



REPUBLIC OF KENYA



**KENYA LAW**  
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**Meru & 3 others v Meru (Civil Appeal 9 of 2018)  
[2023] KECA 1600 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1600 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 9 OF 2018  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
OCTOBER 27, 2023**

**BETWEEN**

**LOISE WANJIRU MERU ..... 1<sup>ST</sup> APPELLANT  
KEZIA WANJIRU ..... 2<sup>ND</sup> APPELLANT  
ROWLAND MAINA MUCHIRI ..... 3<sup>RD</sup> APPELLANT  
JOHN MACHARIA MERU ..... 4<sup>TH</sup> APPELLANT**

**AND**

**JOHN MIGWI MERU ..... RESPONDENT**

*(Being an appeal against the decree and judgment of the ELC Court, Murang'a  
(J. G.Kemei.J.) dated 23rd November 2017 in ELCA Case. No. 3A of 2017)*

**Impact of death of a donor of Power of Attorney in an ongoing suit.**

*The appellants challenged the decision of the Environment and Land Court (ELC) and the Magistrate's Court, both of which held that a power of attorney was extinguished upon the death of the donor but that the cause of action survived. The respondent, acting as a donee of a power of attorney for his deceased mother, filed a suit for rental income. After his mother's death, the respondent obtained letters of administration ad litem and applied for substitution in the suit. The appellants contended that the suit had abated. Both courts found the cause of action had survived and substitution was proper. The Court of Appeal dismissed the appeal, holding that although the power of attorney had been extinguished, the substitution was valid and could proceed.*

Reported by John Ribia

**Agency Law** – power of attorney – survival of power of attorney after death of donor - whether the power of attorney could survive the death of the donor - whether a legal suit initiated by a donee of a Power of Attorney abated upon the death of the donor.

**Civil Practice and Procedure** – abatement - substitution of parties – substitution of a party bearing a power of attorney after the death of the donee - whether substitution of substitution of a party bearing a power of attorney



*could be lawfully done after the death of the donee, and under what conditions - Civil Procedure Rules, 2010 (Cap 21 Sub Leg) order 24 rule 1; 3*

### **Brief facts**

The respondent, acting under a general power of attorney granted by his mother, filed a suit seeking recovery of rent owed to his mother. During the pendency of the suit, the donor passed away. The respondent obtained limited letters of administration and applied for substitution as the plaintiff in the suit. The appellants contended that the suit had abated and that the power of attorney had been extinguished by the donor's death. The Magistrate's Court and the High Court rejected the appellants' claims, holding that while the power of attorney ceased upon the donor's death, the cause of action survived, and the respondent could substitute himself as the plaintiff. Dissatisfied the appellant filed the instant appeal.

### **Issues**

- i. Whether the power of attorney could survive the death of the donor
- ii. Whether a legal suit initiated by a donee of a power of attorney abated upon the death of the donor.
- iii. Whether substitution of a party bearing a power of attorney could be lawfully done after the death of the *donee*, and under what conditions.

### **Held**

1. The power of attorney was extinguished upon death of the donor. In the instant case, when the respondent's mother died, the power of attorney that anchored him to file the suit on behalf of his mother was dislodged. The suit did not nonetheless sink and the respondent was able to take quick action to salvage it and put it back on course. The expiry of the power of attorney did not kill the suit as intimated by the appellants.
2. A suit abated 12 months after the death of a party if no substitution had been done. The suit had not abated as the cause of action, which was not personal to the deceased, survived her. The respondent was appointed as legal representative to that estate within 12 months and sought to be substituted as the plaintiff within the 12 months.
3. The donor should have been named as the plaintiff in the suit followed by the name of the respondent, so that upon the death of his mother, and after obtaining the letters of administration *ad litem*, the substitution would have been flawless. The appellants would not be before the instant court telling the court that the respondent could not substitute himself. That was a technicality. It was not fatal and was found to be curable under article 159(2)(d) of the Constitution which provided that justice shall be administered without undue regard to procedural technicalities. The argument proffered by the appellants to prevent the respondent from pursuing his mother's claim was flippant and the same was properly dismissed.

*Appeal dismissed.*

### **Orders**

*Costs to the respondent.*

### **Citations**

#### **Cases**

None referred to

#### **Statutes**

#### **Kenya**

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — order 24 rules 1, 3 — (Interpreted)
2. Constitution of Kenya article 159(2) -(Interpreted)

#### **Advocates**

None mentioned



## JUDGMENT

1. At the heart of this appeal is the question whether a power of attorney donated for purposes of filing a suit outlives the donor. The trial court and the first appellate court made a finding that a Power of Attorney is extinguished upon death of the donor. The appellant seems to agree, but argues that if a suit “dies” following the death of the donor of the power of attorney, then the same cannot be resuscitated.
2. A summary of the circumstances leading to this appeal will help to place this appeal in context. John Migwi Meru, the respondent was the Donee of a General Power of Attorney, donated by his mother, Grace Wanjiru Migwi. The said power of attorney authorised the respondent to among other things demand and recover monies owed to his mother as rent collected from Parcel Number LR No Loc 13/ Gitugi/1515/10, (the suit property) which his mother co-owned with the appellants’ family.
3. It was in that capacity that the respondent filed Civil Suit No. PMCC 167 of 2015 before the Principal Magistrate’s Court Murang’a seeking, inter alia, the refund of some rental income which he said was due to his mother from the appellants. He also sought orders of injunction to stop the appellants from dealing with the suit property.
4. The appellants challenged the power of attorney on grounds that the donor was senile and thus incapable of granting the power of attorney and the respondent, therefore, lacked the requisite *locus standi* to lodge the claim.
5. Unfortunately, on 2<sup>nd</sup> June, 2015 as the suit was still pending in court, the respondent’s mother died. The respondent moved to court and obtained a grant of letters of administration ad litem in respect of the deceased’s estate but limited for purposes of substitution as a party to the pending suit.
6. The respondent filed an application for substitution (to substitute himself from a Donee of the power of attorney to the personal legal representative of his late mother’s estate). This did not sit well with the appellants who challenged the substitution and insisted that the suit had abated upon the death of the respondent’s mother and the same ought to have been dismissed.
7. The learned magistrate heard the application and after considering the submissions by the parties made a finding that the power of attorney had become extinguished upon the death of the donor. The magistrate however found that the suit had not abated since the statutory 12 months had not expired since the death of the deceased and the respondent, therefore, still had time to regularise his position.
8. The appellants were aggrieved and they moved the High Court on appeal citing 6 grounds of appeal and asked the court to find that the suit had indeed abated upon the death of the respondent’s mother.
9. The High Court considered the rival submissions of both parties and concluded that the respondent was acting for his mother in the suit before the subordinate suit and he ought to have filed the suit in his mother’s name and not his name. Further, that upon the death of the donor, the power of attorney donated to the respondent had extinguished by operation of law, however, it did not extinguish the cause of action which survived the death of the donor.
10. By making an application for grant of letters of administration which were granted, the respondent had become the personal representative of the deceased’s estate pursuant to order 24 rules 1 to 3 of the [Civil Procedure Rules](#) and the respondent had therefore clothed himself with *locus standi* to substitute the deceased as the plaintiff in the suit before the trial court. The learned judge found the issue of the respondent filing the suit in his own name as opposed to that of the deceased’s was curable by article 159(2)(d) of the [Constitution](#). The learned judge affirmed the learned magistrate’s findings and the



respondent was consequently substituted as the plaintiff. The appeal was found to be devoid of merit and the same was dismissed with costs to the respondent.

11. Dissatisfied with the decision of the learned judge, the appellants appealed to this court by a notice of appeal dated November 24, 2017. The grounds raised in the memorandum of appeal are that:

“the learned judge erred in law: in finding that the suit at the lower court subsisted despite the power of attorney having been extinguished by operation of the law; not finding that the suit had abated upon death of the donor of the power of attorney; not finding that the suit in the lower court was premised on the basis of the power of attorney granted to the respondent by his mother and upon the death of the donor the suit could not stand as its legal substratum had become extinguished; finding that the suit in the lower court survived the death of the respondent’s mother; finding that issuance of a grant of letters of administration ad litem cured the defect and not finding that the respondent could not substitute himself.”

12. We hasten to state that the matter before the trial court has yet to be determined on merit. This appeal revolves on the two narrow issues pointed out at the beginning of this judgment. Both parties filed submissions expounding on the two points, which are points of law.

The law on both issues is in our view quite clear and the appellants are just harping on some minor technicality in a bid to frustrate the merit determination of the main suit.

13. We have considered the record, and the written submissions by both parties. The appellants in their notice of motion application dated June 17, 2015 sought to have the respondent’s suit struck out on grounds that the suit had collapsed upon the death of the donor wherein the power of attorney was no longer tenable and that the suit was frivolous and vexatious.

14. On whether the power of attorney survives the death of the donor, there is consensus by both courts below that the power of attorney is extinguished upon death of the donor. We agree with that finding. In the present case, when the respondent’s mother died, the power of attorney that anchored him to file the suit on behalf of his mother was dislodged. The suit did not nonetheless sink and the respondent was able to take quick action to salvage it and put it back on course. The expiry of the power of attorney did not “kill” the suit as intimated by the appellants.

15. On the second issue, the law on abatement of suits is clear and was clearly articulated by the High Court. A suit abates 12 months after the death of a party if no substitution has been done. In this case, as correctly held by the learned Judge, the suit had not abated as first and foremost, the cause of action, which was not personal to the deceased, survived her. Secondly the respondent was appointed as legal representative to that estate within 12 months and sought to be substituted as the plaintiff within the 12 months.

16. The only problem here as we see it, and as was identified by the High Court was that the donor should have been named as the plaintiff in the suit followed by the name of the respondent, so that upon the death of his mother, and after obtaining the letters of administration ad litem, the substitution would have been flawless. The appellants would not be before us telling us that the respondent could not substitute himself.

This, as we stated earlier, was a technicality and as pointed out by the learned judge, it was not fatal and was found to be curable under article 159(2)(d) of the *Constitution* which provides that justice shall be administered without undue regard to procedural technicalities. We hold the same view. The argument proffered by the appellants to prevent the respondent from pursuing his mother’s claim was flippant and the same was properly dismissed.



17. We find no merit in this appeal and we dismiss it accordingly with costs to the respondent.

**DATED AND DELIVERED AT NYERI THIS 27<sup>TH</sup> OF OCTOBER, 2023.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

.....

**JUDGE OF APPEAL**

**L. KIMARU**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

