

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MILIMANI
ELC NO. 335 OF 2015

**BERNADETTE NJERI THIURI (Suing as
The Executor of the Estate of PHILIP
JOHN THIURI alias PHILIP J. THIURI) - PLAINTIFF/APPLICANT**

VS

**LOISE W. WAINAINA - 1ST
DEFENDANT/RESPONDENT**

**EMBAKASI RANCHING CO. LTD - 2ND
DEFENDANT/RESPONDENT**

RULING

**(In respect of the Plaintiff's Notice of Motion Application dated
13/11/2025)**

1. The current motion subject to this ruling is dated 13/11/2025 by the Applicant herein. The application is stated to have been filed in accordance with provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, as well as Orders 51, Orders 12 Rule 6 (1), Order 7 and Order 24 Rule 1 of the Civil Procedure Rules. The Plaintiff substantively seeks the following reliefs from this Court: -
 - a. That this Honorable Court be pleased to set aside the order made on 7/7/2022 dismissing the suit known as ELC Case No. 335 of 2015; Prof. Philip J Thiuri v Loise W. Wainaina & Embakasi Ranching.
 - b. That this Honourable Court be pleased to reinstate ELC No. 335 of 2015; Prof. Philip J Thiuri v Loise W. Wainaina & Embakasi Ranching.
 - c. That this Honourable Court be pleased to substitute the Plaintiff in ELC No. 335 of 2015, Prof. Philip J Thiuri v Loise W. Wainaina & Embakasi Ranching, with the Applicant herein.

- d. That this Honourable Court be pleased to grant the Applicant leave to amend the Plaint in terms of the draft annexed to this Application.
- e. That the costs of this Application be provided for.
2. The motion is supported by the grounds set out therein, as well as by the affidavit sworn on the same date by Bernadette Njeri Thiuri, the Applicant herein. The Applicant avers that the deceased, Philip John Thiuri, alias Philip J. Thiuri, was the registered proprietor of the parcel of land known as Nairobi/Block 105/14183, the suit property herein. That the deceased instituted this suit in person. Alongside the Plaint, the deceased filed an application under certificate of urgency seeking a temporary injunction restraining the 1st Defendant from interfering with his ownership and possession of the suit property. That an order of temporary injunction was duly issued on 7/8/2015, restraining the 1st Defendant from trespassing on the suit property.
 3. The deponent avers that, unfortunately, the deceased passed away on 7/4/2021, while the suit was pending. That at the time of his demise, he had appointed the Applicant herein as the executor of his will. She avers that the suit was subsequently dismissed because it had abated.
 4. The Applicant states that the grant of probate of the deceased estate was issued on 25/10/2021, confirmed on 3/8/2022, and rectified on 16/7/2024. That she visited the 2nd Defendant's offices to collect the original titles and establish the physical location of the deceased properties. She then learnt that the 1st Defendant was in occupation of the suit property contrary to the injunctive orders issued. Upon instructing her Advocates on record to institute a suit against the 1st Defendant, she learnt of the existence of the instant suit and its dismissal.
 5. She argues that the delay in prosecuting the suit was inadvertent and that the instant application has been filed promptly after the discovery of the physical location of the suit property. She prays that the suit be

reinstated; hence, the need to substitute and amend the plaint to reflect the current status quo.

The 1st Defendant's Replying Affidavit

6. The application was opposed by the 1st Defendant, as set out in her Replying Affidavit, sworn on 15/12/2025. The 1st Defendant urges the Court to uphold the dismissal on the basis that no sufficient reason has been given for the failure to substitute the Plaintiff in good time, and that the suit was dismissed several months after the grant of representation had been issued.
7. She argues that the Applicant had sufficient time to seek substitution before the suit was abated, and that the application was brought four years after the dismissal, without furnishing the Court with any reasonable grounds for the delay in seeking reinstatement.
8. The 1st Defendant contends that she is the rightful owner of the suit property, having acquired it from the 2nd Defendant as a shareholder and having paid all the requisite fees. She states that after the suit was dismissed, she prepared a certificate of lease for the suit property and developed it. She asserts that she would suffer irreparable loss and damage if the suit were reinstated.

The written submissions

9. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The Applicant's submissions are dated 9/1/2026, whereas the 1st Defendant's submissions are dated 19/1/2026. I must state that the written submissions, together with the numerous Authorities cited and relied upon by the Advocates for the respective parties, form part and parcel of the Record of the Court and, in any event, have been duly considered.

Analysis and Determination

10. I have considered the application and the rival affidavits. The Court is of the view that the issues for determination in this matter are: -

- a. Whether the suit should be reinstated
- b. Whether the Plaintiff should be granted leave to amend the Plaintiff

Whether the suit against the 2nd Defendant should be revived/reinstated

11. Order 24 of the Civil Procedure Rules provides as follows:

“1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or plaintiffs alone or against the surviving defendant or defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or defendant or defendants.

3. (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 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 sub rule (1), the suit shall abate so far as 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.

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5. Where a question arises as to whether any person is or is not the legal representative of a deceased Plaintiff, or a deceased defendant, such question shall be determined by the Court.

12. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of the Plaintiff. However, Order 24 Rule 7 (2) provides a window to reinstate a suit that has abated as follows:

“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.”

13. For a suit to be revived, an appropriate application must be presented to the Court, and the Court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. In the case of Said Sweilem Gheithan Saanum -vs- Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR), the Court of Appeal explained the provisions of Order 24 of the Civil Procedure 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 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.”

14. From these authorities, three principles emerge. First, abatement occurs by operation of law upon the lapse of time. Second, enlargement of time is a prerequisite to joinder and revival. Third, revival is discretionary and dependent on proof of sufficient cause.
15. In the case of Titus Kiragu vs. Jackson Mugo Mathai (2015) eKLR it was held that:

“It is not the act of the Court declaring the suit as having abated that abates the suit but by operation of law.”
16. It is not disputed that the Plaintiff, Philip J. Thiuri, passed away on 7/4/2021. Given that the claim concerns proprietary interests in land, the cause of action survived his death. However, no lawful substitution of the Plaintiff’s estate was effected within one year of his death in accordance with Order 24 Rule 3(2) of the Civil Procedure Rules.
17. It follows therefore that the suit herein abated on 7/4/2022 by operation of law. The orders issued on 7/7/2022 by Justice E.K. Wabwoto dismissing the suit for want of prosecution were of no effect. The suit had already abated.
18. Order 24 Rule 7(2) of the Civil Procedure Rules gives the Court discretion to revive an abated suit if there is sufficient proof that the

Applicant was prevented by any sufficient cause from continuing the suit. The pivotal issue for determination is whether the Applicant has demonstrated sufficient cause to warrant enlargement of time and revival of the suit several years after abatement. The Court of Appeal in the case of the Honourable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011 stated that:

“Sufficient cause or good cause in law means: the burden placed on a litigant usually by Court, rule or order to show why a request should be granted or an action excused. (See Black’s Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”

19. In the Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR, it was held that for a Court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the Applicant was prevented by a sufficient cause from continuing the suit. In the case of Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR, the Court held that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.

20. When a party dies and the cause of action survives or continues and upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case. Section 2 of the Civil Procedure Act defines legal representative as follows;

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

21. In the instant application, the grant of probate in respect to the deceased Plaintiff's estate was issued to Bernadette Njeri Thiuri, the Applicant herein on 25/10/2021, confirmed on 3/8/2022 and rectified on 16/7/2024. The instant application dated 13/11/2025 was filed on 17/11/2025. The suit having abated on 7/4/2022 the delay is of about 3 years 7 months.
22. The Applicant's explanation for the delay is grounded on the fact that the deceased was acting in person. She avers that after the grant was confirmed, she visited the 2nd Defendant's offices to collect the original titles and establish the physical location of the deceased properties. It is then that she learnt that the 1st Defendant was in occupation of the suit property contrary to the injunctive orders issued. That upon instructing her Advocates on record to institute a suit against the 1st Defendant, it is then that she learnt of the existence of the instant suit and its dismissal. The delay in prosecuting the suit was therefore inadvertent. She asserts that the instant application has been filed timeously after the discovery of the physical location of the suit property.
23. In the case of Jackson Ngungu Kague -vs- Attorney General & 595 Others [2016] eKLR, the Court held that the test for what amounts to delay is whether it leads the Court to an inescapable conclusion that it is inordinate and therefore inexcusable. The Court will determine the issue of delay on a case-by-case basis, whereby a day or two may be considered inordinate delay, while 5 or so years may be considered otherwise. This depends on the circumstances of the case and whether sufficient explanation is given to convince the Court.
24. Given that the deceased was acting in person, the Applicant, as the legal representative, was not in a position to know of the existence of this suit until her visit to the 2nd Defendant's Offices. It is evident that at the time of the Plaintiff's death, the suit property had not been registered. As stated by the 1st Defendant in her Replying Affidavit, she

processed a certificate of lease for the suit property and developed it after the suit was dismissed.

25. In the peculiar circumstances of this case, this Court is satisfied that the delay has been sufficiently explained and does not constitute deliberate inaction, want of bona fides, or abuse of the Court process. I also note that the Defendants will suffer no prejudice from the revival of this case. By contrast, the effect of abatement is drastic, as it extinguishes the Plaintiff's cause of action and bars the filing of a fresh suit. Given the nature of the claim and the Plaintiff's assertion of long-standing occupation and development of the suit property, the interests of substantive justice favour allowing the matter to be heard on its merits, subject to appropriate terms.
26. Balancing the competing considerations and guided by the principles under Order 24, Sections 1A and 1B of the Civil Procedure Act, and Article 159(2)(d) of the Constitution, this Court is persuaded that this is a proper case for the exercise of the Court's discretion to enlarge time, to substitute the legal representative, and to revive the suit.
27. Accordingly, the Court allows the revival and reinstatement of the suit to be determined on merit.

Whether the Plaintiff should be granted leave to amend the Plaintiff

28. The instant application has been brought under the provisions of Section 100 of the Civil Procedure Act, and Order 8 Rule 5 (1) of the Civil Procedure Rules. Section 100 of the Civil Procedure Act provides that: -

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

29. Order 8 Rule 5 (1) of the Civil Procedure Rules provides that: -

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

30. It is evident from the above provisions of the law, that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other party can be compensated by costs.

31. A wider footage on the issue was given in the case of Ochieng and 2 others v First National Bank of Chicago (1995) eKLR, where the Court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings. The same is as follows:

- a) the power of the Court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the Court at any stage of the proceedings;
- d) that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side; and
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the Court to still allow and amendment notwithstanding the expiry of current period of limitation.

32. The above-mentioned parameters are not exhaustive as far as the grant of leave to amend the complaints is concerned. What that means is that the

Court has a very wide berth in granting leave to amend. See the case of St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] e KLR.

33. The proposed amendments, as indicated in the Draft Amended Plaintiff, show that the Applicant intends to include recent developments, including the fact that the suit property is now registered and that the 1st Defendant has taken possession thereof.
34. In the absence of any objection from the Defendants to the proposed amendments, the Court has no basis for denying the Applicant leave to amend the Plaintiff. The Defendants will not be prejudiced in any way by the proposed amendments, as they can also amend their pleadings, if need be. For the purpose of determining the real questions in controversy between the parties herein, this Court will grant the Applicant's prayer to amend the Plaintiff.
35. Accordingly, the Applicant's Notice of Motion dated 13/11/2025 is allowed on the following terms:
 - a. The suit herein is hereby revived and/or reinstated.
 - b. The time within which to apply for substitution of the deceased Plaintiff is hereby enlarged.
 - c. Bernadette Njeri Thiuri, being the executor and legal representative of the estate of the late Philip John Thiuri alias Philip J. Thiuri is hereby substituted in place of the deceased Plaintiff.
 - d. The Applicant shall file and serve the amended Plaintiff within Fourteen (14) days from the date hereof.
 - e. The Defendants shall have Fourteen (14) days upon service to file and serve their amended Defences, if necessary.
 - f. Each party shall bear their own costs of the application.

36. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 15TH DAY OF
APRIL 2026 VIA MICROSOFT TEAMS.**

**J. G. KEMEI
JUDGE**

Delivered Online in the Presence of:

1. Mr. Mwanza for the Plaintiff
2. Mr. Mwangi DK for 1st Defendant
3. N/A for the 2nd Defendant
4. CA- Elizabeth