

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET
ELCC CASE NO. E170 OF 2014

**CHARLES KIPKEMOI SITIENEI &
KIPCHUMBA KANDIE** *suing as personal representatives of the estate of
the late* **ROTICH ARAP CHEMITEI**.....
PLAINTIFFS

VERSUS

FRANCIS DEFENDANT	KIPSANG	KIRWA	1ST
CHEMWENO DEFENDANT		TUITOEK	2ND
JOSPHAT DEFENDANT	KIPKOECH	RUTO	3RD
JOSEPH DEFENDANT		KANDIE	4TH
PIUS DEFENDANT	KIMUIGEI		5TH

RULING:

1. This ruling is in respect of the Notice of motion dated 18th November, 2025 by the plaintiff/Applicant seeking the following orders.
 1. Spent
 2. The court order given on 25.9.2023 dismissing the plaintiff's/Applicant's suit or otherwise be and is hereby set aside forthwith.
 3. The plaintiff's/Applicant's suit be and is hereby reinstated for hearing and final determination on merits.

4. Leave to amend pleadings namely the Reply to Defence dated and filed on 16.7.2014 by way of filing the plaintiff's reply to defence and defence to counter-claim to the 4th Defendant's amended defence and counter-claim dated 11.7.2018 in record be and is hereby granted forthwith.
 5. That the attached plaintiff's draft amended reply to amend defence and defence to counter-claim to the defendant's amended defence and counter-claim be and is hereby deemed duly filed and served subject to court fees.
 6. Pending the hearing and determination of this application, the court orders given on 29.9.2023 and 5.11.2025 respectively together with proceedings be and are hereby stayed forthwith.
 7. Costs to the plaintiff/applicant.
2. The application is based on the 8 grounds thereon and supported by the affidavit of CHARLES KIPKEMOI SITIENEI for and on behalf of the plaintiff/applicant sworn on 5th October, 2025 in which he deponed that he together with Kipchumba Kandie are the personal representatives of the estate of Rotich Arap Chemitei alias Rotich Chemitei (Deceased).
 3. The deponent averred that the firm of Mwinamo Lugonzo & Company for the 1st, 2nd, 3rd, 4th and 5th defendants filed a memorandum of appearance dated 18.6.2014 and defence dated and filed on 26.6.2014 and 27.6.2014 respectively, and

the plaintiff filed the reply to defence dated and filed on 16.7.2014.

4. The deponent stated that this court by the order given and issued on 9.10.2014 and 22.10.2014 respectively, ordered the Uasin Gichu District Land Registrar and the Uasin Gishu Land Surveyor to visit and establish or re-establish the boundaries of the land parcel Nos. KARUNA/KARUNA BLOCK 2 (KARUNA)/57, 56 and 55 and make a report. That the said officers presented the ground findings report dated 28.11.2014 and filed on 1.12.2014 with the sketch map whose copies were supplied to the parties in the suit as ordered on 5.12.2014.
5. That the firm of Manani, Lilan, Mwetich & Company advocates for the defendants filed a Notice of change of advocates dated 11.8.2016 and filed on 17.8.2016 defendants' list of witnesses and documents dated 10.07.2017, and a notice of motion application dated and filed on 31.10.2017 seeking to amend the defendants defence to include a counter-claim which was allowed on 14.6.2018.
6. The deponent stated that the plaintiff was given leave by the court on 25.7.2018 to file a reply to the defendants' defence and defence to the defendants' counterclaim within seven (7) days and the matter was fixed for mention on 8.10.2018. That the defendants' amended defence and counter-claim dated 11.7.2018 and filed on 18.7.2018 was served on 25.7.2018 in open court through the plaintiff's advocates.

7. It is claimed that this suit was before court on 26.1.2022 when the issue of representation of the defendants arose after Mr. Mwetich advocate appeared for the 4th defendant only after the plaintiff attended mediation proceedings for at least three times when such mediation did not take off because of communication barriers on the part of the plaintiff who had hearing impairment.
8. It is further stated that Manani Lilan Mwetich & Company Advocates filed a Notice of change of Advocates dated 28.1.2022 for the 4th Defendant, and there is no application to cease acting and fixed the hearing of that application (sic) on 7.3.2023.
9. That on 30.8.2023, the plaintiff's son Kipchumba Kandie and Lessee Charles Kipkemboi Sitienei met the plaintiff's counsel in the office with a report and instructions that Rotich Arap Chemitei the plaintiff died on 5.4.2023 and a Burial permit issued on 5.4.2023 was available but the Certificate of Death was yet to be obtained, and its acquisition was on going. That they did not get notice of the mediation proceedings, but after attending the sessions, the mediator did not attend and were advised to go away until the court calls them. That they heard from the 4th Defendant that the plaintiff's counsel intended to cease acting formally for the plaintiff. That they obtained advise on the need to apply for a limited grant of letters of administration and substitution of the plaintiff after the demise

of the plaintiff, and the plaintiff's son and lessee met the plaintiff's advocate after the filing of the application by way of chamber summons dated 20.2.2023 and filed on 28.2.2023 to cease acting for the plaintiff in this suit that was served on the 4th Defendant on 1.3.2023, and the application was fixed for 7.3.2023 and 25.9.2023 respectively.

10. It is stated that this court on 19.3.2025 allowed the application by way of Notice of motion dated 1.2.2025 for substitution of the plaintiff that was made after Hon. Justice R. Nyakundi issued the Grant of Letters of Administration Ad Litem on 31.1.2025 to Kipchumba Kandie and Charles Kipkemboi Sitienei in Eldoret HCC AD LITEM CAUSE No. E031 of 2024 in the matter of the estate of Rotich Arap Chemitei (Deceased). That on 7.5.2025, this court heard from the 4th Defendant's counsel that since the plaintiff's suit was dismissed on 25.9.2025 (sic), the 4th Defendant's counter-claim was to be listed down for hearing. That the court directed that the plaintiff was at liberty to make a formal application for setting aside the orders of 25.9.2023 and reinstate the plaintiff's suit. That the hearing of the suit proceeded by way of formal proof of the 4th Defendant's counter-claim on 5.11.2025 after which it was fixed for further hearing on 18.3.2026.
11. The applicant has also annexed an affidavit dated 21.5.2025 by himself and draft Amended Reply to Defence and Defence to Counterclaim.

12. The application is opposed by the 4th Defendant through a replying affidavit sworn by himself on 2.2.2026 wherein he deponed that the plaintiff/applicant filed this suit way back in 2014. That when the matter came for hearing on 25.09.2023, the same was dismissed for non-attendance since the plaintiff was not present in court.
13. The 4th Defendant argued that the reason fronted by the applicant herein for non-attendance is that the plaintiff had died on 30.08.2023, and asked the court to take notice that from the date the deceased died to when the application was filed on 18.11.2025, over two (2) years had already lapsed. That the matter had been mentioned severally and even had a partial hearing for which the plaintiff's counsel attended and the matter proceeded, and by which time the plaintiff's counsel was aware of the passing of the plaintiff and had even filed an application for his substitution dated 11.02.2025. That to come back now and file the present application after such blatant delay and with no reasonable explanation shows lack of vigilance in prosecuting the suit. The 4th defendant further contended that the applicant herein has clearly not been keen to prosecute this case since even before the said dismissal, the applicant herein had sought several adjournments from court.

SUBMISSIONS:

14. The application was canvassed by way of written submissions. The applicant filed submissions dated 11th March, 2026 while

the 4th Defendant filed his dated 17th March, 2026. I have read and considered the said submissions together with the authorities relied on.

ANALYSIS AND DETERMINATION:

15. I have considered the application, the response as well as the submissions filed together with the authorities cited. The issues that arise for determination are: -

- i. Whether the court should set aside the orders made on 25.9.2023 dismissing the plaintiff's suit and have it reinstated.*
- ii. Whether leave should be granted to the plaintiff to file a reply to defence and defence to the 4th Defendant's amended defence and counter-claim dated 11.7.2018.*

i. Whether the court should set aside the orders made on 25.9.2023 dismissing the plaintiff's suit and have it reinstated;

16. The Plaintiff commenced this suit vide a plaint dated 27th May, 2044 and filed in court on 28th May, 2014 and the main prayer sought against the defendants was an order of permanent injunction over the suit land title No. KARUNA/KARUNA BLOCK 2 (KARUNA)/57 in the name of the plaintiff. The defendants entered appearance on 18th June, 2014, and filed their defence on 27th June, 2014. On 16th July 2014, the plaintiff filed a Reply to defence.

17. Vide a Notice of motion application dated 31st October, 2017, the 4th Defendant sought leave to amend his defence to include a counter-claim, and that application was allowed by the court on 25th July, 2018. The court directed the 4th Defendant to file an amended defence and counter-claim within 7 days and the plaintiff to file a reply to amended defence and defence to counter-claim within 7 days of service. Subsequently, the 4th Defendant filed his Amended Defence and counter-claim on 18th July, 2018. Thereafter, the case was fixed for hearing on 26.11.2018, but the same did not proceed. The case came up again for hearing on 24th January, 2019 but the same could not proceed because the plaintiff required a sign language interpreter, and the matter was adjourned to 2.4.2019. On that date, the plaintiff took to the witness box and was sworn, but because he was deaf and not able to hear or communicate, the case was adjourned. The plaintiff's counsel was granted leave to file a power of attorney and regularize his documents within 14 days. The matter was then referred to court annexed mediation on 8.5.2019, but the record shows that the mediation failed, and the matter was fixed for hearing on 4.10.2021, and 26.1.2022. The record further shows that the hearing did not proceed.
18. When the matter came up before court on 26.6.2022, Mr. Mwetich counsel for the defendant informed the court that Mr. Cheptarus counsel for the plaintiff had not filed a defence to

the counter claim. In response, Mr. Cheptarus told the court that he had not been served with that day's mention notice. The court then fixed the matter for hearing on 13.10.2022 and Mr. Cheptarus was directed to file his defence to the counter-claim. However, by 13.10.2022, the defence to counter-claim had not been filed and the plaintiff's counsel was given a last chance to file the same but it was never filed. When the matter came up for hearing on 25.9.2023, only the 4th defendant's counsel was present in court. The plaintiff and his counsel were not in court and the court dismissed the plaintiff's suit for non-attendance and the matter was fixed for hearing of the counter-claim on 3.4.2024, 15.10.2024 and 12.2.2025, but the hearing did not proceed. On 12.2.2025, Mr. Cheptarus informed the court that he had filed an application dated 22.2.2025 for substitution of the plaintiff who was said to have passed on, and that application was allowed on 19.3.2025. Thereafter, the counter-claim was fixed for hearing on 4.11.2025 when the 4th Defendant testified and he was even cross-examined by Mr. Cheptarus and re-examined by Mr. Mwetich. The case was then fixed for further hearing on 18.3.2026. However, soon thereafter, the plaintiff filed the application dated 18.11.2025 which is the subject of this ruling.

19. The application is filed by Charles Kipkemoi Sitienei and Kipchumba Kandie as personal representatives of the estate of the deceased plaintiff, Rotich Arap Chemitei alias Rotich

Chemitei. From their affidavits in support of the application, the plaintiff died on 5.3.2023. That fact is confirmed by the Grant of Letters of Administration Ad Litem that is on the record.

20. Order 24 Rule 1, 2 & 3 (1) & (2) 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 defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff 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 plaintiffs, or against the surviving defendant or defendants.
3. 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 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 defencing the suit to be recovered from the estate of the deceased plaintiff.

21. From the foregoing, it is clear that a suit abates by operation of law. That means that no order is required to declare the suit abated. All that one needs to determine whether or not the suit has abated is evidence of death of the plaintiff and that the deceased plaintiff was not substituted within the time stipulated in law.

22. In the case of **Titus Kiragi -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.”

23. In the case of **Kaboi Mucheru -Vs- Gakuu Mucheru Mbugi (2015) eKLR**, it was held:-

“As indicated earlier, this suit abated and the court did declare so. It is indeed clear from the provisions of Order 24 Rule 3(2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff’s death. There is therefore no

requirement that a court should make a declaration to that effect.”

24. In the case of **Said Sweilem Gheitan Saanum -Vs- Commissioner of Lands (being sued through the Attorney General) & 5 others (2015) KECA 284 (KLR)**, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure Rules 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 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 ceased to exist in the eyes 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. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'mboroki M'arangacha vs Land Adjudication Officer, Nyambene and 2 others, Meru HCC Application No. 45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union vs Charles Murgor (Deceased) NBI HCCC No. 1671 of 1994. From the language of Order 24 Rule 3 (2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of **Lord Denning in M'AcFoy vs Union Africa Co. Limited (1961) 3 ALL ER 1169**, that:-

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado. Though it is sometimes convenient to have the court declare it to be so...”

“...”

“Because the deceased died on 28th August, 2004 and since no application was made within one year of his death to have his legal representative substituted in his place, there can be no debate on the date of the suit. It abated.”

25. In the present case, it is admitted that the plaintiff died on 5.4.2023. Since no application was made within one year of his death to have his legal representatives substituted in his place, and being guided by the above provision of law and the decision of the Court of Appeal which no doubt is binding on this court, it is clear that the plaintiff's suit abated. Although this court allowed an application for substitution on 19.3.2025, the same is a nullity since it was on the basis of the application 22.2.2025 which was made long after the suit had abated on 5.4.2024 or thereabout, which was about a year earlier.
26. I have also looked at the application herein. The same mainly seeks to set aside the plaintiff's suit which was dismissed on 29.9.2023 and reinstate it for hearing. In addition, the applicants are also seeking leave to file and serve a reply to defence and a defence to counter-claim. There is no application for consideration by the court for extension of time and revival of the suit. Therefore, in my view, the present application which is founded on a suit that had abated is made in a vacuum and must fail.

27. For the foregoing reasons, the Notice of Motion dated 18.11.2025 is devoid of merit and is hereby dismissed with costs to the 4th Defendant.
28. It is so ordered.

DATED, SIGNED and **DELIVERED** virtually at **ELDORET** on this **7TH** day of **MAY, 2026** vide Microsoft Teams.

HON. C. K. YANO
ELC, JUDGE

In the virtual presence of:-

Mr. Cheptarus for the Plaintiff.

Mr. Mwetich for Defendants.

Court Assistant - Laban.