

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 456 OF 2015**

**SEBASTIAN PAUL MUINDE**  
**KATHILU.....PLAINTIFF**  
**(Suing through his attorney Marcella Mbithe Kathilu)**

**VERSUS**

**BELN DEVELOPMENT**  
**LIMITED.....DEFENDANT**

**AND**

**FIRST COMMUNITY BANK.....1<sup>ST</sup> INTERESTED**  
**PARTY**  
**JOSEPH N. KARIUKI T/A JOSRICK**  
**MERCHANT AUCTIONEERS.....2<sup>ND</sup> INTERESTED**  
**PARTY**

**RULING**

1. Before this court there are two applications. The first is the notice of motion dated 15<sup>th</sup> July, 2022 filed by Cosmas Muinde Kathilu, the applicant, expressed to be brought under **Order 24 Rules 1 & 3 (1), Order 51** of the **Civil Procedure Rules**, and **Sections 1A, 1B and 3A** of the **Civil Procedure Rules** seeking the following orders:

1. That the plaintiff's suit against the defendant herein if abated, be revived.
2. That this honourable court be pleased to extend the time for the applicant herein (Cosmas Muinde Kathilu) to be

**substituted in place of the plaintiff herein (Sebastian Paul Muinde Kathilu) who is shown to have died during the pendency of these proceedings.**

**3. That subject to granting prayers 1 and 2 hereinabove, this honourable court be pleased to substitute the plaintiff (Sebastian Paul Muinde Kathilu) who is shown to have died during the pendency of these proceedings with Cosmas Muinde Kathilu (the applicant herein) and the said Cosmas Muinde Kathilu be deemed as prosecuting this suit in his capacity as the legal representative of Sebastian Paul Muinde Kathily.**

**4. That costs of this application be in the cause.**

2. The application is premised on the grounds *inter alia* that the plaintiff died on 10<sup>th</sup> July, 2021. The application is further supported by the affidavit of the applicant sworn on even date. The applicant deposed that the plaintiff who is his father died on 10<sup>th</sup> July, 2021 and he obtained grant of letters of administration *ad litem* for the plaintiff's estate. Further, he is desirous to continue with the suit on behalf of the said estate. That though there is one-week delay in obtaining the grant *ad litem*, this court has the jurisdiction to extend the time which the deceased ought to have been substituted.

3. The defendant filed its grounds of opposition dated 27<sup>th</sup> January, 2025 in response to the first application challenging the same on the following grounds:

**1. There has been unexplained inordinate delay in filing the notice of motion.**

**2. The suit abated on 10<sup>th</sup> July, 2022.**

**3. There is no suit to warrant the grant of prayers 1, 2, and 3 of the application.**

**4. The application is devoid of merit and should be dismissed with costs.**

4. The second application is the notice of motion dated 25<sup>th</sup> July, 2022 filed by Mathew Musau Kathilu and Alfred Kioki Kathilu, the applicants, and it is expressed to be brought under **Order 24 Rule 4** of the **Civil Procedure Rules** and **Sections 1A, 1B** and **3A** of the **Civil Procedure Act** seeking the following orders:

**a. Spent.**

**b. That the court grants extension of time for substitution of the deceased plaintiff as it lapsed on 10<sup>th</sup> July, 2022.**

**c. That Mathew Musau Kathilu and Alfred Kioki Kathilu being the legal representatives be substituted as the**

**plaintiffs in this suit in place of the deceased plaintiff the late Sebastian Paul Muinde Kathilu.**

**d. That pursuant to granting of the order of substitution in terms of prayer (c) above, the pleadings be amended accordingly.**

**e. That the application is not brought under any inordinate delay.**

**f. That costs be in the cause.**

5. The application is premised on the grounds on its face. It is further supported by the joint affidavit of Mathew Musau Kathilu and Alfred Kioki Kathilu sworn on even date. They deposed that following the death of the plaintiff, they were appointed the legal representatives of the estate of the deceased, and they wish to be substituted in place of the deceased.

6. The defendant filed its grounds of opposition dated 19<sup>th</sup> September, 2022 in opposition to the instant application/second application on the following grounds:

**1. There has been unexplained inordinate delay in filing the notice of motion.**

**2. The suit abated on 10<sup>th</sup> July, 2022.**

**3. There is no suit to warrant the grant of prayers (c) and (d) of the application.**

**4. The application devoid of merit and should be dismissed with costs.**

7. The interested parties filed their grounds of opposition dated 27<sup>th</sup> February, 2025 challenging both applications on the following grounds:

- 1. That the cause of action does not survive the deceased and the same standard abated for want of revival and/or substitution within one year on 10<sup>th</sup> July, 2022.**
- 2. That the provisions of Order 24 of the Civil Procedure Rules are inapplicable in this matter as there is no pending suit or anything for determination by this court.**
- 3. That the case stands abated until a full confirmation of letters of administration is obtained by the applicants amidst the conflicting grants by different parties from courts of equal jurisdictions.**
- 4. That the applications are incompetent misconceived and bad in law for having been filed out of time and without the leave of the court.**
- 5. That the applications are legally incompetent and the orders sought cannot issue.**

**8.** In a further affidavit sworn on 6<sup>th</sup> May, 2024 by Cosmas Muinde Kathilu, he deposed that he sought to be substituted in place of the deceased plaintiff vide Machakos Misc Succession Cause no. E102 of 2022, and that while the grant was revoked, a grant of letters of administration has since been issued to himself rendering him the proper party to be substituted in this suit. That as the holder of a substantive grant, he prays that the second application be dismissed with costs.

**9.** Cosmas Muinde Kathilu filed his replying affidavit sworn on 25<sup>th</sup> February, 2025 in response to the second application. He deposed that in his further affidavit sworn on 6<sup>th</sup> May, 2024 he annexed a copy of the full grant in the estate of the deceased which was granted to himself and Alex on 21<sup>st</sup> February, 2023 which is yet to be revoked and vests powers upon them as the legal representatives of the estate of the deceased. He deposed that the grant issued on 21<sup>st</sup> February, 2023 goes beyond their grant *ad litem* dated 1<sup>st</sup> July, 2022.

**10.** Cosmas further deposed that the deceased in his lifetime did not reside in Nairobi, and the court with competent jurisdiction to hear any issues regarding the deceased's estate ought to be in

Machakos. Further, once a full grant is issued to the administrators of an estate, any limited grant previously issued ceases to apply.

- 11.** Both applications were canvassed by way of written submissions. The defendant filed two separate written submissions, both dated 24<sup>th</sup> March, 2025. The applicants did not file their written submissions, and neither did the interested parties. Be that as it may, I have considered both applications, the replies thereof and the grounds of opposition as well as the written submissions filed by the defendant. In my view, the issue for determination is *whether the suit ought to be revived, and whether the applicants should be substituted in place of the deceased plaintiff.*
- 12.** On whether the suit should be revived, it is not in dispute that the plaintiff died on 10<sup>th</sup> July, 2021 and the suit abated on 11<sup>th</sup> July, 2022 the law provides for the procedure in case of death of a sole plaintiff.
- 13. Order 24 Rule 3** of the **Civil Procedure Rules** provides as follows:

**“(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.**

**(2)Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time.”**

- 14. In the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] KECA 284 (KLR), the court of appeal held as follows:**

**“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. 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.”

15. While I place reliance on the above authority, it is possible for a suit that has abated following the death of a party like in this case, the plaint to be revived. The same must be based on sufficient grounds taking into consideration the delay in making the

application. The defendant and the interested parties contend that the delay in bringing forth the application has not been explained and further, that the orders cannot be issued as there is no suit in existence. It is worth noting that in both applications, the applicants sought extension of time to substitute the deceased plaintiff. From the annexures, there was litigation going on in the succession causes filed in Milimani and Machakos.

- 16.** Eventually, on 2<sup>nd</sup> March, 2023 Cosmas and Alex were appointed the legal administrators of the estate intestate. Equally, both applications were filed less than two weeks after one year's lapse of the suit. This delay in my view is not inordinate. One can clearly see that during the one year period, there was effort by the applicants to obtain the grant *ad litem* and finally the grant letters of administration intestate.
- 17.** There is sufficient reason demonstrating the delay in reviving the suit, and for this reason, the suit that abated on 11<sup>th</sup> July, 2022 is hereby revived.
- 18.** On the second issue, and in both applications, Cosmas Muinde Kathilu, Mathew Musau Kathilu and Alfred Kioki Kathilu seek to

be substituted in this suit on behalf of the deceased plaintiff who died on 10<sup>th</sup> July, 2021. I will not belabour much on this issue for the reason that vide the letters of administration intestate issued on 2<sup>nd</sup> March, 2023, the legal administrators of the estate of Sebastian Paul Muinde Kathilu are Cosmas Muinde Kathilu and Alex Mutua Kathilu. In the absence of any orders revoking the said letter of administration intestate, I am satisfied that these two applicants ought to be substituted as the plaintiffs in this suit. As such, Cosmas Muinde Kathilu and Alex Mutua Kathilu are substituted as the plaintiffs in this suit.

**19.** From the above, I find merit in the notices of motion dated 15<sup>th</sup> July, 2022 and 25<sup>th</sup> July, 2022 respectively, and I grant the following orders:

***i. The deceased plaintiff's suit is hereby revived.***

***ii. Pursuant to the letters of administration interstate issued on 2<sup>nd</sup> March, 2023 Cosmas Muinde Kathilu and Alex Mutua Kathilu are hereby substituted in place of the deceased plaintiff the late Sebastian Paul Muinde Kathilu.***

***iii. The plaint to be amended accordingly within 21 days from the date hereof to reflect these changes.***

***iv. Further mention on 18<sup>th</sup> June, 2026.***

**v. I make no orders as to costs.**

It is so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 21<sup>ST</sup> DAY OF APRIL, 2026.**

**HON. MBOGO C.G.  
JUDGE  
21/04/2026.**

**In the presence of:**

*Ms. Benson Agunga - Court assistant*

*Mr. Edwine Otieno holding brief for Mr. Anzala for the Defendant*

*No appearance for the Plaintiff*