly considerable and therefore the applicant needed to furnish very good reason for his inactivity, of which I am not persuaded that he has done so."
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> Consequently, the application was dismissed with costs.

9. Being dissatisfied with the decision of the trial court, the appellant preferred the instant appeal, citing 15 grounds of appeal.

10. At the hearing of the appeal on 5th November 2025, Dr. Kamau Kuria, Senior Counsel, appeared for the appellant. Despite proof of service having been effected on the respondents' advocates and the 9th to 14th respondents who are appearing in person, there was no appearance for the respondents. The Court, being satisfied that service had been properly effected, proceeded to hear the appeal in the absence of the respondents.

11. During the hearing, Dr. Kuria distilled the 15 grounds of appeal into three main issues. First, the appellant contended that the Court of Appeal Rules and High Court Civil Procedure Rules must be interpreted in harmony with Article 50 of *the Constitution* which guarantees the right to a fair hearing. The appellant submitted that various judges who had handled different aspects of this long running litigation, as well as counsel, erred by not keeping themselves updated with the decisions of this Court on constitutional interpretation of procedural rules.

12. Second, the appellant relied heavily on the five-judge bench decision of this Court in Trouistik Union International & another v Jane Mbeyu & another [1993] KECA 89 (KLR) which established that only a legal representative can sue or be sued on behalf of an estate. The appellant contended that various trial judges ignored this principle and allowed proceedings to continue when there was no legal representative properly appointed, thereby rendering the impugned decision a nullity.

13. Third, and most significantly, according to counsel, the appellant submitted that under the Law of Succession, a will takes effect from the date of death of the testator. Since Joseph Wachira Waithaka died on 26th March 2012, the appellant obtained capacity to apply for substitution from that very day by virtue of being named as executor in the will. The appellant argued that neither his advocates nor the respondents' counsel understood this principle, and therefore, the delay should not be held against him. Section 82 of the *Law of Succession Act* was cited in support of this proposition.

14. Citing Murai v Murai [1982] KLR 38, the appellant contended that a mistake of law by an advocate constituted a valid reason for delay. The appellant further submitted that the trial court erred by not applying principles guiding the exercise of discretion as established in United India Insurance Company Ltd and Kenindia Insurance Company Limited vs. East African Underwriters (Kenya) Limited and Others [1982-1988] KAR 632.

15. Counsel urged the Court to allow the appeal and maintained that this delay should not be fatal given the legal mistakes that had been made.

16. We have carefully considered the record of appeal, the memorandum of appeal, the written submissions filed by the appellant, and the oral highlights presented by learned Senior Counsel.

17. The central issue in this appeal is whether the trial judge correctly exercised his discretion in dismissing the application for revival of the suit and extension of time to substitute the appellant for the deceased.

18. The parameters for interference with the exercise of judicial discretion on appeal have time and again been discussed before this Court. In Mbogo v Shah [1968] EA 93, the Court stated:

> " It is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

19. Similarly, in United India Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd [1985] EA 898 the Court stated that;

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting as at first instance, would or might have given different weight to that given by the Judge to the varies factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first that the Judge misdirected himself in law; secondly, that he misapprehended

the facts; thirdly that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of consideration of which he should have taken account of; or fifthly, that his decision albeit a discretionary one is plainly wrong."

20. A court's power to revive an abated suit stems from Order 24 of the Civil Procedure Rules. We reproduce the pertinent part of that provision:

> Order 24 Rule 7:
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> 1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

21. The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.(emphasis ours)

    1. It took almost seven years between the date the deceased died and the time when the application was presented. Joseph Wachira Waithaka, the original plaintiff, died on 26th March 2012. By operation of law under Order 24 Rule 3(2) of the Civil Procedure Rules, the suit automatically abated one year thereafter, on 26th March 2013. The respondents filed an application on 15th July 2013 seeking formal recognition of the abatement. Waithaka J. thereafter delivered a ruling on 30th January 2015 declaring that both the main suit and counterclaim had abated. The appellant obtained a grant of letters of administration ad litem on 2nd March 2016 through Succession Cause No. 45 of 2015. On 11th May 2016, he filed an application to revive the suit. However, this application remained entirely unprosecuted until the court issued a notice to dismiss for want of prosecution. The application which resulted in the impugned ruling was eventually filed on 18th February 2019.

22. It is imperative to examine the length and reasons for delay. Even if the delay from death on 26th March 2012 to obtaining the grant ad litem on 2nd March 2016 being approximately three years and eleven months is partially attributed to the objection lodged by Boniface Maina Wachira in the main succession matter and the time required to process the ad litem application, this explanation is inadequate. The learned trial Judge found that the appellant had not adequately explained why he took three years to apply for the grant. The objection did not constitute an absolute bar to seeking a limited grant for litigation purposes, as demonstrated by the fact that the appellant eventually obtained one.

23. The question that remains unanswered is, why did it take three years from the date of abatement in March 2013 to even commence an application for a grant? Even accepting the appellant's assertion that he was misadvised by his former advocates regarding the necessity of obtaining the grant ad litem, this alleged misadvice does not explain why no steps whatsoever were taken for three years. If the appellant believed he already had authority as executor, why did he not come to court immediately after abatement to assert that authority? And if he believed he needed a grant, why did he wait three years to seek it? In our view, these are not rhetorical but procedural questions that go to the root of our determination.

24. More critically, the period from 11th May 2016 to 18th February 2019 which is approximately two years and nine months is entirely unexplained. The appellant's own application lay dormant and unprosecuted during this entire period. He has offered no explanation whatsoever for this inactivity. This is not a case where external circumstances prevented action but rather where the appellant, having

filed an application, simply abandoned it. At the trial court, the 1st respondent aptly characterized this as "indolence," and we agree.

25. As earlier stated, Order 24 Rule 7(2) of the Civil Procedure Rules requires proof that the applicant "was prevented by any sufficient cause from continuing the suit." The burden rests on the appellant to demonstrate an adequate reason(s) that genuinely prevented action. The reasons proffered before the trial court were as follows:

> First, the appellant stated that he petitioned for a grant of probate in 2012 (Nakuru High Court Succession Cause No. 881 of 2012) but no grant was issued due to an objection by one Boniface Maina Wachira. He contended that this objection delayed his ability to obtain formal recognition as legal representative.

26. Second, he argued that his former advocates made serious mistakes of law by advising him to seek a grant ad litem when he already derived authority as executor directly from the will. He successfully obtained the grant ad litem on 2nd March 2016. However, he maintained that this was unnecessary because he had automatic authority to prosecute the suit, as the will took effect from the date of death of the testator. He contended that the various steps taken, or not taken, were based on erroneous advice from his former advocates.

27. In essence, the explanation proffered by the appellant through his learned Senior Counsel is that the learned judges of the High Court, the advocates, and the appellant were all unaware of certain legal principles regarding capacity to sue on behalf of an estate and the effect of a will. With respect to learned Senior Counsel, we find this explanation wholly insufficient to constitute sufficient cause for such an extraordinary delay for the reasons stated hereunder.

28. The first explanation that the objection in the succession matter delayed his ability to obtain formal recognition is inadequate. The learned trial judge correctly found that the objection "could not in any way prevent him from seeking a special grant ad litem for purposes of continuing this suit on behalf of the estate of his late father." As we have already noted, the objection was not insurmountable, and in any event provides no explanation for the lengthy periods of inaction both before and after the grant was obtained.

29. The second explanation that his former advocates made mistakes by advising him to seek the grant ad litem, fares no better. The learned trial Judge found in his ruling that "the applicant was properly advised by his erstwhile lawyers." We agree. Where there is an objection preventing the grant of probate in the main succession matter, the prudent and proper course is to seek a limited grant ad litem for litigation purposes. The former advocates acted entirely correctly.

30. With great respect to Senior Counsel, the underlying assertion that advocates, and appellant were all unaware of legal principles regarding capacity to sue and the effect of a will is particularly troubling. Ignorance of the law, even if genuine, has never been accepted as sufficient cause for prolonged delay in litigation. The law presumes that parties will conduct themselves with reasonable diligence and will seek competent legal advice. If that advice proves inadequate, the remedy lies elsewhere, not in permitting stale litigation to be revived after seven years.

    Moreover, the suggestion that multiple Judges of the High Court were unaware of basic principles of succession law is not only unsupported by evidence but also untenable. We think all the trial Judges are innocent. The assertion of ignorance rings hollow when one considers that the appellant, claiming to be executor under a will, was in a position to know his rights and responsibilities from the outset. A party cannot sleep on his rights for seven years and then seek to excuse his inaction by claiming ignorance of basic legal principles.

31. The learned trial Judge correctly rejected these explanations and found as follows:

> " The applicant herein was certainly aware of the death of his own father, and he must have known, that his father had this case going on. Indeed, nowhere in his affidavits does he claim that he was not aware of this case. He himself did not move the court to have him substitute his deceased father within one year of death and he cannot fault the respondents for not effecting substitution. He himself could very well have applied for substitution."

32. As was stated by this Court in Rebecca Mijide Mungole & Another vs. Kenya Power & Lighting Company Ltd & 2 Others [2017] eKLR:

> "The operating phrase in rule 7(2) 'sufficient cause' has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant."

33. Applying these principles to the present case, the appellant's conduct exhibits precisely the indolence and negligence that militates against revival. The appellant waited three years before seeking the grant ad litem, obtained it in March 2016, then allowed his own application to lie dormant for nearly three years until threatened with dismissal for want of prosecution. The explanations offered; objection in succession and allegedVmisadvice, are neither reasonable nor plausible given the extended periods of complete inaction. Moreover, reviving this suit after seven years would prejudice the respondents who have relied on the finality of the abatement order and reorganized their affairs accordingly. In our view, the appellant has failed to meet the standard required for revival.

34. We further find that the trial court whilst applying the legal framework under Order 24 Rules 3 and 7 of the Civil Procedure Rules correctly recognized that the burden lay on the appellant to demonstrate sufficient cause, correctly assessed the significance of the length of the delay and correctly evaluated each explanation offered by the appellant and found them wanting.

35. The trial court, therefore, correctly concluded that no sufficient cause had been demonstrated. Its decision was based on the evidence, grounded in law, and thoroughly reasoned. We have not been shown that the trial court misdirected itself on the law, misapprehended the facts, took into account matters it ought not to have considered, failed to take into account matters it ought to have considered, or that its decision was plainly wrong. We find no error in its approach or conclusion.

36 The law's insistence on timely action in matters of substitution and revival is crucial. Litigation is not eternal and must come to an end. Parties are entitled to finality and closure. Where a suit has been abated for over six years, where the successful party has acted in reliance on that abatement, and where no adequate explanation has been provided for the delay, the interests of justice do not favour revival. In this case, the 1st respondent's husband is now deceased. According to the appellant's own affidavits, his widow and successors have, in the years since the abatement, obtained registration of the suit properties, subdivided them, and transferred portions to various parties including the 1st respondent herself. They have arranged their affairs in reliance on the finality of the abatement order made in January 2015 and the appellant's subsequent inaction for over four years.

37. In the end, we uphold the decision of the trial court. The appeal is devoid of merit and is accordingly dismissed.

38. Given that the respondents did not appear and were not represented at the hearing, we make no order as to costs.

39. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JANUARY, 2026.

M. WARSAME

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JUDGE OF APPEAL

M. GACHOKA, C.Arb, FCIArb

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JUDGE OF APPEAL JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR