



**Rutto v Kugu; Keter (Applicant) (Environment & Land Case
123 of 2012) [2024] KEELC 4044 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4044 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 123 OF 2012
FO NYAGAKA, J
MAY 20, 2024**

BETWEEN

SILAH KIPKURGUT ARAP RUTTO PLAINTIFF

AND

ELIUD KIPROTICH ARAP KUGU DEFENDANT

AND

ESTHER KETER APPLICANT

RULING

1. By an application dated 04/12/2023, brought under Order 24 Rules 1 and 3 and Order 51 Rule 1 of Civil Procedure Rules, 2010, the Applicant who was the legal representative of the defendant/judgment debtor applied to this Court for the following reliefs:-
 1. That the suit hearing be revived.
 2. That Esther Keter be substituted as the defendant herein in place of Eliud Kiprotich Arap Kugu, now deceased.
 3. That costs be in the cause.
2. The application was based on six (6) grounds. The first one being that the Defendant had died. Twelve months had elapsed since the time of his demise. The Applicant was since appointed as the legal representative of the deceased. From the time of the death of her husband she had been quite unwell but was ready and willing to prosecute and defend the suit hence the application for revival. It was necessary in the interest of justice, that the orders sought be granted.
3. The application was supported by the affidavits sworn by Esther Keter on 04/12/2023. Basically, she repeated the contents of the grounds, save that she deposed that her husband died on the 07/04/2017.



- She annexed to the affidavit and marked as EK1, a copy of the Certificate of Death. She deposed further that she did not file the application for substitution because she was badly affected by the death of the husband and had been unwell since his demise. She annexed as EK2 a copy of a record of treatment issued by an unnamed hospital. She also annexed a copy of the Limited Grant for Representation as EK3 which showed that it was issued 31/07/2023 in Kitale CMC Ad Litem Cause No. 67 of 2023. She went on to depone that this court had the discretion to a grant the orders sought.
4. The application was opposed through the affidavit sworn on 22/01/2024 by Rebecca Jekpkemei Kuto who had been substituted on behalf of the decree holder in 2018. She deponed that the defendant died on 07/04/2017, yet the instant application was filed after six and half years later without any explanation on the delay. She deponed further that the suit had abated with effect from 07/04/2018, and that the applicant had not demonstrated that she was sick all along and the sickness prevented her from taking over the suit which was against her husband. Further, she annexed and marked as RJK1 a copy of the decree which this court issued on 13/03/2013. She deponed that the deceased had encroached into her husband's land of 1 acre and the applicants had by that reason used it to date to the detriment of the respondent's family.
 5. Her further deposition was that the County Surveyor was served with the court order but had not perfected it. She annexed as RJK2 and RJK3 copies of self-explanatory letters to the County Surveyor calling upon him to enforce the decree and the Surveyor's response by which he had intimated that he would visit the ground on 15/05/2023. She deponed that the present application was prompted by the surveyor's letter by which he intimated that he intended to enforce the decree. The application was an abuse of the process of the court, since it was brought 6½ years later and only when the surveyor had reached out to perfect the decree.
 6. The Applicant filed, on 31/01/2024, a Further Affidavit which she swore on 26/01/2024. She stated that the death of the husband greatly affected her. She annexed as EK1 further copies of medical treatment records from Moi's Bridge Health Centre and some which did not bear any stamps to show their origin. She stated that the late husband was the breadwinner of the family and his death caused her to have pressure and made her confused. She denied the deposition that the letter by the surveyor prompted her to action. She deposed that when the Respondent applied for her substitution she did not oppose the application hence the opposition to her instant application was in bad faith.
 7. The Application was canvassed by way of written submissions. The Applicant submitted through hers dated 05/02/2024 and filed on 12/02/2024. She began by reiterating the provisions of Order 24 Rules 4 and 7 of the Civil Procedure Rules. She argued that this Court had the authority to revive the suit. The delay was as a result of her being in shock because of the death of the husband. She stated that these were exceptional circumstances by which would implore the court to exhibit compassion and grant her leniency.
 8. She relied on the case of Rukwaro Waweru vs Kinyutho Ritho & Another [2015] ECLR, and Charles Mugunda Gacheru vs Attorney General and Another [2015] eCLR, and The Hon. Attorney-General vs The Law Society of Kenya and Another, Civil appeal (Application) No. 133 of 2011, and lastly, the case of Mbaya Nzulwa versus Kenya Power and Lighting Company Limited [2018] eCLR.
 9. On her part, the Respondent relied on the submissions dated 21/02/2024 filed on 22/02/2024. She began by summing up the contents of the application and argued further that the application had been brought six and half years after the demise of the Defendant. The Applicant had not demonstrated that such sickness as she deponed prevented her from taking over the suit yet he had all along been aware of it. She too reproduced the contents of Order 24 Rule 4 and Order 24 Rule 7(2) of the Civil Procedures Rules. About the requirement by the two provisions that an Applicant shows that he/



- she was prevented by sufficient cause from applying for substitution, she relied on the holding of honourable Justice Munyao in the case of *Kiprotich Korir & Another vs. Shiyotor Holdings Limited* [2021] eKLR where he stated that the reason must be genuine and good, well explained and excusable.
10. Regarding whether the explanation given by the applicant in the instant case was sufficient to warrant revival of the suit the applicant submitted that the reasons were not because the claim that the death of her husband and the subsequent illness caused her to delay in making the application, the evidence the applicant annexed to her affidavit showed that the illness arose more than three years after the death of her husband and abatement. There was thus delay already made which was unexplained. She relied on the case of *Timoi Farms and Estate Limited versus Kipngeno Arap Ngeny & Another* [2022] eKLR.
 11. One does need the application of rocket science to find that the instant application was prompted by the action of the Decree Holder in moving to perfect the decree by writing to the County Surveyor on 17/01/2022 (see annexure RJK3 of the Affidavit by the Respondent) and the Surveyor agreeing to do so by issuing a notice on 05/06/2023 to the effect that he would be visiting the suit land on 15/06/2023 to do so (see annexure RJK3). It was upon issuance of the latter letter that the Applicant moved to the Kitale Subordinate Court and filed Kitale CMC Ad Litem Cause No. 67 of 2023 and obtained a Limited Grant of Letters of Administration on 31/07/2023 (see annexure EK2 of the affidavit of the Applicant). This was barely a month after the notice by the surveyor. Is it too coincidental that the Applicant would now suddenly spring to good health and move the Court with speed for the issuance of a grant Ad Litem to use to apply for revival of the suit? It is almost miraculous. I think the Applicant's move demonstrates a reason that this Court could not have accepted as sufficient cause for delay in applying for substitution if it were to consider the merits of the instant application.
 12. This Court has made the finding above based on the record herein. It is clear from the record that the original Plaintiff sued the original defendant (both parties are since deceased) and the suit proceeded to hearing on 20/02/2013 when two witnesses testified. The Court delivered judgment on 13/03/2023. The Judgment had never been set aside.
 13. Following the delivery of the judgment, the Defendant, when he was still alive, was aware of the existence of the same since he participated in the proceedings of 28/04/2015 when taxation of the Plaintiff's Bill of Costs was due but learned counsel for the Applicant requested for adjournment to file an application to set it aside. It appears an application was filed on 12/05/2025 but it was never prosecuted. It turns that the Decree holder died on 04/08/2015 and was substituted on 28/02/2028. Since then no step was taken until the instant application was filed, preceded by a fairly similar one filed by the Applicant on 06/09/2023 but withdrawn on 02/11/2023.
 14. While this Court may not wish to inquire into wisdom on the part of the decree holder on the delay in execution of the decree herein which, if not executed in the next few months, will lapse after the twelve (12) year period, in terms of Section 4(4) of the *Limitation of Actions Act*, on 12/03/2025, it is clear that the execution of the decree is what prompted the Applicant's hurry herein. With foregoing summary of the record in mind, the question this Court now needs to answer before considering the merits of the Application, if need be, is whether the Application herein is competent and properly before the Court.
 15. The issue is relevant because Order 24 Rule 10 of the Civil Procedure Rules which provides for the Application of the Order in case where there exist decrees needs to be considered. The provision reads that "Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order."
 16. To understand its import, this Court needs to examine the Rules which it excludes application to. Order 24 Rule 3 is in regard to the "Procedure in case of death of one of several plaintiffs or of sole plaintiff" and it provides for abatement of the suit by the deceased plaintiff(s) where substitution is not made within 12 months. Order 24 Rule 4 is about the "Procedure in case of death of one of several



- defendants or of sole defendant” and it provides for abatement of the suit by the deceased defendant(s) where substitution is not made within 12 months. Order 24 Rule 7 is on “Effect of abatement or dismissal” and provides for making of applications for revival and continuation of the suit if they abate under Rules 3 or 4 of the Order.
17. Then Order 24 Rule 10 comes in to clarify the procedure after an order or decree is made in a matter and is being executed. It expressly excludes the procedure and abatement where either of the parties dies after a decree or order being executed is made.
 18. This Court has had occasion express itself on the effect of the death of a decree holder or judgment debtor after judgment. In *Egylyne Chepchirchir Choge & Another v County Council of Trans-Nzoia* [2022] eKLR, it stated:

“The law governing time within which legal proceedings may be brought against a party after the passing of a decree is to be found in the Limitations of Actions Act.”
 19. Section 4 (4) of the *Limitation of Actions Act* provides:

“An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent Order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due”.
 20. In the case of *Willis Onditi Odhiambo vs. Gateway Insurance Company Limited* (2014) eKLR, the Court of Appeal held that the term ‘action’ covers execution of judgments. In the instant case the, the execution was commenced 9 years after the decree was issued it falls within the statutory time.
 21. Further in the case of *Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others* (unreported) ELC No. 5704 of 1992(O.S) Mutungi J. had this to say;

“What I consider the law to be is that once a judgment has been rendered, execution of that judgment must be commenced within 12 years period otherwise you cannot obtain a judgment and fail to do anything about it and after 12 years have expired seek to execute the same. Section 4(4) of the Limitations of Actions Act will bar you from carrying on with such execution”.
 22. It is clear from the provision above that since Order 24 Rules 3, 4 and 7 of the Civil Procedure Rules apply to the manner in which abatement occurs and the effects of abatement. These are exempted in their application to decrees, then decrees passed before death of a party. Such do not abate by the mere demise of the party. Moreover, the Rules do not provide for substitution of a debtor who dies before execution of the decree. This is also clarified by Section 37(1) of the *Civil Procedure Act*. It provides:-

“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”
 23. When a judgment debtor dies, the decree holder merely applies to Court to execute against the Estate. In my considered view, it follows that there is no need for substitution where the judgment debtor



dies. The decree holder can execute even upon any party who is intermeddling with the property of the deceased or the legal representative thereof as long as it is in relation to the deceased's property."

24. The above position is supported by views of learned judges in other decisions. For instance, in *Agnes Wanjiku Wang'ondou v Uchumi Supermarket Ltd* [2008] eKLR, the Court held:

"..that the requirement for substitution does not apply to proceedings in execution of an order. That while Order 30 Rule 1 (now Order 31 Rule 1) states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. The Court cited the case of *Dhulla Harichand vs Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu-Udin*, [1940] KLR Vol. XIX at page 6 where the Court held as follows;

"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".

25. This was the same position in *Mueni Kiamba v Mbithi Kimeu Kimolo* [2017] eKLR where the Court stated:-

"I find there is wisdom in the above provision in that matters that have reached execution stage should be allowed to proceed without the need for substitution of deceased parties (emphasis mine). This goes a long way in ensuring the overriding objective of the *Civil Procedure Act* and Rules namely the timely and expeditious determination of disputes between parties. Hence, it is my considered view that it was not mandatory to substitute the deceased decree holder at the execution stage and therefore the learned trial magistrate misapprehended the law when he ruled that the non-substitution of the decree holder was fatal to the suit..."

26. Similarly, in the case of *V. Uthirapathi v Ashrab Ali & Ors* on 18 February, 1998, AIR 1998 SC 1168, the Supreme Court of India held:

"Before the decree is passed - that the legal representatives are to be brought on record within a particular period and if not, the suit could abate, - is not applicable to cases of death of the decree holder or the judgment debtor in execution proceedings.

In *Venkatachalam v Ramaswami* [1932 ILR 55 Mad. 352 = AIR 1932 Mad. 73 (FB)], a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. Mulla's Commentary on CPC (Vol.3) p. 2085 (15th Ed., 1997) refers to a large number of judgments of the High Court:

"Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The rule is, therefore, for the benefit of the decree holder, for his heirs need not take steps for



substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or they may file a fresh execution application.”

27. Further, in the V. Uthirapathi case (supra), the Supreme Court of India went on to state as follows:-

“It is clear, therefore, that after the filing of an execution petition in time, the decree holder dies and his legal representatives do not come on record-or judgment debtor dies and his legal representatives are not brought on record, then there is no abatement of the execution petition. If there is no abatement, the position in the eye of law is that the execution petition remains pending on the file of execution Court. If it remains pending and if no time limit is prescribed to bring the legal representatives on record in execution proceedings, it is open in case of death of decree holder for his legal representatives to come on record at any time. The execution application cannot even be dismissed for default behind and back of decree holder’s legal representatives. In case of death of the judgment-debtor, the decree holder could file an application to bring the legal representatives of the judgment debtor on record, at any time. In any event, execution petition cannot be dismissed as abated.”

28. Similarly, the High Court in India in the case of Ajab Lal Dubey and Ors. Vs. Hari Charan Tewari and Ors. [AIR1945Pat1] has held:-

“In India, as in England, it is clear that the execution proceedings do not abate by reason of the judgment-debtor’s death. Lord Sinha has pointed that out in the Privy Council case, Jang Bahadur v. Bank of Upper India, Limited A. I. R. 1928 P. C. 162 to which I have several times referred. Order 22, Rule 12, Civil P. C, indeed makes that clear. The orders of the Court therefore remain valid and in force, and in the case we are considering all necessary orders providing for the sale have already been passed, and passed perfectly regularly, in the lifetime of the judgment-debtor. I can see no difference in this respect between execution of a money-decree where attachment has issued, and execution of a mortgage-decree where the sale is directed by the decree itself. In both cases the sale proclamation has been drawn up and published; the order for the sale has actually been made. All that remains to be done is of administrative character, namely, the actual holding of the sale by the Court’s Nazir, whose duty, I think, may for this purpose be regarded as analogous with that of the English sheriff. Can it be said that when the Nazir is following out the Court’s orders, which were perfectly valid orders, the sale becomes a nullity merely because just before the actual sale a death takes place of which neither he nor the Court nor the decree-holder have any knowledge? To my mind, this question should be emphatically answered in the negative. That was the answer which Sir John Edge gave in Sheo Prasad v. Hira Lal (90) 12 All. 440 as far back as 1889. That is the Indian case which deals with the matter in this aspect, and speaking for myself I can find nothing throughout the long course of subsequent Indian decisions which detracts from the reasoning of Sir John Edge and his four brother Judges.”

29. Additionally, in MALLIKARJUN S/O GURULINGAPPA KOUJALGI SINCE DECEASED REP. BY HIS LRS. VS. VIJAYALAXMI @JAYASHRI W/O LATE BASAVARAJ PATIL the High Court of India still held:

“It is explicitly clear from the scheme of the Code that Rules 3, 4 and 8 deal with abatement of suit or proceedings in case of death of plaintiff or defendant or in case of insolvency of the plaintiff during the pendency of the suit or proceedings. But as already discussed above, an



execution petition, unlike a suit or appeal, does not abate on the death of the decree holder or the judgment debtor.”

30. In the instant case, both the Applicant and the Respondent seem to agree, but mistakenly so, that the suit against the Defendant herein abated on the 07/04/2018. This Court disagrees respectfully. A decree or order does not abate upon the death of a decree holder or judgment debtor. Its execution is only subject to the law of limitation of actions. As long as there is a decree against the Defendant who passed away at a date a year before the alleged abatement, the decree is firmly against his Estate. All that the Plaintiff needs or needed to do was, as soon as an administrator of his Estate was appointed, to apply to substitute him or her and execute the decree accordingly.
31. This holding is guided by the reasoning of their Lordships in the Court of Appeal case of Bakari Ibrahim v Issa Ibrahim [2016] eKLR where they stated as follows:-

“Equally, execution proceedings against the judgment debtor were commenced after his death. That was irregular. Under Section 37(1) of the *Civil Procedure Act*, the appellant should have applied to execute against the judgment debtor’s legal representative. That section provides:

“Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased.”

16. Counsel for the appellant argued that the use of the words “may apply” in that provision conferred a discretion on the appellant whether or not to apply. That it was up to the appellant to determine whether or not to apply to the court to execute against the deceased’s legal representative. We are not persuaded by that argument. In our view, the words “may apply” as used in Section 37 of the *Civil Procedure Act* signify that a judgment creditor may elect to execute a decree or order against the legal representative of a deceased judgment debtor. However, if the judgment creditor elects to do so, he must, in our judgment, make an application to execute against the legal representative of such deceased person. [See Mulla on the Code of Civil Procedure, 14th edition by J. M. Shelat, Volume 1 at page 354-358].

17. We are therefore in agreement with the learned Judge of the High Court when he held that “it was imperative that if any execution proceedings were to be undertaken against the deceased’s estate, the decree holder had to comply with the provisions of Section 37 of the *Civil Procedure Act*” and that absent such application in this case, the execution process against the deceased, was “unlawful, null and void and of no consequence.”

32. Therefore, since the Applicant brought an application to revive the suit and apply for substitution, the limb for revival of the same is misconceived and improper before the Court.
33. But with regard to the prayer for substitution, the same is properly before the Court because, as explained above, the decree herein still stands and the therefore the claim against the deceased and his estate is still ‘alive’. The issue is whether the prayer is merited. The Applicant argues that she was prevented from applying for substitution for reasons of sickness and stress arising from the demise of the husband. She gave copies of medical records both in the supporting affidavit and the Further



Affidavit she filed. I have carefully scrutinized the records. Save for the reasons that they tend to show that the applicant suffered some illness which made her to visit hospital on and off since 2017 there is none including the many copies she annexed as EK1 to the Further Affidavit, that shows that she was prevented from giving instructions to learned counsel or moving the Court in person all these years. As stated in paragraphs 10, 11 and 12 above, the Applicant's sudden 'awakening' to move the Court for the Grant Ad Litem and application for substitution was cajoled by the move by the decree holder to execute the decree, perfectly so, before the 12 years elapse.

34. The upshot is that the Application fails in entirety. Nevertheless, since the Applicant has come out and taken out a Grant Ad Litem as deponed, the Respondent is at liberty to move the Court as the Court of Appeal held in the Bakari case (supra). Since costs follow the event and the Application has failed, the Applicant shall bear the costs thereof.

35. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
20TH DAY OF MAY, 2024.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

