

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC NO. 839 OF 2014 (O.S)

DORICAH MIDEVA MIDOYO & 27 OTHERS
PLAINTIFFS

VERSUS

WAIRIMU KINYANJUI
DEFENDANTS

RULING

1. The Plaintiffs have, by a Notice of Motion dated 5th March 2025, brought pursuant to **Sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act, Order 24 Rule 7(1) & (2), Order 50 Rule 1** of the **Civil Procedure Rules, and Article 159** of the **Constitution of Kenya**, sought the following orders:

- a) That this Honourable court be pleased to revive the suit herein.*
- b) That this Honourable Court be pleased to grant an extension and/or enlargement of time to file an application to join the Defendant's legal representative herein David Waweru Kinyanjui.*
- c) That the Respondent herein be substituted with David Waweru Kinyanjui, the executor of the will of the deceased Wairimu Kinyanjui.*

d) That the costs of this application be in the cause.

2. The application is supported by an affidavit sworn by Salome Kagwiria Gerald, the 28th Plaintiff. She deponed that the Plaintiffs instituted the suit on 26th June 2014 through the firm of Betty Rashid & Co. Advocates while the firm of M.M. Rungare & Co. Advocates appeared for the Defendant, and a consent order maintaining the *status quo* was entered.
3. It was deponed that at the time of filing suit, the suit property did not have a title deed, the vendor having issued only deed plans to purchasers; that during the pendency of the suit , and specifically on 28th April 2014, the Defendant procured a title deed for the suit property being LR 6845/124 (Original Number 6845/16/92) in her name and that the Plaintiffs thereafter lodged a caveat against the property.
4. The deponent stated that as parties waited for the directions on how to progress the hearing of the matter, the parties' advocates agreed to a consent to have the *status quo* maintained until the hearing and determination of the matter. Subsequently, the firm of Gitonga Muriuki & Co. Advocates came on record for sixteen of the Plaintiffs, while M/S Betty Rashi & Co. Advocates continued to represent nine Plaintiffs.
5. It was further deponed that during this period, the Plaintiffs learnt that the Defendant, Wairimu Kinyanjui, had passed

away in 2015. Upon obtaining information regarding her family, the Plaintiffs filed an application for substitution, and that on 24th January 2017, Hon. Justice Obaga issued substitution orders.

- 6.** Upon service, it was deposed that the deceased's children appointed M/s Wanjohi Gachie & Co. Advocates and contested the substitution on grounds that they were neither administrators nor executors of the estate. The court upheld the objection and struck them out of the suit.
- 7.** Thereafter, the Plaintiffs commenced citation proceedings in HCC Succession No. 1407 of 2017; that the matter was placed before Hon. Lady Justice Margaret Mungai, who directed that it be heard in Succession Cause No. HCP&A 536 of 2017 and that the family of the deceased was represented by M.J.D. Associates and Wanjohi Gachie & Co. Advocates.
- 8.** Following the ruling, and upon discovering that a grant had been issued by Hon. Justice Ougo, the Plaintiffs applied to have the suit property included in the succession proceedings; that the matter was placed before Hon. Justice Muchelule; that the estate was then represented by M.W. Muli & Co. Advocates and that the suit property, LR No. 6845/124, was also the subject of ELC No. 265 of 2015.
- 9.** It was deposed that while awaiting the ruling, the parties had several mentions in ELC No. 839 of 2014 and ELC No. 265 of

2015; that on 29th March 2022, the ruling was delivered in the citation file, which had earlier been closed on 2nd April 2019 and that the Plaintiffs only accessed the ruling on 6th February 2024.

- 10.** It was deposed that in the ruling, the court directed that the Plaintiffs sue the executor of the will of the late Wairimu Kinyanjui; that acting on that direction, the Plaintiffs filed an application dated 8th February 2024, which was dismissed by this court on grounds that the suit had abated and ought first to have been revived and that it is on that basis that the present application was filed.
- 11.** The Plaintiff deponed that they have been in possession of portions of LR No. 6845/124 between 1991 and 1994, having purchased the same for value and developed permanent residences thereon. It was further deponed that they have consistently paid rates to the Nairobi City Council since 1994.
- 12.** The Plaintiffs contended that unless the orders sought are granted, they stand to suffer violation of their rights to property and risk losing their lifelong investments and homes. It was asserted that no prejudice will be occasioned to the Respondent if the application is allowed.
- 13.** The application was opposed by David Waweru Kinyanjui, the legal representative of the estate of the late Wairimu Kinyanjui, through a Replying Affidavit sworn on 24th April

2025. He contended that the application is frivolous, vexatious, and an abuse of the court process.

- 14.** He deponed that the suit was filed after the deceased commenced subdivision of the land with the intention of processing titles for purchasers. He stated that the deceased passed away on 15th August 2015 and that the suit abated on 15th August 2016. Although the Plaintiffs obtained orders enlarging time in 2017, they subsequently substituted the deceased with her children, who had no legal capacity, leading to their removal from the proceedings.
- 15.** He contended that upon the striking out of the improperly substituted parties, time began to run afresh for substitution, and the Plaintiffs failed to comply with **Order 24** of the **Civil Procedure Rules**, resulting in abatement of the suit in 2019.
- 16.** It was contended that no sufficient cause has been demonstrated to justify revival of the suit, and that the Plaintiffs have been indolent since 2019. The delay is said to be inordinate, unexplained, and prejudicial to the estate, as witnesses may have died and documents lost.
- 17.** It was argued that the Plaintiffs have not presented any reason why they improperly enjoined the beneficiaries as the burden lies on them to properly substitute a deceased. It was deposed that they ought to have taken out grant ad litem in the event they did not have information on who the

administrator or the executor of the estate of the deceased defendant was.

- 18.** The Respondent further contended that the Plaintiffs were aware of the identity of the executor as early as 2017 through the succession proceedings, yet failed to move the court appropriately.
- 19.** He asserted that timelines under **Order 24** are mandatory and not mere procedural technicalities curable under **Article 159**, and that revival after prolonged delay would undermine the principles of finality, certainty, and efficient administration of justice.
- 20.** In a Further Affidavit sworn on 15th May 2025, Salome Kagwiria Gerald challenged the authenticity of the Replying Affidavit and contended that the Respondent has taken inconsistent positions regarding representation of the estate. She further asserted that the suit property does not form part of the deceased's estate, as it was not included in the will dated 6th October 2011 or in the confirmed grant.
- 21.** Salome Kagwiria Gerald argued that the conduct of the deceased Wairimu Kinyanjui constituted double speak and was fraudulent, all meant to steal and disinherit the legal and lawful owners of these parcels of land already developed and settled with their families for the last 30 years.

22. The parties file submissions and a bundle of authorities which I have considered.

Analysis and Determination

23. Having considered the Notice of Motion, the affidavits on record and the rival submissions of counsel, the issues that arise for determination by this Court are the following:

a. Whether the Plaintiffs have demonstrated sufficient cause to warrant the revival of the abated suit under Order 24 Rule 7(2) of the Civil Procedure Rules.

b. Whether the Plaintiffs have established a basis for enlargement of time to apply for substitution of the deceased Defendant with her legal representative.

24. This suit was instituted through Originating Summons dated 26th June 2014, in which the Applicants sought, inter alia, orders relating to registration of their respective interests in portions excised from LR No. 6845/124 (original number 6845/16/92), together with ancillary reliefs restraining disposition of the suit property.

25. It is not disputed that the Defendant, Wairimu Kinyanjui, passed away in 2015. Given that the claim concerns proprietary interests in land, the cause of action survived her death. However, no lawful substitution of the Defendant's estate was effected within one year of her death in accordance with **Order 24 Rule 4(1)** of the **Civil Procedure Rules**.

26. The record nevertheless shows that the Plaintiffs did not remain entirely inactive. By an application dated 24th August 2016, the Applicants sought to substitute the deceased with her children. That application was allowed on 16th March 2017. However, by a ruling of Obaga J delivered on 26th July 2018, the substituted parties were struck out on the ground that they lacked legal capacity, not having obtained a grant of representation.
27. Thereafter, the Plaintiffs commenced citation proceedings in **High Court Succession Cause No. 1407 of 2017**, which were subsequently directed to be determined within **High Court Succession Cause No. 536 of 2017** through a ruling dated 2nd April 2019. The object of the citation proceedings was to compel the taking out of representation in respect of the estate of the deceased Defendant and to identify the proper person to be substituted.
28. The Plaintiffs state that a ruling in the citation proceedings was delivered on 29th March 2022, but that they only accessed it on 6th February 2024, in which the court directed that they sue the executor of the will. Notably, however, a copy of the said ruling was not availed to this court. Acting on the stated directions, the Plaintiffs filed an application dated 8th February 2024, which was dismissed on the ground that the suit had already abated and required revival. The

present application was subsequently filed on 5th March 2025.

29. It is not disputed that a grant of representation was issued to David Waweru Kinyanjui in **High Court Succession Cause No. 536 of 2017** on 27th February 2018. By virtue of that grant, he is the lawful legal representative of the estate of the late Wairimu Kinyanjui for purposes of **Order 24** of the **Civil Procedure Rules**.
30. The applicable legal framework is found in **Order 24 Rules 4 of the Civil Procedure Rules** which governs substitution where a Defendant dies:

“(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.

31. Order 24 Rule 4 requires that where a Defendant dies and the cause of action survives, the court shall, upon application, cause the legal representative of the deceased to be made a party; and where no such application is made within one year, the suit abates as against the deceased Defendant.

32. By operation of law, therefore, and following the failure to effect substitution within the prescribed period, the suit abated upon the lapse of one year from the date of death of the Defendant. As was stated in **Titus Kiragu vs. Jackson Mugo Mathai (2015) eKLR**:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

33. Although the Plaintiffs attempted to enjoin the beneficiaries of the Defendant’s estate, they were struck out from the proceedings on 26th July 2018. That development signified that, at the material time, there was no proper legal representative of the estate before the court. The earlier substitution, though indicative of an attempt to regularise the proceedings, did not cure the fundamental defect arising from the absence of a grant of representation.

34. As this court held in its ruling dated 27th February 2025, upon the striking out of the Defendants, time began to run afresh for the Plaintiffs to comply with the mandatory substitution requirements under **Order 24 Rule 4** of the **Civil Procedure Rules**. Upon the lapse of the prescribed period in 2019, the suit consequently abated once again.
35. The Plaintiffs now seek to invoke the discretion of this court under **Order 24 Rule 7(2)** to revive the abated suit. The Order reads as follows:

“(2) 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.”

36. The Court of Appeal in **Said Sweilem Gheithan Saannum vs Commissioner of Lands & 5 Others (2015) eKLR** set out the applicable sequence under **Order 24**:

“There are three stages according to these provisions. As a general rule, the death of a

plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit."

37. Similarly, the Court of Appeal in *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Limited & 2 Others (2017) eKLR* stated as follows:

"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 where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within 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. But as was observed by this Court in Said Sweilam (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

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. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.

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. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. 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.”

- 38.** From these authorities, three principles emerge. First, abatement occurs by operation of law upon the lapse of time. Second, enlargement of time is a prerequisite to joinder and revival. Third, revival is discretionary and dependent on proof of sufficient cause.
- 39.** The pivotal issue for determination is whether the Plaintiffs have demonstrated sufficient cause to warrant enlargement of time and revival of the suit several years after abatement.
- 40.** The concept of sufficient cause was considered by the Court of Appeal in **Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011** as follows:

“Sufficient cause or good cause in law means: the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused. (See Blacks Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges

mind. The explanation should not leave unexplained gaps in the sequence of events.”

- 41.** The Plaintiffs’ explanation for the delay is grounded on the complexity surrounding the succession proceedings, the contestation over who the proper legal representative of the estate was, and the fact that earlier attempts at substitution were struck out on account of lack of capacity. They contend that they were compelled to pursue citation proceedings in order to identify and compel the proper legal representative of the estate.
- 42.** While it is true, as contended by the Respondent, that the Plaintiffs were aware, or ought to have been aware, of the succession proceedings by 2018, as noted by Obaga J in his ruling dated 26th July 2018, the record nonetheless demonstrates that the question of representation of the estate was neither straightforward nor uncontested.
- 43.** In particular, the suit property was not listed as an asset in the deceased’s will and was not disclosed to the succession court, a factor that further complicated the process of identifying and proceeding against the proper legal representative. In the circumstances, the Plaintiffs’ pursuit of citation proceedings, though protracted, cannot be equated to complete indolence or an abandonment of the suit.
- 44.** The delay between 2019 and 2025 is substantial and calls for scrutiny. However, the chronology placed before the court

shows that during this period, the Plaintiffs were engaged in succession-related proceedings whose outcome was necessary to enable lawful substitution. Upon receiving clear judicial direction in early 2024, the Plaintiffs moved the

court, albeit unsuccessfully, and promptly filed the present application.

45. In the peculiar circumstances of this case, this court is satisfied that the delay has been sufficiently explained and does not amount to deliberate inaction, want of bona fides or abuse of the court process.
46. The Respondent has asserted that revival of the suit would prejudice the estate due to passage of time, loss of witnesses, and loss of documents. While the court accepts that delay carries inherent prejudice, no specific prejudice has been demonstrated beyond general assertions.
47. On the other hand, the effect of abatement is drastic, as it extinguishes the Plaintiffs' cause of action and bars the filing of a fresh suit. Given the nature of the claim and the Plaintiffs' assertion of long-standing occupation and development of the suit property, the interests of substantive justice favour allowing the matter to be heard on its merits, subject to appropriate terms.
48. Balancing the competing considerations, and guided by the principles under **Order 24, Sections 1A and 1B** of the **Civil**

Procedure Act, and Article 159(2)(d) of the Constitution, this court is persuaded that this is a proper case for the exercise of the court's discretion to enlarge time, substitute the legal representative, and revive the suit.

49. In the result, the Plaintiffs' Notice of Motion dated 5th March 2025 is allowed on the following terms:

- a. The suit herein is hereby revived.**
- b. The time within which to apply for substitution of the deceased Defendant is hereby enlarged.**
- c. David Waweru Kinyanjui, being the executor and legal representative of the estate of the late Wairimu Kinyanjui pursuant to the grant issued in High Court Succession Cause No. 536 of 2017, is hereby substituted in place of the deceased Defendant.**
- d. The Plaintiffs shall file and serve an amended Originating Summons and supporting affidavit where necessary, within fourteen (14) days from the date hereof.**
- e. The Respondent shall have fourteen (14) days upon service to file and serve any replying affidavit or amended response, if necessary.**
- f. Each party shall bear their own costs of the application.**

Dated, signed and delivered virtually in Nairobi this 5th day of February, 2026.

**O. A. Angote
Judge**

In the presence of:

Mr. Gaturu for Interested Party

Mr. Muriuki for 19 Plaintiffs

Mr. Gachie Mwangi for Defendants

Court Assistant: Tracy