

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELCA NO. E018 OF 2025

PETER KIMANI MWANGI 1ST
APPELLANT

SUSAN WANGUI MWANGI 2ND
APPELLANT

VERSUS

FRANCIS MWANIKI NYAGA 1ST
RESPONDENT

JOSPHAT MARARU NYAGA 2ND
RESPONDENT

*(Being an Appeal from the Ruling of Hon. Njoki Kahara (PM)
delivered on 12th March 2025 in Siakago PM-ELC No. 82 of 1994)*

JUDGMENT

Introduction

This appeal challenges the ruling of the trial court delivered on 12th March 2025 in which the learned Principal Magistrate dismissed a Preliminary Objection raised by the Appellants and allowed the Respondents' Notice of Motion dated 28th March 2024. The trial court granted orders substituting the Respondents in place of the deceased plaintiff, directed

reissuance of the decree in their names, and ordered the lifting of conservatory orders registered against land parcels No. NTHAWA/RIANDU/2467, 2468 and 2469.

Being dissatisfied with that decision, the Appellants lodged this appeal.

Background

The record shows that the original plaintiff, Nyaga Muchiru Mbogo, obtained a decree on 25th October 1996 in PM-ELC No. 82 of 1994. The decree was subsequently challenged on appeal, and execution was stayed by orders issued on 29th January 2004 pending determination of the appeal which was eventually concluded on 28th February 2019.

The decree holder died on 3rd November 2013 during the pendency of the appeal. In March 2024, the Respondents, who are administrators of his estate, filed an application seeking substitution, extension of time, reissuance of the decree and lifting of prohibitory orders.

The Appellants opposed the application through a Preliminary Objection contending that:

- i) The application was statute-barred under Section 4(4) of the Limitation of Actions Act; and
- ii) The suit had abated under Order 24 Rule 3 of the Civil Procedure Rules.

The trial court dismissed the Preliminary Objection and allowed the application, prompting the present appeal.

The Appellants faulted the trial Magistrate for:

1. Allowing an application that was statute-barred under Section 4(4) of the Limitation of Actions Act;
2. Allowing substitution despite alleged abatement of the suit;
3. Dismissing the Preliminary Objection contrary to law and evidence.

This being a first appeal, this Court is obligated to reconsider the material before the trial court and arrive at its own independent conclusion while bearing in mind that it did not have the benefit of seeing the witnesses, as stated in **Selle v Associated Motor Boat Co. [1968] EA 123**.

Issues for Determination

From the grounds of appeal, submissions and record, the issues for determination are:

1. Whether the application for substitution and execution was statute-barred under Section 4(4) of the Limitation of Actions Act;
2. Whether the suit had abated under Order 24 of the Civil Procedure Rules;
3. Whether the trial court properly exercised its discretion in allowing substitution and reissuance of the decree;
4. Whether the appeal has merit.

Section 4(4) of the Limitation of Actions Act provides that:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered...”

The Appellants argued that the decree was issued on 25th October 1996 and therefore enforcement after twelve years was barred. The Respondents however contended that execution of the decree was stayed pending appeal between 29th January 2004 and 28th February 2019, and therefore time did not run during that period.

Kenyan courts have consistently held that limitation does not run during a period when execution of a decree is stayed by a court order. In **Koinange Investment & Development Co. Ltd v Ian Kahiu Ngethe & 3 Others (2019) eKLR**, the Court held that where execution is stayed pending appeal, time for purposes of Section 4(4) is suspended.

Similarly, in **Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others**, the court emphasized that computation of limitation periods must exclude time during which a party is legally disabled from acting.

Comparative jurisprudence also supports this principle. In the English decision of *Lowsley v Forbes [1999] 1 AC 329*, the House of Lords held that time for enforcement of a judgment does not

run where enforcement is prevented by court order. Courts in India have similarly held in *Sital Prasad v Kishori Lal AIR 1967 SC 1236* that limitation is suspended where execution is legally stayed.

In the present case, the decree holder was prevented by court order from executing the decree during the pendency of the appeal. It would be unjust to compute limitation against a party who was legally restrained from executing the decree.

I therefore find that the trial court correctly held that Section 4(4) did not bar the Respondents' application.

The Appellants argued that the suit abated under Order 24 Rule 3 since substitution was not done within one year of death. However, the Respondents contended that the suit had already been determined and what remained was execution.

Order 24 Rule 10 of the Civil Procedure Rules provides:

“Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”

The effect of this provision is that abatement does not apply to execution proceedings. This position has been affirmed in **Said Sweilem v Commissioner of Lands (2015) eKLR**, where the Court held that once judgment is delivered, the matter moves to execution and abatement provisions do not apply.

The deceased in this matter had already obtained judgment and a decree. What remained was enforcement. Therefore, the death of the decree holder did not cause abatement.

Comparative authorities support this position. In *Mool Chand v Deputy Director of Consolidation AIR 1995 SC 2493*, the Indian Supreme Court held that abatement rules do not apply where rights have crystallized in a decree.

I therefore find that the trial court properly held that the suit had not abated.

Regarding the second issue, it is apparent that Kenyan Courts have inherent power to substitute legal representatives of a deceased decree holder to enable execution. This principle was emphasized in **Silas Njeru Njiru & 2 Others v Mugo Mukere (2022) eKLR**, where the court allowed substitution long after death to facilitate execution.

From the evidence by the Respondents, it is clear that they are administrators of the estate of the deceased and that they were unaware of the decree and had moved promptly upon discovery and that no prejudice would be suffered by the Appellants.

The Supreme Court of India in *Bhagwan Swaroop v Mool Chand AIR 1983 SC 355* observed that procedural rules should not

defeat substantive rights and substitution should be allowed to enable enforcement of decrees.

Similarly, the Court of Appeal in the case of **Johnstone Muchemi Mugutu v Simon Kihara Kamau (2019) eKLR** emphasized that courts should lean towards sustaining rather than terminating proceedings.

The trial court in my view exercised her discretion judiciously. It is trite that an appellate court will not interfere with discretionary decisions unless they are plainly wrong. This principle was set out in **Mbogo v Shah [1968] EA 93**.

In the present case, I am satisfied that the trial court Correctly interpreted Section 4(4) and Properly applied Order 24 Rule 10. I am also satisfied that the trial Magistrate exercised her discretion judiciously and considered relevant authorities and did not misdirect herself in law or fact.

For the foregoing reasons, I find this appeal lacking merit. The trial court properly dismissed the Preliminary Objection and allowed substitution to enable execution of a valid Judgment/decree.

FINAL ORDERS

1. The appeal herein is hereby dismissed.

2. The ruling of the trial court delivered on 12th March 2025 is upheld in its entirety.

3. The Respondents shall have the costs of this appeal.

It is so ordered.

**READ, DELIVERED AND SIGNED AT EMBU THIS 30th DAY OF
APRIL, 2026**

HON. E.C CHERONO
ELC JUDGE, EMBU

In the presence of;

1. M/S Kamochu H/B for Muthoni Ndege for the Appellant
2. Mr. Kalamu Ndolo for the Respondent
3. Diana Kemboi C/A