**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 935 OF 2001 [OS]**

**NJUGUNA MWAURA MBOGO…….....PLAINTIFF**

**VERSUS**

**EK BANKS LIMITED……...…….DEFENDANT**

**RULING**

**Introduction**

1. On 4/4/2014, the defendant, ***EK BANKS LIMITED***, brought a Notice of Motion of even date seeking the following orders:

> *"2. Elizabeth Nyambura Njuguna and Francis Kamau Njuguna being the administrators of the plaintiff's estate be enjoined as interested party or parties to this suit.*
>
> *3. In the alternative to the above prayer, the honourable court do give directions as it deems fit to order Elizabeth Nyambura Njuguna and Francis Kamau Njuguna being the administrators of the plaintiff's estate [now deceased] parties to this suit.*
>
> *4. The honourable court be at liberty to make such further orders as it deems fit and appropriate in the circumstances to meet the ends of justice.*
>
> *5. The costs of this application be provided for."*

2. The application is supported by a lengthy affidavit sworn on 4/4/2014 by the Defendant's Managing Director, Aaron Ruto. The deponent has set out a background to the present application and enumerated grounds upon which the defendant seeks the above orders. The application is opposed by both ***ELIZABETH NYAMBURA NJUGUNA AND FRANCIS KAMAU NJUGUNA***, administrators of the estate of the plaintiff *[the Administrators]*. To understand the context of the present application, it is necessary that I briefly outline the contextual background to the application.

3. In the year 2001, the plaintiff, ***NJUGUNA MWAURA MBOGO*** *[now deceased]* commenced this suit by way of an Originating Summons seeking to be declared the owner of Land Reference Number 10581 compromised in Grant No. I.R. 18437 measuring approximately 561 Acres [less road reserve of 19 Acres], situated in Nakuru County *[the suit property]*. The deceased sought to be declared owner under the doctrine of adverse possession, contending that he had been in uninterrupted and peaceful possession of the suit property since 1959. It was alleged the originating summons was served upon the defendant but the defendant failed to enter appearance. The originating summons was subsequently heard *ex parte*. In February 2003, Hayanga J delivered an *ex parte* judgment in favour of the plaintiff. The deceased plaintiff thereafter promptly moved to execute the *ex parte* judgment by causing the suit property to be

transferred into his name in the same year 2003. The defendant subsequently brought proceedings to set aside the *ex parte* judgment.

4. In April 2006, while the application seeking the setting aside of the ex parte judgment was pending, the plaintiff disappeared and in July 2006 his dead body was found. In 2007, the defendant brought a motion to substitute the deceased plaintiff with the administrators herein but the application aborted because the personal representatives of the deceased plaintiff had not been given a grant. Subsequently, in August 2008, Elizabeth Nyambura Njuguna and Francis Kamau Njuguna *[the administrators]* were appointed as administrators of the estate of the plaintiff.

5. Subsequent substitution proceedings were initiated in the suit in July 2011 by the defendant through an application seeking to substitute the deceased plaintiff with his personal representatives, Elizabeth Nyambura Njuguna and Francis Kamau Njuguna. In the same application, the defendant also sought extension of time for filing of the application for substitution. That application was heard by Ougo J and struck out on technicalities. The Hon Ougo made the following verbatim observation:

> ***"The suit against the deceased plaintiff abated a year from April 2006. No application was made within the year to have the plaintiff substituted. In the application before me the applicant has not applied to revive the suit. It therefore remains a suit that abated in the year 2007. The application before me, therefore, is premature and incompetent since the suit has to be revived before any application is made. I accordingly strike out the application dated 13th July, 2011 with costs."***

6. Through a notice of motion dated 15/4/2012, the defendant sought a review of Judge Ougo's order of 28/3/2012. In a ruling delivered on 21/9/2012, Judge Ougo dismissed the application for review in the following verbatim words:

> ***"5. In my ruling delivered on 28th March, 2012, which the applicants seek to review, I found that the application dated 13.07.11 was premature since, in my view, the suit should have first been revived before the application for substitution was filed. I do not, with respect, agree with learned counsel for the applicant's submissions in the present application that an extension of time for the filing of an application for substitution per se would have revived the suit which has abated. There is no basis upon which this court can review its order of 28.03.12 and the applicant's relief does not lie in review. I note that the application was struck off. I, therefore, find that the application dated 5th April, 2012 is not merited and dismiss it with costs to the respondents."***

7. Soon after Judge Ougo delivered her ruling of 21/9/2012, the defendant, through an application dated 12/10/2012, sought a revival of this suit in terms of the following verbatim prayer:

> ***"1. That the honourable court be pleased to exercise its discretion and revive the above suit which has abated by extending the statutory period of substitution from one year to such period as it would deem fit and reasonable to facilitate the substitution of the plaintiff who is now deceased."***

8. That notice of motion was canvassed before Judge Mutungi who on 29/4/2013 delivered a ruling in the following verbatim terms:

> ***"A suit cannot be revived against a deceased plaintiff as the defendants are attempting to do through this application. In my view, substitution of necessity would have to precede revival of the suit in case of a deceased plaintiff. I suppose that is the reason why under the proviso to*** *Order 24 rule 3* ***the court has discretion to extend time for bringing an application for substitution, if there is good cause. If substitution was to be granted, automatically the abated suit would be revived. It is not an application for substitution that is before me, the same having been disposed off by my sister Honourable Justice Ougo, but one for revival of the suit which unfortunately I cannot grant as the party who has brought the application lacks the capacity to***

***do so. Such an application for revival of an abated suit can only be brought at the instance of the deceased plaintiff by the legal representative, trustee or official receiver under the provisions of*** *Order 24 rule 7 (2) of the Civil Procedure Rules.* ***The upshot is that I find the notice of motion application by the defendant dated 12th October, 2012 to be devoid of any merit and I order the same dismissed with costs to the plaintiffs."***

9. The ruling by Judge Mutungi culminated in the filing of the present application in which the defendant seeks to have the administrators of the estate of the deceased plaintiff made parties to this suit. The application is opposed by the administrators/ personal representatives.

**Submissions**

10. Parties to the application presented written submissions. The defendant/applicant set out the following three key issues on which he submitted: *1] whether the present application is* ***res judicata****; 2] whether the personal representatives of the deceased can be substituted as plaintiffs; and 3] whether there has been inordinate delay in presenting the instant application.*

11. On whether or not the instant application is ***res judicata***, the applicant's counsel submitted that the applicant presented an application for substitution in July 2011 and in her ruling on the application, the learned judge held that the application for substitution was premature in view of the fact that the suit had abated. In the judge's view, an application for substitution had to be preceded by an application for revival of the suit. The judge then proceeded to strike out the application without delving into its merits. In counsel's view, the application for substitution was not considered on its merits. Consequently, the doctrine of ***res judicata*** does not come to play.

12. Counsel for the applicant further submitted that when the applicant, in compliance with the ruling of Judge Ougo made an application for revival of the suit, Judge Mutungi rendered a substantive ruling and dismissed the application for revival on the ground that revival automatically follows substitution and substitution must precede revival, a stark opposite of Judge Ougo's observation while striking out the earlier application for substitution.

13. Counsel for the applicant submitted that this court is enjoined by ***Articles 48 and 50 of the Constitution of Kenya*** to ensure access to justice for all persons and to guarantee the parties the right to a fair hearing.

14. On whether or not the plaintiff's personal representatives are necessary parties to this suit, counsel submitted that the deceased plaintiff filed the Originating Summons herein claiming adverse title to the suit property which was registered in the name of the defendant. He contended that the defendant was not served with the originating summons and summons to enter appearance and consequently did not enter appearance. As a result, *ex parte* judgment was obtained against the defendant. Upon learning about the *ex parte* judgment, the defendant put in motion proceedings to set aside the *ex parte* judgment. The deceased plaintiff died while those proceedings were pending. He submitted that in the above circumstances, if substitution is not allowed, grave injustice would be occasioned to the defendant.

15. On whether there has been inordinate delay in presenting the present application, counsel submitted that the defendant learnt about the plaintiff's death in April 2007. The defendant then proceeded to file an application praying for substitution of the deceased plaintiff. That application was withdrawn because of lack of *locus standi* on the part of the personal representatives. On 13/7/2011, a fresh application for substitution was filed. When the application was struck out by Judge Ougo on 28/3/2012 and a review declined on 21/9/2012, the defendant immediately filed another application seeking revival of the suit. Upon Judge Mutungi's determination of the application seeking revival of the suit, the defendant presented the present application. Counsel contended that the defendant had been diligent all through.

**Submissions by Personal Representatives**

16. Counsel for the personal representatives of the plaintiff filed written submissions dated 26/11/2014 in

which he submitted that the present application is an abuse of the court process. He contended that in the past, the defendant filed an application dated 13/7/2011 seeking substitution, which application was struck out on 28/3/2012. Second, the defendant filed an application dated 5/5/12 seeking the setting aside of the orders of 28/3/2012, which application was declined. Third, the defendant filed an application dated 12/10/2012 seeking revival of this suit, which application was dismissed on 29/4/2013. Counsel submitted that the present application constitutes an appeal filed in the same court. He further argued that the present application is ***res judicata*** because the issues raised in it were raised and determined in the previous applications. Lastly, counsel submitted that the suit herein having abated, it follows that the court cannot be asked to enjoin Elizabeth Nyambura Njuguna and Francis Kamau Njuguna to a suit that has ceased to exist by operation of the law.

**Analysis and Determination**

17. This application raises four key issues. The first issue is whether the present application is ***res judicata***. The second issue is whether this court has jurisdiction to entertain the instant application. The third issue is whether an order of substitution of a deceased plaintiff is available to a defendant in a suit which has abated as a result of the plaintiff's death. The fourth issue is whether the applicant has satisfied the criteria for substitution and revival of an abated suit under ***Order 24 rule 3 of the Civil Procedure Rules***.

18. Before I pronounce myself on the above issues, I am inclined to observe that the present application has brought to the fore the recurring question on the precise place of our pre-2010 ***Civil Procedure Rules*** *vis-à-vis* the overriding and broader constitutional underpinnings, principles, guarantees and safeguards on access to justice and the right to a fair hearing. In the present suit, the plaintiff died soon after obtaining *ex parte* judgment granting him title under the doctrine of adverse possession to a parcel of land measuring approximately 561 Acres. Invariably, the defendant would not take any further proceedings in the suit to challenge the *ex parte* judgment without first substituting the deceased plaintiff. On their part, the administrators have been vehemently opposed to substitution. The first motion seeking substitution aborted because the administrators contended that they did not have *locus standi*. The administrators subsequently applied for a grant after the suit herein had abated. The defendant's second application was struck out because the court was of the view that the application for substitution was premature in that it was not preceded by an order reviving the abated suit. When the defendant, in compliance with the court's guidelines, filed an application for an order of revival, the court substantively heard the application, considered it on merit and held that the revival order would not be granted because revival automatically follows substitution of the deceased plaintiff. The defendant was told by the court that its remedy lay in an application for substitution and that on order of substitution would automatically revive the suit. It is on account of this last ruling that the defendant has, for the second time, brought an application geared towards constituting a proper judicial quorum for redress against the *ex parte* judgment that deprived it 561 Acres of land. In the absence of that judicial quorum, the defendant would have no forum of redress because the *ex parte* judgment remains binding. As a matter of law, the *ex parte* judgment cannot be challenged until the deceased plaintiff is substituted. It is in this context that this court has been invited to make findings on the above four issues.

19. The first issue to be determined is whether the present application is ***res judicata***. The doctrine of ***res judicata*** is contained in ***Section 7 of the Civil Procedure Act*** which provides as follows:

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

20. The Court of Appeal gave a rendition of the doctrine of ***res judicata*** in ***JOHN FLORENCE MARITIME SERVICES LIMITED & ANOR V CABINET SECRETARY FOR TRANSPORT AND INFRASTRUCTURE & 3 OTHERS*****, (2015)** ***eKLR*** in which it cited verbatim the following paragraph in ***HENDERSON V HENDERSON, (1843) 67 ER 313***:

***"… where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of*** *res judicata* ***applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time."***

21. The rationale behind ***res judicata*** was outlined in the above case as follows:

***"The rationale behind*** *res judicata* ***is based on the public interest that there should be an end to litigation over the same matter.*** *Res judicata* ***ensures the economic use of the court's limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistence in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law."***

22. The instant application seeks substitution of the deceased plaintiff with his personal representatives. The preceding application which was substantively determined by Judge Mutungi was an application for a revival order. The learned judge dismissed the application holding that the relief available to the defendant was an order of substitution. Prior to filing the application for a revival order, the defendant had filed an application for substitution and that application was struck out by Judge Ougo on the ground that it was premature and that substitution had to be preceded by a revival order. She observed thus:

***"In the application before me the applicant has not applied to revive the suit. It therefore remains a suit that abated in the year 2007. The application before me therefore is premature and incompetent since the suit has to be revived before any application is made. I accordingly strike out the application dated 13/7/2011 with costs."***

23. It is quite clear from a plain reading of the ruling of Judge Ougo that the judge found that the application for substitution was premature and she proceeded to strike it out without considering its merits. In my view, ***res judicata*** becomes operative when an issue has been litigated and substantively determined by the court or tribunal. The application before Judge Ougo was struck out on the ground that it was premature; it was not determined on its merits. I accordingly find that the doctrine of ***res judicata*** cannot be properly invoked as a bar to the present application which seeks substitution of the deceased plaintiff.

24. The second issue is whether this court has jurisdiction to entertain the present application which seeks an order of substitution. In my view, court rulings and orders on procedural issues such as those in the present suit serve to provide procedural guidelines which parties are expected to follow in court proceedings. In the ruling of Judge Ougo, the court informed the defendant that the procedural step it needed to take was to bring an application for a revival order. In compliance with the ruling and guidelines given by the judge, the defendant brought the application for revival. In a subsequent ruling by Judge Mutungi, this court told the defendant that it should not have brought an application for a revival order; that it should instead have brought an application for substitution. The defendant similarly obliged and brought the present application. The respondents have argued that to entertain the present application would be tantamount to sitting on an appeal against the ruling of Judge Ougo. I do not agree with that interpretation. First, Judge Ougo did not make a substantive finding on the application for substitution. She gave procedural guidelines which the defendant faithfully implemented. Subsequently, Judge Mutungi determined the subsequent application on merit and spelt out new procedural guidelines telling the defendant that its remedy lay in bringing an application for substitution, which in the opinion of the court, would automatically revive the suit herein. It is noteworthy that the ruling of Judge Mutungi was a ruling of this court and the ruling of Judge Ougo was a ruling of the predecessor court of equal status.

Both rulings contained procedural guidelines which the defendant has endeavoured to comply with fully. In the circumstances, this court would be acting contrary to the spirit of ***Articles 40, 50 and 159 of the Constitution of Kenya*** if it were to deny the defendant access to justice because of the contradictory procedural guidelines given by Judge Ougo and Judge Mutungi. I would hasten to add that had Judge Ougo substantively heard and determined the application for substitution, I would have no jurisdiction to entertain the present application. That is not the position in the present application. I therefore find that I am properly seized of the present application.

25. The third issue is whether an order of substitution of a deceased plaintiff is available to a defendant in a suit which has abated as a result of the plaintiff's death. The legal framework on substitution of a deceased plaintiff is contained in ***Order 24 Rules 1, 2, and 3 of the Civil Procedure Rules*** which provide 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 defendants dies 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. (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."***

26. ***Order 24 Rule 7*** contains a framework on revival of an abated suit. It provides as follows:

> ***"(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***
>
> ***(2) 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."***

27. My interpretation of the legal framework in ***order 24*** is that any party to a suit can apply for the substitution of a deceased plaintiff or deceased defendant within one year following the death of the deceased party. The proviso to ***rule 3 sub rule 2*** gives the court powers to extend the time for substitution beyond one year for good reason, implying that once substitution is allowed outside the one year period, the suit is deemed to have been revived automatically. Secondly, a reading of ***rule 7*** indicates that the relief of revival of an abated suit under ***rule 7*** is not available to a defendant; it is only available to the legal representative of a deceased plaintiff, a trustee or an official receiver in the case of a bankrupt plaintiff. Thirdly, where a suit abates or is dismissed under ***order 24***, no fresh suit is allowed to be brought on the same cause of action. The legal ramification of the framework in ***rule 7*** is that both parties to an abated suit are barred from maintaining a fresh suit on the same cause of action. This legal

ramification ought to be considered by a court seized of an application for substitution or revival under ***order 24*** because a conclusive and final pronouncement on an application for substitution or revival under ***order 24*** carries severe legal consequences. If declined, the applicant is effectively locked out of the courts.

28. In view of the fact that the order of revival is not available to a defendant under ***order 24 rule 7***, the only available remedy to a defendant who wishes to obtain a relief in a suit which has abated as a result of the death of a plaintiff, is an application for substitution under ***rule 3 (2) of the Civil Procedure Rules***. Once the court allows substitution, the suit is deemed to have been revived at the behest of the defendant. Consequently, it follows that the defendant herein is in law properly entitled to bring the present application because that is the only route available to the defendant in challenging the *ex parte* judgment which deprived it the 561 Acres of land. Closure of that avenue would mean that the defendant will forever remain locked out of the arena of justice.

29. The fourth issue is whether the applicant has satisfied the criteria for substitution and revival of an abated suit under ***Order 24 rule 3 of the Civil Procedure Rules***. The court's power to grant an order of substitution and/or revival is a discretionary one. The discretion is to be exercised judicially, taking into account all relevant circumstances of the case, and guided by the law and the guiding principles.

30. ***Order 24 rule 3*** requires that an extension be granted only when a *"good reason"* has been tendered to the satisfaction of the court. Indeed the Court of Appeal emphasized this approach in ***SAID SWEILEM GHEITHAN SAANUM V COMMISSIONER OF LANDS [being sued through Attorney General] & 5 OTHERS, (2015) eKLR***.

31. In the present suit, the motion seeking substitution of the deceased plaintiff and by extension, revival, was brought by the defendant. The deceased plaintiff died in 2006. His personal representatives applied for a grant in 2008, after the suit had abated. The grant was issued to the personal representatives in August 2008. It is not clear if the grant has been confirmed. It is also not clear as to the precise point in time when the defendant became aware that the court had issued a grant. At paragraph 32 of Mr Aaron Ruto's supporting affidavit, he depones as follows:

> ***"I am aware that our advocate timeously filed a notice of motion dated 18th April, 2007 praying for substitution of Elizabeth Nyambura Njuguna and Francis Kamau in this proceedings but the said application was withdrawn for reasons of incompetency."***

It is instructive that the first attempt to bring the plaintiff's personal representatives on board was made in early 2007 but this aborted because the personal representatives had not initiated succession proceedings.

32. The subsequent motion seeking substitution was made by the defendant in 2011. This aborted because Judge Ougo was of the view that the defendant needed to obtain an order of revival before seeking substitution. The third motion was brought soon after Judge Ougo gave her guidelines, and this third motion was in tandem with those guidelines. The third motion was dismissed by Judge Mutungi on the ground that the defendant needed to apply for the very order it had sought before Judge Ougo. The present application is the fourth motion.

33. It is not lost to this court that a defendant seeking to substitute a deceased plaintiff is in a disadvantaged position because he must first ascertain who the personal representatives are. If the personal representatives choose to wait until a suit abates before they take out a grant, the defendant will inevitably have to confront the challenges of substitution in an abated suit.

34. From the foregoing, it is clear, in my view, that the delay in bringing the present application was not intentional. It is also clear that good reasons have been tendered to explain why the court should exercise its discretion to allow substitution and automatic revival under ***order 24 rule 3 of the Civil Procedure Rules***.

35. Lastly, I have deeply reflected on this application and its background in the context of ***Articles 48, 50***

***and 159 of Kenya's Constitution*** and ***Sections 1A and 1B of the Civil Procedure Act***. In my view, the ends of justice and the unique circumstances of this case justify the exercise of my discretion to allow substitution.

36. In light of the foregoing, I make the following orders in disposing the defendant's notice of motion dated 4/4/2014:

> ***(a) Elizabeth Nyambura Njuguna and Francis Kamau Njuguna are hereby substituted as plaintiff in place of the late Njuguna Mwaura Mbogo.***
>
> ***(b) The suit herein shall be deemed as revived by dint of the substitution herein.***
>
> ***(c) Costs of the application shall be in the cause.***

**Dated, signed and delivered at Nairobi on this 6th day of October, 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Wachera holding brief for Waiganjo Advocate for the Plaintiff

Rono Advocate for the Defendant

Halima Abdi: Court Assistant