



**Mwanzia (The legal representative of the Estate of Boniface Mutinda Kabaka (Deceased) t/
a Kabaka & Associates Advocates v Machakos County Government (Environment and Land
Miscellaneous Application 387 of 2017) [2024] KEELC 805 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 805 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 387 OF 2017
CA OCHIENG, J
FEBRUARY 21, 2024

BETWEEN

**VASCOLINE KATANU MWANZIA (THE LEGAL REPRESENTATIVE OF THE
ESTATE OF BONIFACE MUTINDA KABAKA (DECEASED) T/A KABAKA &
ASSOCIATES ADVOCATES APPLICANT**

AND

MACHAKOS COUNTY GOVERNMENT RESPONDENT

RULING

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the 27th April 2023 where she seeks the following Orders:-
 1. The firm of B.M. Musau & Co. Advocates LLP be allowed to come on record on behalf of the Applicant;
 2. The Notice Change of Advocates dated 24th February, 2023 be deemed as properly on record;
 3. This court be pleased to revive this suit;
 4. This Honourable Court be pleased to extend time within which the deceased Applicant should have been substituted;
 5. Vascoline Katanu Mwanzia (the Applicant), be granted leave to substitute the deceased Advocate; and
 6. The costs of this Application be in the cause.
2. The Application is based on grounds on the face of it and supported with the Affidavit of one Vascoline Katanu Mwanzia. She deposes that the deceased died on 11th December, 2020 at the Nairobi Hospital



and prior to his death, there was a pending Application dated the 18th December, 2019, before court. She explains that the consequence of failing to substitute the deceased Advocate in this matter within twelve (12) months was due to the abatement of the suit. She confirms that she obtained the Limited Grant of Letters of Administration Ad litem on 24th February, 2022 through her advocates and that the delays in making the Application was not intentional but was occasioned by the need of the advocates on record to familiarize themselves with the current status of the matter. Further, that they were also unable to trace the deceased Advocate's file of papers in respect to this matter. She states that it was only later that her advocates learnt that the matter was pending final determination on 23rd February, 2023 when it was listed for mention before Hon. Lady Justice Christine Ochieng while attending to other matters before this court. She contends that her advocates thereafter perused the court file on 4th April, 2023 and established that there was on record a pending Application. She reiterates that she is desirous of prosecuting the matter to completion for the benefit of the beneficiaries of the Estate of the deceased.

3. The Respondent opposed the Application by filing a Replying Affidavit sworn by one James Kathili, its County Attorney where he deposes that this suit was abated on 11th December, 2021 since the deceased died on 11th December, 2020. He states that the Applicant had not provided sufficient cause for revival of the suit under Order 24 Rule 7(2) of the *Civil Procedure Rules*. He insists that the Applicant had been indolent in prosecuting the matters, having obtained the Limited Grant Ad Litem on 26th April, 2022 but filed the instant Application a year later on 27th April, 2023. He explains that the Applicant had been issued with a Mention Notice on 11th August, 2022 but they did not bother to attend court. He reiterates that enlargement of time is an equitable remedy but not a right of any party and sought for the instant Application to be dismissed.
4. The Application was canvassed by way of written submissions but it is only the Applicant that filed hers on 12th October, 2023.

Submissions by the Applicant

5. The Applicant in her submissions provided a brief background of the matter herein and explained that she had demonstrated the cause of delay. She further submitted that the Letters of Administration Ad Litem had been obtained after the suit had already abated and that the advocates on record needed time to familiarize themselves with the suit before they could proceed. To support her averments, she relied on the following decisions: *Elizabeth Wanjiru Njenga & Another v Margaret Wanjiru Kinyara & 2 Others* (2018) eKLR and *Joseph Kabonge Muthondu v John Thuo Macharia & Elizabeth Muthoni Kabonge* (2019) eKLR.

Analysis and Determination

6. I have considered the instant Notice of Motion Application including the respective Affidavits and Applicant's submissions and the only issue for determination is whether the said Application is merited.
7. The Applicant has sought for the revival of the abated suit as well as for the substitution of the deceased Advocate. The legal provisions governing revival of abated suits is contained in Order 24 Rule 7(2) of the *Civil Procedure Rules* which provides inter alia:-

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.”

8. From the above provision, it is evident that the power to revive a suit or extend the time for substitution of a deceased party in a suit is at the court’s discretion. Further, that the only duty that the court has, is to assess if there exists a sufficient cause that prevented the parties from continuing with the suit earlier. What then amounts to sufficient cause? The Court of Appeal in *The Hon. Attorney General Vs the Law Society of Kenya & Another Civil Appeal* (Application) No. 133 of 2011 defined the same as follows:-

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 Blacks Law Dictionary, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”

9. From the evidence presented, I note the Applicant filed the instant Application, one (1) year after the Grant of Ad Litem had been issued by the Succession Court. The Applicant explained that by the time she obtained the Grant Ad Litem, the suit had abated and her advocates were taking time to familiarize themselves with the suit and the deceased Advocate’s file of paper in respect to this matter could also not be traced. From the court record, I note the deceased person sought to be substituted was an advocate in private practice. The court takes judicial notice of the fact that in instances where an advocate is deceased, there is a procedure of taking over the law firm including the files.

10. The Court of Appeal in *Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others* [2012] eKLR, Koome, JA (as she then was) while dealing with an Application filed after two (2) years and eight months to revive an abated Appeal held that:-

This Application was made two years and eight months after the appeal had abated. The explanation offered by the applicant is that the Advocate Mar Abdallah failed to take the steps because the court diary did not have dates. It is also to be noted that the appeal was filed by the deceased in person. By a notice of appointment filed on 20th July, 2011, the firm of Timamy & Company Advocates came on record as having been instructed by the applicant as the legal representative of the deceased. 9. Besides the principles set out in the case of *Leo* (supra), I am also guided by the provisions of Section 3A and 3B of the *Appellate Jurisdiction Act* otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through *the Constitution* of Kenya, 2010 in particular Article 159. 10. Bearing in mind those overarching objectives, this appeal deserves to be revived for the following reasons: firstly, the appellant was acting in person when he filed the appeal. Secondly, an advocate was instructed but he did not take the necessary steps to revive the appeal; although no reasons have been given for the advocate’s failure, his failure or mistakes cannot be attributed to the applicant. Thirdly, the applicant has a limited grant of letters of administration in respect of the deceased’s estate. Although the limited grant gives the applicant power to file a suit, that power can also be construed to include prosecuting an appeal. The fourth reason for allowing the revival of the suit is for reasons that the dispute involves ownership of land and a durable solution that addresses the substantive issues is always a better option.



11. I note the suit herein abated in December, 2021 by operation of the law and the Applicant made the instant Application on 27th April, 2023 which was one year, four months after abatement. The Respondent has vehemently opposed the instant Application but not demonstrated what substantial loss it stands to suffer if the suit was revived. The Applicant has explained the reasons for the delay in filing the instant Application which I find plausible. This court further stands guided by the principles enshrined in the Constitution on administration of justice, specifically the Overriding Objective. Further, from the averments in the Replying Affidavit, it is my considered view that no harm will be suffered if the parties are allowed to prosecute the Application dated the 18th December, 2019, on its merits and to bring the same to a conclusive end.
12. Based on the facts as presented while relying on the legal provisions cited above as well as the decisions quoted, I find that the Applicant has demonstrated sufficient cause to allow for the revival of the abated suit and will proceed to do so.
13. As to whether the firm of B.M. Musau Advocates LLP should come on record for the Applicant.
14. I note the aforementioned firm seeks to come on record for the Applicant after the entry of Judgment and during the process of Taxation. The Respondent's Counsel has not indicated if it opposes this prayer. On coming on record post Judgment, Order 9 Rule 9 of the Civil Procedure Rules stipulates that: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
15. Since this prayer was not opposed and in relying on the legal provisions cited, since I have allowed the revival of the abated suit, I will allow the aforementioned law firm to come on record for the Applicant. I further direct that the Notice Change of Advocates dated the 24th February 2023 be and is hereby deemed to be properly on record.
16. In the circumstances, since I have already allowed for the revival of the abated suit, I hereby allow the Applicant to substitute the deceased.
17. In the foregoing, I find the Notice of Motion Application dated the 27th April, 2023 merited and will allow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

