

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCC No. 104 OF 2021**

**KABETE MBUGA** .....

**PLAINTIFF**

**VERSUS**

**NYAKANGI  
NYAMACHE** .....

**DEFENDANT**

**AND**

**JOSEPH** .....

**NYAKANGI**

**BITOYO**  
**APPLICANT**

**RULING**

1. This is an old matter which was filed on 6<sup>th</sup> March 1996, in the High Court at Kisii. The Defendant filed a Defence and Counterclaim. The matter was heard and determined in the High Court with judgment being delivered on 15<sup>th</sup> November 2000.
2. The High Court held that the Defendant had proved that he was the registered proprietor of the parcel of land known as North Mugirango/Boisanga/147 and that the Plaintiff had violated the Defendant's right to own and use the said parcel. The Court issued an order of eviction against the Plaintiff and awarded the Defendant KShs 100,000 being general damages.
3. By Notice of Motion dated 22<sup>nd</sup> September 2025, the Applicant now seeks the following orders:

1. *THAT this Honourable Court be pleased to have JOSEPH BITOYO NYAKANGI the Applicant herein be substituted in place of the late NYAKANGI NYAMACHE, the deceased Defendant.*
2. *THAT costs of this application in the cause.*
4. The application is based on the following grounds as listed on its face:
  - (a) *THAT the late NYAKANGI NYAMACHE died on the 8<sup>th</sup> January, 2024.*
  - (b) *THAT the Chief Magistrate's court at Nyamira issued Letters of Administration Ad Litem of all the estate of the deceased to the Applicant to enable him proceed with the matters now pending in court in order to protect the deceased's estate.*
  - (c) *THAT the Applicant cannot participate in this suit on behalf of the deceased Defendant unless substituted by this Honourable Court to act as such.*
  - (d) *THAT the Applicant wishes to proceed with the suit and all matters will arise from the suit.*
  - (e) *THAT this Honourable Court has the jurisdiction to grant the orders sought in the interest of justice.*
5. The application is supported by an affidavit sworn by the Applicant. He rehashed the matters stated in the grounds of

the application and annexed a copy of a certificate of death as well as Limited Grant of Letters of Administration *Ad Litem*.

6. The application is opposed through a replying affidavit sworn by Wilfred Moriasi Ombui who deposed that the application was made way out of the prescribed time and that the delay was inordinate and inexcusable.
7. The application was canvassed through written submissions. The Applicant filed submissions dated 6<sup>th</sup> February 2026 while the Plaintiff filed submissions dated 10<sup>th</sup> February 2026.
8. I have considered the application, the affidavits and the submissions. The sole issue for determination is whether substitution should be granted.
9. The application is brought under **Order 24 rules 1 and 4** of the **Civil Procedure Rules. Rule 1** provides that the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.
10. On the other hand, **Rule 4** provides:

***(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.***

11. From the copy of certificate of death on record, it is apparent that the Defendant passed away on 8<sup>th</sup> January 2024. Pursuant to the annexed copy of Limited Grant of Letters of Administration *Ad Litem* issued to the Applicant on 24<sup>th</sup> August 2024 in Nyamira CM Misc. Succession Cause No. E041 of 2024, I am satisfied that the Applicant is a legal representative of the deceased Defendant's estate as defined at **Section 2** of the **Civil Procedure Act**.

12. Substitution is not granted routinely. In view of **Order 24 rule 1**, it can only be granted where the cause of action survives. The Defendant had a cause of action in his counterclaim, and the trial Court granted judgment in his favour. The ensuing decree was however not enforced and on 20<sup>th</sup> July 2022, this Court (differently constituted) delivered a ruling in which it made the following orders:

**1. Execution of the Judgment and subsequent Decree in this suit is time barred under section 4 (4) of the Limitations of Actions Act and no further attempts can be made by the substituted Decree Holder.**

**2. The Notice to show cause slated for 28/3/2022 was void ab initio and that no further Notice(s) should be served upon the Judgment Debtor.**

**3. Consequently, the instant Application is dismissed with costs to be borne by the Applicant.**

13.A cause of action that has found itself in the firm grip of limitation of actions is stale, dead and unenforceable. It simply does not exist. In that regard, it is useful to recall the rationale behind statutes of limitation, which the Court of Appeal restated in **The German School Society & another v Ohany & another [2023] KECA 894 (KLR)** thus:

***The statutes of limitations are enacted as a matter of public policy to fix a limit within which an action must be brought, or the obligation is presumed to have been paid, and is intended to run against those who are neglectful of their rights, and who fail to use reasonable and proper diligence in the enforcement thereof. The underlying purpose of statutes of limitation is to***

***prevent the unexpected enforcement of stale claims concerning which persons interested have been thrown off their guard by want of prosecution.***

14. In the absence of a surviving cause of action, any attempt to grant substitution, however well-intentioned or even actuated by a zealous desire to resolve a dispute, is simply an action in futility. In that regard, it is apt to recall the holding of the Court of Appeal in **National Social Security Fund Board of Trustees vs. Kenya Tea Growers Association & 14 Others [2023] KECA 80 (KLR)** thus:

***Jurisdiction, a mantra in adjudication connotes the authority or power of a court to determine a dispute submitted to it by contending parties in any proceeding. A Court of law is invested with jurisdiction to hear a matter when: (a) it is properly constituted as regards numbers and qualifications of members of the bench, and no member is disqualified for one reason or another; (b) the subject matter of the case is within its jurisdiction, and there is no feature in the case which prevents the Court from exercising its jurisdiction; and, (c) the case comes before the Court initiated by due process of law, and upon fulfilment of any condition precedent to the exercise of jurisdiction. The three ingredients***

***must co-exist in order to infuse jurisdiction in a Court. Where a Court is drained of the jurisdiction to entertain a matter, the proceedings flowing from it, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into it, will be marooned in the intractable web of nullity.***

15. The effect of the ruling of 20<sup>th</sup> July 2022 was that any cause of action which the deceased Defendant had in the proceedings came to an end. In the absence of a surviving cause of action, I see no possibility, or even the efficacy, of substitution.

16. In the result, I find no merit in Notice of Motion dated 22<sup>nd</sup> September 2025. I dismiss it with costs to the Plaintiff.

**Dated, signed, and delivered at Nyamira, this 26<sup>th</sup> day of February 2026.**

**D. O. OHUNGO  
JUDGE**

Delivered in the presence of:

No appearance for the Applicant

Mr Masese for the Plaintiff

Court Assistant: B Kerubo