

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO 40 OF 2014

AMSTRONG FRED KASUKU
PLAINTIFF

VERSUS

JAMES CHARLES NAKHWANGA

OSOGO (deceased) 1ST
DEFENDANT

MARIA ELIZABETH NAKHUBALI OSOGO 2ND
DEFENDANT

RIVERA PROPERTIES LIMITED 3RD
DEFENDANT

KHUKERI HOLDINGS LIMITED 4TH
DEFENDANT

RULING

1. Before this court for determination is the Plaintiff/Applicant's Notice of Motion Application dated 9th October, 2025 brought pursuant to the provisions of **Section 95** of the **Civil Procedure Act, Order 24 Rules 2 and 4(1), (2) and (5) & Order 8(2) and Order 50 Rule 5** of the **Civil Procedure Rules**. He seeks the following reliefs: THAT:

- i. The Honourable Court be pleased to cause an entry to be made on the record to the effect that the Plaintiff's Cause of Action survives the***

demise of James Charles Nakhwanga Osogo and the Plaintiff shall proceed with his suit against The Estate of James Charles Nakhwanga Osogo together with the 2nd, 3rd and 4th Defendants.

ii. The Honourable Court be pleased to issue an order/ directions that Steve Joseph Osogo and Maria Elizabeth Nakhubali Osogo being the Legal Representatives of the estate of James Charles Nakhwanga Osogo be enjoined/substituted in place of the 1st Defendant and for them to make a Defence as to their character as Legal Representatives.

iii. IN THE ALTERNATIVE to Prayer (iii) above and in the event that the cause of action abated Twelve (12) months after the demise of James Charles Nakhwanga Osogo an order /direction do issue that the Plaintiff is at liberty to continue with his claim against The Estate of James Charles Nakhwanga Osogo.

iv. The costs of this application be borne of James Charles Nakhwanga Osogo.

2. The Motion is premised on the grounds set out on its face and is supported by the Affidavit of Amstrong Kasuku, the Plaintiff/Applicant, sworn on the same date. He depones that the suit was scheduled for hearing on 6th February, 2024.

However, by a letter dated 1st February, 2024, Counsel for the 1st Defendant notified the court, their Counsel M/s Kimani & Muriithi Advocates, and himself that the 1st Defendant had passed away. The notification did not disclose the date or place of death.

3. Mr. Kasuku further avers that following the death of the 1st Defendant, no steps were taken by the executors named in the deceased's written will, nor by any other person entitled in law, to apply for a Grant of Probate or Letters of Administration Intestate. As time continued to run and apprehensive that the suit would abate by operation of law, he filed a Notice of Motion dated 25th July, 2024 seeking orders that the court designates certain named persons as legal representatives of the deceased for purposes of the suit.
4. He deposed that the said Motion was opposed by the 1st, 2nd and 4th Defendants and directions were issued for the filing of written submissions. When the matter came up for mention on 3rd February, 2025 to confirm compliance, the court fixed a further mention date of 12th May, 2025 and, at the same time, directed Counsel for the Plaintiff/Applicant to consider instituting citation proceedings in the Family Division.
5. He deposed that pursuant to that direction, he instructed his Counsel, Mr. N. W. Amolo, to commence citation proceedings, which were duly filed on 13th March, 2025 as

Milimani HCFP & A No. E218 of 2025, In the Matter of the Estate of James Charles Nakhwanga Osogo; that the persons cited therein did not enter appearance or respond to the citation and that instead, Steve Joseph Osogo and Marie Elizabeth Nakhubali Osogo subsequently filed a Petition for Probate of Written Will dated 4th September, 2025.

6. Mr. Kasuku states that he has reasonable grounds to apprehend that the failure or delay by the executors named in the written will of the late James Charles Nakhwanga Osogo to file Milimani HCFP & A No. E737 of 2025 was deliberate, and intended to allow the Plaintiff's suit to abate by effluxion of time. He avers that the said probate proceedings were only instituted after, and as a direct consequence of, the citation proceedings initiated by the Plaintiff/Applicant.
7. In response to the Motion, the 2nd Defendant/Respondent filed Grounds of Opposition dated 11th November, 2025 premised on the grounds that:

i. The suit as against the 2nd Defendant has abated and thus the court cannot issue orders in vain.

ii. This Honorable Court is not a succession cause for purposes of appointing Legal Representatives of a deceased party.

iii. The issue of the issuance of Letters of Administration in respect of the estate of the James Charles Nakwanga Osogo (deceased) is pending before Nairobi HC Succession Cause Number E737 of 2025 (In the matter of the estate of James Charles Nakwanga Osogo (deceased) and thus this Honorable Court cannot assume powers reserved for the High Court sitting as a Succession Court under the Law of Succession Act Chapter 160, Laws of Kenya.

iv. The Application is an abuse of the court process; and

v. Such other grounds as shall be adduced at the hearing hereof.

8. The 4th Defendant/Respondent equally filed Grounds of Opposition dated 18th November, 2025 contending that:

i. The Plaintiff has failed to produce evidence of Letters of Administration in the Estate of the 1st Defendant have been issued.

ii. The application is vexatious and an abuse of court process.

9. The Plaintiff filed submissions on 2nd December, 2025. Counsel set out the factual background as set out in his Motion stating that **Order 24 Rule 4** of the **Civil Procedure**

Rules and **Section 2** of the **Civil Procedure Act** clearly outline the procedure where a Defendant dies but the cause of action survives.

- 10.** Counsel urged that since the Plaintiff's claim is founded on contract and survived the death of the 1st Defendant, and since the Motion dated 25th July 2024 was filed before abatement, the Plaintiff properly invoked the procedural safeguards under **Order 24**. The Defendants' opposition, despite their own inaction, only confirms the necessity of the court's intervention.
- 11.** Counsel stated that in **Islam K. Islam vs Zamzam Hassan alias Zamzam Ali & 5 Others (ELC No. 320 of 2014) [2023] KEELC 21931**, the court, dealing with similar issues had no hesitation in reviving the suit and directing that the Plaintiff be substituted. In the present circumstances, it was explained, the matter had not yet abated at the time of the filing of the Notice of Motion dated 25th July, 2024. Even it had, Counsel stated, the court retains jurisdiction under **Section 95** of the **Civil Procedure Act** and **Order 50 Rule 6** of the **Civil Procedure Rules** to enlarge time in the interests of justice.
- 12.** The 2nd Defendant filed submissions on 4th December, 2025. Counsel submitted that under the **Law of Succession Act**, a legal representative is expressly defined as an executor or administrator of a deceased person, and an administrator is a

person to whom a grant of letters of administration has been issued by a competent court.

13. It was argued that the law is settled. No person may act on behalf of a deceased's estate without prior appointment by the Succession Court, and such authority is conferred only through a Grant of Probate or Letters of Administration. In this case, it was submitted, the Plaintiff has expressly conceded that neither Grant of Probate nor Letters of Administration has been issued in respect of the 1st Defendant's estate, and that the intended parties have not been appointed as legal representatives. Consequently, the orders sought cannot lie.
14. Reliance in this regard was placed on the cases of **Kimoi Cheruiyot vs Johanna Sawe Arap Biwot & Chepkangor Kigen (2018) KEELC (KLR)**, and **Nancy Njeri Gitau & Maurice Harun Gitau vs James Muchone Njuga & Sarah Muthoni Mwangi (2021) KEPRT 361 (KLR)**, which emphasized that the appointment of a legal representative is a formal legal process and that no one may act in that capacity until a grant is issued by a competent court.
15. It was submitted that Plaintiff is effectively inviting this court to assume the jurisdiction of a Succession Court, which is impermissible under the Environment and Land Court Act as expressed in **Beatrice Wambui Kiarie vs Beatrice Wambui Kiarie & 9 Others [2018] eKLR**.

- 16.** Accordingly, it was submitted, the court may only exercise powers under **Order 24 Rule 4(1)** of the **Civil Procedure Rules** once a certified Grant of Probate or Letters of Administration is produced; that the court cannot appoint legal representatives merely to revive a suit, nor can family membership alone satisfy the requirements for substitution under **Order 24**. Ultimately, it was urged, the Plaintiff has not satisfied the legal threshold for the grant of the orders sought and the Motion is for dismissal.
- 17.** The 4th Defendant filed submissions on 5th December, 2025. Counsel submitted that the documents tendered by the Plaintiff, including the death certificate, show that the 1st Defendant died on 15th August 2023; that under **Order 24 Rule 4** of the **Civil Procedure Rules**, an application for substitution must be made within one year of the death of the defendant, failing which the suit abates by operation of law; that as at 9th October 2025, when the present application was filed, no earlier application seeking substitution had been lodged and that the one-year statutory window had lapsed, and the suit had already abated.
- 18.** Counsel emphasised that **Order 24 Rule 4** is couched in mandatory terms, leaving no discretion to extend time. The court, it was argued, lacks jurisdiction under **Section 95** of the **Civil Procedure Act**, or any other provision, to enlarge time for substitution after abatement because the Civil Procedure Act and Rules confer no such power. Once

abatement occurs, the suit cannot proceed against the deceased Defendant.

- 19.** On the prayer seeking to substitute the deceased 1st Defendant, it was stated the same is equally devoid of legal merit; that the Plaintiff has not produced any Letters of Administration or Grant of Probate issued to the proposed individuals; that without such authority, they lack *locus standi* to act as legal representatives and that to substitute persons who do not hold a grant would amount to a legal nullity. Moreover, it was submitted, with the suit already abated, any substitution would be academic and incapable of reviving proceedings.
- 20.** The Plaintiff filed Further Submissions dated 15th January, 2026. Counsel reiterated his earlier submissions further stating that despite their concession that that no Grant of Probate or Letters of Administration has been issued in respect of the estate of the deceased, the Defendants assert that the Plaintiff has no *locus standi*.
- 21.** This argument, Counsel submitted, is fundamentally misconceived as the responsibility to apply for probate or letters of administration lies, in law, with the executors named in a will or, in cases of intestacy, with the relatives of the deceased, not with a third-party litigant such as the Plaintiff.

22. It was submitted that the Defendants' reliance on the decisions in **Kimoi Cheruiyot(supra)** and **Nancy Njeri Gitau(supra)** are, at best, persuasive and are in no way binding upon this court. As regards the **Kimoi Cheruiyot case**, Counsel asserted that the same is clearly distinguishable from the present case. In that case, it was submitted, the suit itself had been instituted *ab initio* by a person purporting to act for the estate of a deceased registered proprietor without any grant having been obtained. It was in that context that the court struck out the suit for want of *locus standi*.
23. The present Motion, it was asserted, was not brought under the Law of Succession Act, but under **Order 24 Rules 2, 4(1), 4(2) and 5** of the **Civil Procedure Rules**, read together with the definition of "legal representative" under **Section 2** of the **Civil Procedure Act**.
24. Had Parliament or the Rules Committee intended the procedural regime of the **Law of Succession Act** to override or supplant **Order 24**, it was stated, they would have expressly so provided. They did not. Counsel submitted that the correct legal position is as articulated in **Zamzam Hassan alias Zamzam Ali & others vs Said Mohamed Mwarua & others [2015] eKLR**, earlier relied on.
25. It was submitted that the court ought to take notice of the material facts on record, including the admission by the 2nd

Defendant that James Charles Nakhwanga Osogo passed away on 15th August, 2023, a fact that was only disclosed when the matter came up for hearing on 6th February, 2024.

Analysis and Determination

26. Having considered the Motion, responses and submissions, the issues for determination are:

- i. Whether the suit has abated? And if not?*
- ii. Whether Steve Joseph Osogo and Maria Elizabeth Nakhubali Osogo ought to be substituted in place of the deceased 1st Defendant as the legal representatives of the estate of James Charles Nakhwanga Osogo, and be directed to file a defence in that representative capacity?*

Whether the present suit has abated

27. The Plaintiff urges the court to find and declare that the cause of action pleaded herein survives the demise of James Charles Nakhwanga Osogo, and that the suit may lawfully proceed against his estate alongside the 2nd, 3rd, and 4th Defendants.

28. It is his case that the cause of action herein is a contract for land and survives the deceased; that upon being notified of the death of the 1st Defendant, he moved the court within the statutory period by filing the application dated 25th July 2024, and thereafter complied with the court's directions by

instituting citation proceedings to compel the named executors to take out representation.

- 29.** He maintains that the delay in obtaining a Grant of Probate was attributable not to his inaction but to the deliberate failure of the executors to move the Succession Court, and that the procedural safeguards under **Order 24** should not be defeated by such conduct.
- 30.** In opposition, the 2nd and 4th Defendants assert, first, that the suit has abated by operation of law under **Order 24 Rule 4** of the **Civil Procedure Rules**, and second, that there is presently no lawful representation of the estate of the late James Charles Nakhwanga Osogo. They argue that in the absence of a Grant of Probate or Letters of Administration issued by a competent Succession Court, no person can be recognized as a legal representative for purposes of substitution, and that this court lacks jurisdiction to appoint or designate such representatives. Consequently, they contend that the Plaintiff's Motion is legally untenable.
- 31.** The statutory starting point is **Section 2(1)** of the **Law Reform Act**, which provides in mandatory terms that, upon the death of any person:

“All causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate.”

- 32.** The proviso to that section expressly excludes only a narrow class of causes of action, namely those founded on defamation, seduction, inducing a spouse to leave or remain apart, or claims for damages grounded on adultery.
- 33.** The scope and effect of **Section 2(1)** of the **Law Reform Act** were considered by the Court of Appeal in ***Karl Wehner Claasen vs Commissioner of Lands & 4 others [2019] KECA 766 (KLR)***. The court held that causes of action of a personal nature do not survive for the benefit of a deceased person's estate, while causes of action founded on property rights, contractual obligations, statutory breaches, or equitable interests do survive. The court further clarified that a cause of action is not synonymous with a chose in action, but rather denotes a combination of facts giving rise to a legally enforceable right and a corresponding remedy.
- 34.** When the Plaint in the present suit is examined against that legal backdrop, it is evident that the Plaintiff's cause of action is not personal to the deceased within the meaning of the proviso to **Section 2(1)**. The dispute before the court concerns proprietary and equitable interests in L.R. No. 1/390, contractual obligations arising from the agreement dated 7th November, 2009, and the legal consequences of the Plaintiff's payment of Kshs. 4,521,676.75 to redeem the suit property from the statutory power of sale.

35. The Plaintiff further pleads the existence of trust obligations, alleged fraudulent and prejudicial dispositions of land, and statutory violations under the **Land Registration Act, 2012**, together with claims for declaratory relief, injunctions, restitution, compensation, and damages. These claims are anchored in land, contract, equity, and statute. Such causes of action, by both statute and precedent, survive against the estate of a deceased party.
36. Having found that the cause of action does indeed survive as against the deceased, the next question is whether the suit has abated. The law with respect to abatement of suits is to be found in **Order 24** of the **Civil Procedure Rules**. Of relevance herein is **Order 24 Rule 4** which provides as follows:

“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.”

37. What this means is that upon death of a Defendant and on application of a party, the court has the discretion to substitute the deceased Defendant and that after one year with no application, the suit abates.

38. In the present case, it is common ground that the deceased died on the 15th August, 2023. The suit as such abated on 15th August, 2024. It must be emphasized that abatement is by operation of law. As explained by the Court of Appeal in **Said Sweilem Gheithan Saanum vs Commissioner of Lands & 5 Others [2015] eKLR**:

“the effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”

39. See also the case of **Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others**

2017 eKLR where the Court of Appeal stated thus that it is the effluxion of time that causes the suit to abate.

40. The Plaintiff states that by the time he filed the Motion of 25th July, 2024, the suit had not yet abated. This is factual. However, that Motion was not not prosecuted to its logical conclusion. Consequently, it is the present Motion that now seeks substitution, as such, in this case, it is this present Motion which “seeks substitution” and it has been made after the lapse of the statutory period. The suit as such has abated.

41. As an alternative plea, the Plaintiff seeks that;

“in the event that the cause of action abated Twelve (12) months after the demise of James Charles Nakhwanga Osogo an order /direction do issue that the Plaintiff is at liberty to continue with his claim against The Estate of James Charles Nakhwanga Osogo.

42. The jurisdiction that grants this court discretion to revive an abated suit lies with **Order 24 rule 7(2)** of the **Civil Procedure Rules** which provides:

“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.”

43. The legal threshold to consider before exercising discretion to revive a suit is whether the Applicant has demonstrated sufficient cause. Explaining what constitutes sufficient cause, the court in ***Wachira Karani vs Bildad Wachira [2016] eKLR***, held as follows:

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the Defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

44. The Supreme Court of ***India in Civil Appeal 1467 of 2011 Parimal vs Veena Bharti (2011)*** observed that:

“Sufficient cause is an expression which has been used in large number of statutes. The meaning of the word, “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the

purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which then the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man.”

- 45.** Before considering whether sufficient cause has been shown to warrant revival of the suit, it is necessary to address assertion raised by the 2nd and 4th Defendants that the estate of the deceased has no lawful representation. The law is settled that only a duly appointed legal representative, as contemplated under the Law of Succession Act, may be substituted in place of a deceased party in pending proceedings.
- 46.** The term “legal representative” is defined under **Section 2** of the **Civil Procedure Act** to mean a person who in law represents the estate of a deceased person, and includes a person on whom the estate devolves where a party sues or is sued in a representative capacity.
- 47.** Under the Law of Succession Act, however, such representation can only be lawfully assumed upon the issuance of a Grant of Probate or Letters of Administration by a competent Succession Court. **Section 82** of that Act

vests the powers to sue or be sued on behalf of an estate exclusively in the personal representatives of the deceased.

- 48.** In the present matter, there is no dispute that no Grant of Probate or Letters of Administration had been issued at the time the present Motion was filed. The Plaintiff has in fact annexed a Petition for Probate of Written Will dated 4th September, 2025, thereby acknowledging that the process of obtaining representation is still pending. It follows that there is, as yet, no person clothed with the requisite legal capacity to act as the legal representative of the estate of the late James Charles Nakhwanga Osogo for purposes of substitution under **Order 24 Rule 4(1)**.
- 49.** The court therefore agrees with the position taken by the 2nd and 4th Defendants that, in the absence of a duly issued Grant of Probate or Letters of Administration by the High Court, there exists no competent party capable of being substituted in place of the deceased Defendant. To revive the suit or order substitution in such circumstances would be to proceed against a non-existent legal entity, contrary to both the Civil Procedure Act and the Law of Succession Act.
- 50.** Suffice to say that the Plaintiff will have to wait until the Grant of Probate is issued before applying for revival of a suit. For the avoidance of doubt, the Plaintiff is not precluded, once the Estate is duly represented in law, from applying afresh for enlargement of time, revival of the suit

and substitution of the deceased Defendant in accordance with the law.

51. For those reasons, the application dated 9th October, 2025 is struck out with no order as to costs.

Dated, signed and delivered virtually in Nairobi this 26th day of February, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Amollo for Plaintiff/Applicant

Mr. Daniel Nzeki for 2nd Defendant/Respondent

Mr. Mureithi for 4th Defendant

Court Assistant: Tracy