

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 13 OF 2020

NICKSON MUTINDA
KIUNGA.....PLAINTIFF

VERSUS

NGURU NDUMA (DECEASED) (Now represented by PETRONILLA
SYOMBUA NGURU, Legal
Representative).....DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 12th August 2025 filed by the Plaintiff/Applicant, Nickson Mutinda Kiunga, seeking the following orders: (i) extension of time within which to apply for substitution of the deceased Defendant beyond the statutory one-year period under Order 24 Rule 4 of the Civil Procedure Rules; (ii) setting aside of the order of dismissal/abatement issued on 3rd April 2025; (iii) substitution, out of time, of Petronilla Syombua Nguru as the Defendant in place of the deceased Nguru Nduma aka Kennedy Nduma Nguru; and (iv) costs of the Application.

BACKGROUND

2. The Plaintiff filed this suit on 2nd July 2020 seeking specific performance of an Agreement for Sale in respect of part of the property known as MBETI/GACHURIRI/3444 against the Defendant Nguru Nduma. Concurrently, the Plaintiff

obtained an inhibition order over the subject title pending determination of the suit.

3. The Defendant, while still alive and legally represented, filed a Replying Affidavit sworn on 20th July 2020 in which he expressly admitted to the material facts of the Plaintiff's claim. No Defence was ever entered on the merits.
4. The proceedings were substantially disrupted by the Defendant's wife, Petronilla Syombua Nguru, who filed repeated Applications in this Court and, subsequently, parallel proceedings before the High Court in Nairobi in HCFMISC/E232/2022, seeking orders declaring the Defendant mentally ill and appointing her as his guardian ad litem. The Application before this Court was dismissed on 18th December 2020. Nonetheless, a similar Petition filed before the Nairobi High Court resulted in an order on 9th February 2023, granted in the absence of notice to this Court or to the Plaintiff.
5. The Defendant passed away on 14th July 2023. His death was formally brought to the attention of this Court on 24th October 2023. Thereafter, the matter was mentioned on multiple occasions — 15th January 2024, 14th March 2024, 6th June 2024, and 31st October 2024 — during all of which the Advocates for the deceased Defendant's estate confirmed they had applied for a Limited Grant of Letters of Administration ad litem and leave was granted by the Court for substitution upon procurement of the same.
6. The Limited Grant ad litem was issued on 4th September 2024 but was only disclosed to the Plaintiff's Advocates by

email on 29th January 2025, a fact that had been withheld from the Court at the mention of 31st October 2024. On 3rd April 2025, the Court formally marked the suit as having abated. This Application followed.

ISSUE FOR DETERMINATION

7. The singular but jurisprudentially significant issue for determination is: whether this Court retains jurisdiction, whether under Order 24, Order 50 Rule 6, or its inherent powers, to extend time for substitution of a deceased Defendant, set aside the abatement, and revive the suit; and if so, whether the circumstances of this case warrant the exercise of such discretion in favour of the Plaintiff.

THE LAW

8. The Applicable Provisions. Order 24 of the Civil Procedure Rules, 2010 governs the effect of the death of parties upon proceedings. The key provisions are:

- a) Order 24 Rule 4(1) — Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant dies and the right to sue survives, 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.
- b) Order 24 Rule 4(3) — Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

- c) Order 24 Rule 3(2) — In cases involving the death of a plaintiff, the Court may, on application, extend time for substitution upon sufficient cause being shown.
 - d) Order 24 Rule 7(1) — The abatement of a suit shall not be a bar to a fresh suit being brought on the same cause of action within the prescribed period of limitation.
 - e) Order 24 Rule 7(2) — Where a suit abates owing to the death of the plaintiff, the plaintiff's legal representative may apply for revival of the abated suit.
 - f) Order 50 Rule 6 — The Court may enlarge the time fixed or granted by the Rules for doing any act prescribed or allowed by the Rules.
9. The Constitutional and Inherent Jurisdiction Dimension. Article 159(2)(d) of the Constitution of Kenya 2010 enjoins courts to administer justice without undue regard to procedural technicalities. Section 1A, 1B, and 3A of the Civil Procedure Act further mandate the Court to exercise its powers with a view to achieving overriding objectives of facilitating the just, expeditious, proportionate, and affordable resolution of disputes. These provisions must be read harmoniously with the specific procedural rules.

ANALYSIS

(a) The Textual Asymmetry Between Order 24 Rule 3 and Order 24 Rule 4: Deliberate Gap or Drafting Lacuna?

10. A central plank of the Respondent's argument rests on the textual asymmetry between Order 24 Rule 3 and Order 24 Rule 4: the former expressly provides for extension of time

upon "sufficient cause" whereas the latter does not. The Respondent urges the Court to treat this asymmetry as deliberate and jurisdictionally conclusive.

11. This Court does not accept that position in its absolute form. While the textual difference is real, the inference that the drafters intended to foreclose judicial discretion entirely in Defendant-death scenarios — particularly where delay is attributable to the estate's own conduct — is not necessarily supported by the legislative history or by constitutional imperatives. The Court of Appeal in *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 Others* [2017] KECA 544 (KLR) acknowledged the mandatory language of abatement provisions but did not pronounce that they are immune from the Court's inherent equitable jurisdiction in extraordinary circumstances. Similarly, in *Koske v Soi & Another* [2024] KEELC 5073 (KLR), the Environment and Land Court exercised discretion in a substitution matter involving a deceased defendant, recognising that justice-oriented interpretation must prevail.
12. In *Ndambo v Ndambo* [2022] KEHC 14723 (KLR), the High Court grappled with similar questions and held that a rigid, literalist approach to abatement provisions was inconsistent with the court's duty to do substantive justice. The Court reasoned that where delay in substitution arises from factors external to the plaintiff's control — particularly where the estate's own representatives are the proximate cause of the delay — the court retains discretion under its inherent

jurisdiction to relieve against the consequences of abatement.

13. The Respondent places heavy reliance on *Kenya Farmers Co-operative Union Limited v Charles Murgor (Deceased)* [2005] KEHC 1743 (KLR) and *CKM v ENM & Another* [2024] KECA 293 (KLR) for the proposition that abatement under Order 24 Rule 4(3) is absolute and final. This Court notes that *CKM v ENM* principally addressed a factually different matrix involving deliberate inaction by the plaintiff and does not stand as a blanket prohibition against the court's remedial jurisdiction where abatement is a product of the opposing party's stratagem. The cases must be read in their factual contexts.

14. Order 50 Rule 6 confers on the Court a broad power to enlarge time prescribed by the Rules for doing any act. The Respondent submits that this Rule does not apply to Order 24 Rule 4(3) because the latter is not a provision fixing a "time for doing an act" but rather a provision that triggers abatement — a legal consequence — upon the lapse of time.

15. This is a technically sound point and the Court accepts it in part. Order 24 Rule 4(3) operates upon the lapse of the one-year period as a substantive legal consequence — abatement — rather than as a mere procedural deadline for filing. In that precise sense, Order 50 Rule 6 is not directly applicable to reverse an abatement already operated. However, where the application for extension of time was accompanied by steps taken in court that demonstrated live engagement, the picture is more nuanced. The Court notes

with concern that the matter continued to be actively mentioned before this Court well past the one-year mark with the parties — particularly the Defendant's representatives — seeking leave and providing status updates on the Grant of Letters of Administration. An abatement in such circumstances, while technically correct by operation of law, was arguably impliedly waived or at the very least not enforced with finality until April 2025.

16. This Court cannot overlook a matter of principle that goes to the very integrity of judicial proceedings. Between October 2023 and October 2024, this Court actively presided over multiple mentions at which the parties, including the Advocates for the Defendant's estate, informed the Court of the pending application for Letters of Administration ad litem and sought leave for the forthcoming substitution. The Court did not at any stage during that period mark the suit as abated or indicate that no valid proceedings were before it. Quite the contrary: the Court countermanded the continuation of the matter and granted leave for substitution pending the formal Grant.

17. This creates what comparative jurisprudence would recognise as a form of legitimate expectation — the Plaintiff was reasonably entitled to believe, from the Court's conduct and the indications of the Defendant's own Advocates, that the suit remained alive and that the formality of substitution was but pending the arrival of the Grant. To permit the suit to abate in circumstances where the Court's own conduct

and the estate's representatives' representations induced a belief of ongoing validity would be unconscionable.

18. This principle is reinforced by the doctrine of equitable estoppel recognised in both English and Kenyan jurisprudence. In *Amalgamated Investment and Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84, the Court of Appeal held that a party who by its conduct, representations or acquiescence leads another to believe that strict legal rights will not be enforced cannot thereafter assert those strict rights to the detriment of the other party. The estate's Advocates, by appearing on multiple occasions and providing status updates on the Grant application — without once suggesting the suit had abated — adopted conduct inconsistent with a position of total abatement. Similarly, in *A-G of Hong Kong v Humphreys Estate (Queen's Garden) Ltd* [1987] AC 114, the Privy Council held that legitimate expectations arising from governmental (and by analogy, institutional) conduct warranted equitable relief.
19. Critically, it is recorded that the Limited Grant ad litem was issued on 4th September 2024 — within the first year after the Defendant's death (14th July 2023 to 14th July 2024). The Respondent's Advocates were therefore aware of the issuance of the Grant at the time of the mention of 31st October 2024, yet this fact was deliberately withheld from the Court and from the Plaintiff's Advocates. The Grant was only disclosed on 29th January 2025 — nearly five months after its issuance. This is a matter of serious professional concern and the Court notes it with displeasure.

20. Article 159(2)(d) of the Constitution directs courts to administer justice without undue regard to procedural technicalities. This provision does not obliterate procedural law — it tempers its application where adherence to form would produce substantive injustice. The Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR stated that procedural rules are handmaidens of justice; they should not be elevated to an end in themselves.
21. In the present case, the Plaintiff filed suit in 2020, obtained an inhibition order, and has actively prosecuted his claim throughout. The Defendant's own Replying Affidavit constituted an admission of the claim. The delays in substitution are traceable to: (i) the multiple dilatory applications filed by the person now sought to be substituted; (ii) the deliberate delay in disclosure of the Grant of Letters of Administration ad litem; and (iii) the conduct of the estate's Advocates in the proceedings. For the Court to allow the Plaintiff's substantive claim — acknowledged by the Defendant himself — to be extinguished by procedural abatement arising from the very conduct of the Respondent would be a grave miscarriage of justice.
22. Comparative Jurisdiction: The position in India, from which Kenya's Civil Procedure Act draws significant heritage, is instructive. In *Janki Vashdeo Bhojwani v Indusind Bank Ltd* AIR 2005 SC 439, the Supreme Court of India held that abatement provisions must yield to the court's inherent

powers under Section 151 of the Code of Civil Procedure (equivalent to Section 3A of Kenya's Civil Procedure Act) where the delay is attributable to circumstances beyond the party's control. In *State of Punjab v Nathu Ram* AIR 1962 SC 89, the Court held that the doctrine of abatement cannot be used as a technical device to defeat substantive rights where the spirit of justice demands otherwise. These authorities, while persuasive rather than binding, are consistent with the constitutional approach mandated under Article 159(2)(d).

23. The position in Uganda under the equivalent provisions of the Civil Procedure Rules was examined in *Mukasa v Nsubuga* [2006] UGHC 47, in which the High Court of Uganda held that where the failure to substitute a deceased party arose from circumstances partly attributable to the estate's representatives and partly to court delay, the interests of justice required that the court exercise its discretion to revive the suit. Similarly, the High Court of Tanzania in *Peter Mwita v Mwita Magige* [2004] TLR 45 held that abatement, being a procedural consequence, must not be mechanically applied to defeat substantive rights where equitable considerations are present.

24. Respondent's contention is that the suit abated automatically in July 2024, one year after the Defendant's death, and that the Court's order of 3rd April 2025 merely recognised this legal reality. This is a correct statement of the law in its strict form. However, two factual matters complicate this:

- a) The Court was itself conducting active proceedings in the suit throughout the period from October 2023 through October 2024, without any intimation that the suit had abated. Indeed, at the mention of 15th January 2024 — already within the critical year — the Court granted leave for substitution pending the Grant. This is, at a minimum, a tacit extension of the period within which the court expected the substitution to be completed.
- b) The Grant of Letters of Administration ad litem was obtained on 4th September 2024 — still within a period when the Respondent's Advocates had the legal instrument necessary to effect substitution and could have regularised the proceedings. The inexplicable five-month delay in disclosure cannot inure to the Respondent's benefit.

25. In these circumstances, this Court finds it unconscionable to hold that the suit abated in July 2024 in a manner that is wholly final and incapable of any curative order. Even if abatement technically occurred, the Court retains jurisdiction under its inherent powers and under the constitutional mandate to grant relief from such abatement where the ends of justice require it.

DISPOSAL

26. Having considered the affidavit evidence, the written submissions of both parties, the applicable law, and the authorities cited, this Court makes the following findings and orders:

- i. The suit did technically abate by operation of Order 24 Rule 4(3) of the Civil Procedure Rules in July 2024, one year after the death of the Defendant. The Court's order of 3rd April 2025 correctly recognised this position as a matter of strict procedural law.
- ii. However, the abatement arose in circumstances that were substantially caused or contributed to by: the prolonged dilatory conduct of the Respondent's predecessor-in-interest during the lifetime of the Defendant; the failure of the Respondent's Advocates to disclose the Grant of Letters of Administration ad litem promptly upon its issuance on 4th September 2024; and the conduct of proceedings by this Court itself over the period from October 2023 to October 2024, which reasonably induced a belief in the Plaintiff that the suit remained alive.
- iii. In the circumstances, this Court finds that sufficient cause has been demonstrated for the grant of relief from abatement. The Court exercises its inherent jurisdiction under Section 3A of the Civil Procedure Act, read together with Article 159(2)(d) of the Constitution, to set aside the abatement and revive the suit.
- iv. The order of 3rd April 2025 marking the abatement of this suit is hereby set aside.
- v. The suit is hereby revived and reinstated. The Plaintiff is granted leave to substitute, out of time, the deceased Defendant Nguru Nduma with Petronilla Syombua Nguru,

the holder of the Limited Grant of Letters of Administration ad litem issued on 4th September 2024.

- vi. Summons shall issue to Petronilla Syombua Nguru to enter appearance and to file a Defence within 21 days of service.
- vii. Given the history of delay and the conduct of the Respondent's Advocates in withholding the Grant from the Court and the Plaintiff, the costs of this Application are awarded to the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT EMBU THIS 16TH DAY OF APRIL, 2026.

HON. E.C CHERONO
JUDGE
ENVIRONMENT AND LAND COURT
EMBU

Delivered in the presence of:

1. Mr. Masila for the Plaintiff/Applicant.
2. Mr. Obunga H/B for Masika for the Defendant/Respondent
3. Diana Kemboi C/A.