



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ndunda v Ndunda & another; Kalii (Applicant) (Environment & Land  
Case 1 of 2021) [2025] KEELC 795 (KLR) (25 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 795 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 1 OF 2021  
AY KOROSS, J  
FEBRUARY 25, 2025**

**BETWEEN**

**MILCAH LUKA NDUNDA ..... PLAINTIFF**

**AND**

**LUCAS MUNYAO NDUNDA ..... 1<sup>ST</sup> DEFENDANT**

**JOHN KALII WAMBUA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**ELIZABETH NDINDA KALII ..... APPLICANT**

**RULING**

**Applicant's case**

1. This ruling seeks to determine the notice of motion dated 22/04/2024 filed by the applicant and she seeks the following reliefs from this court: -
  - a. The honourable be pleased to substitute the 2<sup>nd</sup> defendant with the applicant.
  - b. Costs of the application be provided for.
2. The motion is supported by the grounds set out on the body thereof and the supporting affidavit of the applicant ELIZABETH NDINDA KALII which she deposed on 22/04/2024.
3. In summary of both, the applicant contended the matter had been concluded and the 2<sup>nd</sup> defendant died on 28/10/2022 which was at the execution stage and upon his demise, she obtained a limited grant of letters of administration dated 31/06/2023 which allowed her as the personal representative to pursue this claim.



4. Moreover, she stated she had an interest in the matter, the motion be allowed and no prejudice would be occasioned on the other parties.

#### **Plaintiff's case**

5. In opposition, the plaintiff MILCAH LUKA NDUNDA filed a replying affidavit deposed on 16/05/2024 which mostly raised matters of law. She averred the motion contravened provisions of Order 24 Rule 1 and 2 of the Civil Procedure Rules (CPR) and that the 2<sup>nd</sup> defendant's claim abated on 28/10/2023.
6. Additionally, she stated the motion was filed 6 months after the limited grant was issued and no reasons had been tendered to explain why there were delays in the substitution. According to her, the motion should be dismissed.

#### **1<sup>st</sup> defendant's case**

7. The 1<sup>st</sup> defendant did not file any response to the motion.

#### **Parties' submissions**

8. The court directed parties to file and exchange written submissions. In compliance, the applicant's law firm on record M/s. J.A. Makau & Co. Advocates filed written submissions dated 16/01/2025 whereas the plaintiff's counsel M/s. Kui relied on the plaintiff's replying affidavit. The 1<sup>st</sup> defendant did not file any submissions.
9. The applicant's submissions framed 2 issues for determination which were whether the court should allow the applicant to substitute the 2<sup>nd</sup> defendant for purposes of execution of the decree and whether the suit can abate at the execution stage.
10. Therefore, upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider the plaintiff's and applicant's counsel's arguments on the particular issue and also bear in mind the law and judicial precedents they relied upon to advance their arguments.

#### **Issues for determination.**

11. Having carefully considered the motion, its grounds, affidavits, and submissions, the following issues commend themselves for determination.
  - a. Whether the motion is merited.
  - b. What orders should be issued including an order as to costs?

#### **Analysis and Determination**

12. Since the outcome of issue (b) flows from the finding (s) on issue (a), these issues shall be dealt with together.
13. The legal framework for substitution of a deceased party is captured in Order 24 of the Civil Procedure Rules.



14. However, as evidenced by Order 24 Rule 10 of the Civil Procedure Rules, this provision of law does not apply to legal processes that were at the execution stage. This provision of law states: -

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

15. Both counsels were of contrarian arguments with the plaintiff's counsel arguing the 2<sup>nd</sup> defendant's claim had abated. Nonetheless, the law is very clear that provisions of law do not apply to proceedings on the execution of the decree or order and resultantly, I must agree with the applicant's counsel.

16. How then could the applicant substitute the 2<sup>nd</sup> defendant at the execution stage? Guidance on this is found in Order 31 Rule 1 of the Civil Procedure Rules which provides as follows: -

“In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.” Emphasis added.

17. My reading of this provision of law is that there are 2 options which are dependent on certain intervening circumstances. These options are either to ignore the substitution of a party and proceed with the execution process or move the court as the applicant has done and substitute a party.

18. The decision of Dhulla Harichand vs Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin, (1940) KLR Vol. XIX on page 6 was cited with approval in Agnes Wanjiku Wang'ondou V Uchumi Supermarket Ltd [2008] Kehc 2233 (KLR) which stated: -

“In Shailendranath Ghosh vs Surendranath De (930, I.L.R. 57 Cal. p. 1137 at p. 1140) the learned Judges in appeal say: “O. XXII, Rule 12, Civil Procedure Code, lays down that the provisions as to abatement of a suit or appeal, in consequence of death or insolvency of a party, do not apply to execution proceedings. It follows, therefore, that the provision is for the benefit of a decree holder or his heirs and that the heirs need not take steps for substitution. This is clear from the decision of the Judicial Committee in the case of Kedarnath Goenka vs Anant Prasad Singh (L. R. 52 I. A. 188). There are two courses, either of which may be availed of by the heirs, that is to say, that they may apply immediately for carrying on the proceedings in execution of the decree or they may apply for fresh execution under O. XXI, r. 16, Civil Procedure Code (our O. XIX. R. 13) Akhoy Kumar Talukdar v. Surendra Lal Pal (1926, C. W. N. 735)”.

In (1934) I.L.R. 13 Pat. P. 777 Khaja Mohamed Noor J. says at p. 780: “No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative”.

19. From the record, the 2<sup>nd</sup> defendant commenced execution and by a ruling in his favour of 23/03/2022, he was awarded costs of kshs. 165,224.24/- but unfortunately died shortly thereafter.



20. The applicant has since obtained a limited grant and has moved this court to substitute the 2<sup>nd</sup> defendant. Having opted for the 2<sup>nd</sup> option as envisaged by Order 31 Rule 1 of the Civil Procedure Rules, I have no reason to deny her the reliefs sought. I find the motion is merited.
21. For the finding and reasons herein stated above and in addressing the issue (b), the application dated 22/04/2024 is hereby allowed. The applicant is at liberty to continue with the execution process. Each party is to bear their respective costs of the motion.
22. Lastly, since there is a judgment in this matter which was rendered on 29/11/2018, this file is hereby effectively marked as closed.

It is so ordered.

**DATED AT MACHAKOS THIS 25<sup>TH</sup> DAY OF FEBRUARY, 2025**

**HON A. Y. KOROSS**

**JUDGE**

**25. 02.2025**

Delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Miss Wangu Kabuu holding brief for Miss Kui for Plaintiff/Respondent

Mr. Odero holding brief for Mr Makau Mutua for Applicant

Ms Kanja- Court Assistant

