

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERUGOYA
ELC CASE NO. 33 OF 2013

ABRAHAM MAINA WACHIRA &

**DOUGLAS MWANGI WACHIRA (Suing as the legal
administrators of the Estate of Wachira Kinguru)**
PLAINTIFFS

VERSUS

KARIUKI NGUNDO 1ST DEFENDANT

**STEPHEN MBAU WARUI 2ND
DEFENDANT**

**THE LAND REGISTRAR, KERUGOYA (Sued
through the HON. ATTORNEY GENERAL) 3RD DEFENDANT**

AND

**PHILLIP MUCHUNGU 1ST INTERESTED
PARTY**

**JOSEPH GITAU KIBUCHI 2ND INTERESTED
PARTY**

GABRIEL MUCHOKI KIBUCHI 3RD INTERESTED PARTY

RULING

[NOTICES OF MOTION DATED 5TH MARCH 2025 & 31ST MARCH 2025]

1. The interested parties filed the notice of motion dated 5th March 2025 seeing for interalia that:
 - a. *That the suit be marked abated for failure by the plaintiffs to have the 1st & 2nd defendants who died in 2021 and 2012 respectively, substituted.*

- b. That the plaintiffs' suit against the 1st & 2nd defendants does not survive or continue against the 3rd defendant.
- c. That the suit be dismissed with costs to interested parties.

The application is based on the seven (7) grounds on its face marked (a) to (g) respectively and supported by the affidavits of Phillip Muchungu, the 1st interested party, sworn on 5th March 2025 and 9th April 2025, in which he among others deposed that the 2nd defendant died in 2012 as per the entry made on the green card for **parcel Kiine/Thingirichi/347** of 18th April 2008, and consequently, the said land vested on the 1st defendant; that the 1st defendant died on 18th January 2021, and the plaintiffs have not substituted them; that in view of the court ruling of 19th May 2017, allowing the interested parties application dated 5th July 2016, their application is properly before the court; that the plaintiffs' application dated 31st March 2025 suffers laches and is an afterthought as it was filed after that by the interested parties.

2. The application is opposed by the plaintiffs through the replying affidavit of Douglas Mwangi Wachira, the 2nd plaintiff, sworn on 2nd April 2025 among others deposing that the interested parties lack *locus standi* to file the application seeking substantive orders as their role in the suit is peripheral; that the interested parties have no *locus standi* to seek for orders on behalf of the 1st & 2nd defendants and their application is bad in law; that by the time the interested parties joined the suit in 2017 the plaintiff and 1st defendant had settled the suit amicably through their consent filed on 14th October 2015 and endorsed by the Deputy Registrar on 7th April 2016; that the said consent is still binding and the interested parties' application dated 17th July 2017 had been dismissed; that the interested parties attempt in land case number 6 of 2024 to consolidate was also dismissed; that should the court find the suit against the 1st & 2nd defendants had abated, it should revive it as the plaintiffs had filed the substitution application dated 19th July 2021 and served the dependants of the 1st defendant; that the court should allow the substitution of 1st defendant by Robert Mbira Kariuki and strike out the 2nd defendant from the suit.

3. The plaintiffs moved the court vide the notice of motion dated 31st March 2025 seeking for orders inter alia that:

- a. *The 1st defendant be substituted with his son, Robert Mbira Kariuki, administrator of the Estate of Kariuki Ngundo alias Ernest Kariuki Ngundo, deceased 1st defendant.*
- b. *The time to substitute the 1st defendant be enlarged.*
- c. *Leave be granted to the plaintiffs to further amend their plaint to include Robert Mbira Kariuki as administrator of the estate of the deceased 1st defendant.*
- d. *The plaintiffs' claim against the deceased 1st defendant that has abated be reinstated.*
- e. *Costs be provided for.*

The application is supported by the affidavit of the Douglas Mwangi Wachira, 2nd plaintiff, sworn on 21st March 2025 in which he among others deposed that, the deceased plaintiff filed this suit against 1st to 3rd defendants in June 2012; that the interested parties were allowed to join the suit vide the ruling of 19th May 2017; that the 1st defendant died on 18th January 2021 and the plaintiffs' attempts to have his widow, Purity Muthoni Kariuki, substituted for the deceased did not bear fruits; that Robert Mbira Kariuki, a son to the deceased 1st defendant, applied for letters of administration for the 1st defendant's estate in **Kerugoya Succession Cause No. E317 of 2022**, and time for substitution should be extended, and the abated suit revived.

4. The application is opposed by the interested parties through the replying affidavit of Phillip Muchungu, the 1st interested party, sworn on the 17th September 2025 in which he inter alia deposed that the plaintiffs' suit against the 1st & 2nd defendants has abated as they died over four (4) years ago, without being substituted within one year of their death; that there was inordinate delay in filing the plaintiffs' application, and is fatally defective and an afterthought to defeat the interested parties' application filed earlier; that the plaintiffs' application dated 19th July 2021 to substitute the 1st defendant with Purity Muthoni Mwangi was

and still is incompetent *ab initio* as she had not obtained any grant of representations in the estate; that the plaintiffs have not exhibited any letters of administration or grant of probate to show that Robert Mbira Kariuki, who they seek to substitute the 1st defendant through their application dated 31st March 2025, has legal authority over the deceased 1st defendant's estate.

5. The record confirms the court on 16th June 2025 directed among others that the two applications to be canvassed together. The learned counsel for the plaintiffs and interested parties filed their submissions dated the 26th August 2025 and 17th September 2025 respectively, which the court has considered.
6. The issues arising in the two applications for the court's determinations are as follows:
 - a. *Whether the interested parties' application that the plaintiffs' suit against the 1st & 2nd defendants has abated has merit, and if so, whether the suit against the 3rd defendant survived the deaths of the 1st & 2nd defendants.*
 - b. *Whether the plaintiffs' application for substitution of 1st defendant, enlargement of time to substitute, leave to amend the plaint, and reinstatement of the suit has met the legal threshold.*
 - c. *Who should pay the costs?*
7. The court has carefully considered the grounds in the applications, affidavit evidence filed, submissions by the learned counsel, superior court decisions cited and come to the following determinations:
 - a. That from the record and pleadings filed herein, the suit was initially commenced vide the plaint dated 19th February 2010, and filed on 22nd February 2010 as **Embu HCCC No. 22 of 2010**, by **Wachira Kinguru against Kariuki Ngundo and Stephen Mbau Warui**. That through the amended plaint dated the 6th June 2012, the Land Registrar, Kerugoya was added as the 3rd defendant. The

suit was then transferred to this court, through the order of 28th December 2012, and registered as **ELCC No. 33 of 2013**.

- b. The interested parties moved the court vide the application dated the 5th July 2016 for among others joinder in the suit and review of the judgement dated 7th April 2016, that was heard and allowed through the ruling of 19th May 2017. The interested parties were directed to file and serve their pleadings, consequent to which they filed among others their defence and counterclaim dated 8th June 2017. The plaintiff responded by filing reply and defence to the counterclaim dated 22nd June 2017. The plaintiffs claim that the interested parties are without *locus standi*/capacity to move the court for the orders they seek cannot therefore have basis, as their joinder and previous participation has been with the court's blessing.
- c. Upon the death of the original plaintiff on 18th May 2022, Abraham Maina Wachira and Douglas Mwangi Wachira, his legal representatives, filed the chamber summons dated 14th March 2023 seeking to be substituted in the deceased's place and for leave to amend the plaint. The application was allowed and an amended plaint dated 20th April 2023 filed, inter alia joining them as plaintiffs on behalf of the estate of the initial plaintiff.
- d. The interested parties' contention that the 1st and 2nd defendants who died in 2021 and 2012 respectively has not been disputed by the plaintiffs. By the time the interested parties and plaintiffs filed their applications dated 5th March 2025 and 31st March 2025 respectively, the 1st and 2nd defendants had been dead for a period of about four (4) and thirteen (13) years respectively. There is no evidence on record of any attempt having been taken by the plaintiffs to substitute the 2nd defendant from the date of his death in 2012 to date.

Paragraph 17 of the replying affidavit by Douglas Mwangi Wachira, 2nd plaintiff, sworn on the 2nd April 2025, in answer to the interested parties application dated 5th March 2025, it was deponed that;

“17. That this honourable court has powers to exercise its discretion and allow the substitution of 1st defendant with Robert Mbira Kariuki and to order the striking of the 2nd defendant from this suit.....” [underlining mine]

The underlined portion of the deposition leaves no doubt that the plaintiffs have no intention to have the 2nd defendant substituted or the suit against him revived. **Order 24 Rule 4(3) of the Civil Procedure Rules** provides that a suit by or against a deceased person who is not substituted within one year of their death abates. It follows that as the 2nd defendant died in 2012, and was not substituted within one year of his death, the plaintiffs’ suit against him abated in 2013, and the plaintiffs’ deposition that his name be struck out of the suit is superfluous.

- e. The plaintiff first application for substitution of the 1st defendant with Purity Muthoni Mwangi, his widow, was through the application dated 19th July 2021, which is yet to be prosecuted. The plaintiffs have at paragraphs 6 and 7 of the affidavit of Douglas Mwangi Wachira sworn on 31st March 2025 in support of their application dated 31st March 2025 deposed on the attempts made to serve the application upon the family of 1st defendant and that *“the plaintiffs had no knowledge of the persons that had taken out letters of administration of the estate”*

The interested parties have at paragraph 13 of the replying affidavit of Phillip Muchungu, 1st interested party, sworn on 17th September 2025 deposed inter alia that;

“13. That the plaintiffs’ application dated 19th July 2021 was (still is) incompetent ab initio, in that the proposed substitute, Purity Muthoni Mwangi, had not at the time

obtained any Grant of Representation conferring upon her the legal status of a personal representative of the deceased 1st defendant. in law, only a duly appointed legal representative may be substituted, and absent of such authority, the application cannot be deemed a valid attempt at substitution.”

The plaintiffs have not rebutted or challenged the above interested parties' deposition through a further or supplementary affidavit attaching a certified copy of the grant clothing her with legal representative capacity in respect of the estate of the 1st defendant. The application dated 19th July 2021 was therefore a non-starter.

f. The plaintiffs' second substitution application is the one dated 31st March 2025 that seeks to substitute the 1st defendant with his son, Robert Mbira Kariuki. In paragraph 8 of his supporting affidavit, Douglas Mwangi Wachira deposed inter alia that;

g.

“8. ..Robert Mbira Kariuki had on 6th July 2022 commenced and/or finalized the process of applying for letters of administration to the estate of Kariuki Ngundo alias Ernest Kariuki Ngundo, 1st defendant herein in Kerugoya Succession Cause No. E317 of 2022.”

The interested parties have at paragraphs 14, 15 and 16 of the replying affidavit of Phillip Muchungu, 1st interested party, sworn on 17th September 2025, disputed the capacity of Robert Mbira Kariuki as a substitute for 1st defendant, deposing inter alia that;

“14.iii. More importantly, no letters of administration or grant of probate have been exhibited to demonstrate that Robert Mbira Kariuki is clothed with legal authority to represent the estate of the deceased 1st defendant.

15. That neither an obituary, a eulogy, nor even a gazette notice confers upon any person the legal status of a representative of a deceased's estate....."

16. That lacking such capacity, Robert Mbira Kariuki has no locus to be substituted and or joined as a party. To allow such substitution would amount to this honourable court issuing orders in vain, contrary to established principles, such orders would be directed at a person who is not clothed with capacity to represent the deceased's estate or to participate in the proceedings, rendering the order futile, irregular and unenforceable."

- h. It is apparent the plaintiffs have not challenged or disputed the foregoing deposition by the interested parties through a further or supplementary affidavit annexing a certified copy of the grant appointing the Robert Mbira Kariuki, the proposed substitute, as administrator of the estate of the deceased 1st defendant. Under **Sections 107 to 109 of the Evidence Act chapter 80 of Laws of Kenya**, it was the responsibility of the plaintiffs to avail evidence to convince the court that the said Robert Mbira Kariuki, had the capacity to be substituted as the legal representative of the estate of the deceased 1st defendant, but have failed to do so. The mere fact that Robert Mbira Kariuki had commenced a succession cause in respect of the 1st defendant's estate does not automatically make him the administrator of the said estate, until the court pronounces him as such. The plaintiffs should have waited for the succession court to make an order appointing the administrator of the estate before filing their application dated 31st March 2025, but they appear to have acted in haste to pre-empt the interested parties' application dated 5th March 2025 that had been filed.
- i. The learned counsel for the interested parties in their submissions cited the following **Court of Appeal** decisions that among others speaks to the central role of the element of legal capacity of parties in litigations:

- i. **Virginia Edith Wamboi Otieno versus Joash Ochieng Ougo & Another (Civil Appeal No. 31 of 1987) [KECA 63 (KLR) (Civ) (15 May 1987) (Judgement)**, in support of the disposition an administrator is not entitled to bring action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of inception.
- ii. **Troustik Union International & Another versus Jane Mbeyu & Another [1993] KECA 89 (KLR)** for the holding that an action instituted on behalf of the estate of a deceased person must be brought in the name of a person who is clothed with grant of representation in respect of the estate. Without such a grant, the plaintiff has no locus standi.
- iii. **Said Sweilem Gheithan Saanum versus Commissioner of Lands [being sued through Attorney General] & 5 Others [2015] KECA 284 (KLR)** where the grant of representation was issued to *Nur Salim Mohamed* and not the appellant, *Nur Sweilem Gheithan*, hence the latter had no capacity to bring the action.

The above decisions on capacity of persons suing for estates of deceased persons applies to persons sued or defending suits on behalf of the estates of deceased persons. That as there is no evidence presented that Robert Mbira Kariuki, the intended substitute, has been appointed as the legal representative of the estate of the deceased 1st defendant, then he lacks the legal capacity/*locus standi*, to be joined in the suit in substitution of the 1st defendant and the plaintiffs' notice of motion dated 31st March 2025 fails.

- j. That as correctly submitted by the learned counsel for the parties, the court has powers/discretion under **Order 24 Rule 7(2) of Civil Procedure Rules**, to revive an abated suit upon sufficient cause being presented to its satisfaction. The applicant must however approach the court in the order set out by the **Court of Appeal** in the case of **Rebecca Mijide Mungole & Another versus Kenya Power & Lighting Company Ltd & 2 Others [2017] KECA 544 (KLR)**, where it was held that:

“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 three prayers. But it is incompetent to seek joinder or revival when the prayer for more time has not been granted.” [underlining mine]

The plaintiffs in their substitution application dated 31st March 2025 set the order of their prayers as follows:

1. Substitution of 1st defendant with Robert Mbira Kariuki.
2. Enlargement of time for substitution.
3. Leave to further amend the plaint.
4. Reinstatement/revival of the abated suit against 1st defendant.
5. Costs.

The plaintiffs’ order of prayers run counter to that prescribed in the **Rebecca Mijide Mungole & Another versus Kenya Power & Lighting Company Ltd & 2 Others case [supra]** as it did not start with the prayer for enlargement or extension of time to substitute.

- k. Abatement of a suit by or against a deceased person that survives the party's death occurs at the expiry of one year from the date of death if there is no steps taken to substitute such a person, and is therefore an operation of the law. In such a situation or occurrence, there is no need of any party to move the court to declare such a suit to have abated, and prayer (1) of the interested parties' application dated 5th March 2025 is superfluous. The interested parties have at prayers (2) & (3) sought for an order that the plaintiffs suit against the 3rd defendant has not survived and it should therefore be dismissed with costs.

The plaintiffs' response is at paragraph 11 of the replying affidavit of Douglas Mwangi Wachira sworn on 2nd April 2025 in which he deposed inter alia that they have "*laid out particulars of fraud against the 3rd defendant. The fraudulent transactions of the 1st defendant could only be possible with the aid of the 3rd defendant, as such, the 3rd defendant has a major part to play in the determination of this suit and the same cannot be ignored.*" Having considered the plaintiffs' averments in the further amended plaint that touches on the 3rd defendant, and being aware the plaintiffs may still pursue substitution of the deceased 1st defendant once a legal representative is appointed, the court finds their claim against the 3rd defendant still subsists, and should be allowed to go to trial and determined on its merit. It follows therefore that the interested parties' notice of motion dated 5th March 2025 is without merit.

- l. It is trite that under **Section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya**, costs follow the event unless otherwise directed by the court on reasonable ground. As both the interested parties and the plaintiffs have failed in their respective applications, it is only fair that each side bears their own costs.

8. Flowing from the above determinations, the court finds and orders as follows: -

- a. That the interested parties' application dated 5th March 2025 is without merit and is dismissed.***
- b. That the plaintiffs' notice of motion dated 31st March 2025 is without merit and is struck out.***
- c. That the parties to bear their own costs in the two applications.***

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 4TH DAY OF FEBRUARY 2026.

**S. M. Kibunja
ELC JUDGE**

In the presence of:

Plaintiffs - No appearance

Defendants - No appearance

Interested Parties - Mr. Phillip Omoiti

Kinyua - Court Assistant.

**S. M. Kibunja
ELC JUDGE**