



**Irungu (Legal Representative of Irungu Kibe – Deceased) v Kibe (Suing as the Legal Representative of Ruth Njeri Kibe - Deceased) & another (Environment and Land Appeal 22 of 2017) [2024] KEELC 5027 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 5027 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL 22 OF 2017**

**LN GACHERU, J  
JUNE 27, 2024**

**BETWEEN**

**MARGARET WAIGWE IRUNGU (LEGAL REPRESENTATIVE OF IRUNGU KIBE – DECEASED) ..... APPELLANT**

**AND**

**JOHN MAINA KIBE (SUING AS THE LEGAL REPRESENTATIVE OF RUTH NJERI KIBE - DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**JOHN MWANGI KIBE ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Through a Notice of Motion Application dated 13<sup>th</sup> December, 2023, filed on 15<sup>th</sup> December, 2023, and anchored on Order 24, Rule 3 of the Civil Procedure Rules, the 1<sup>st</sup> Respondent/Applicant sought for the following Orders:
  - a. That the Appeal against Irungu Kibe, the Appellant herein, who died on 31<sup>st</sup> May 2020, be revived.
  - b. That Margaret Waigwe Irungu, the legal representative of Irungu Kibe, who died on 31<sup>st</sup> May, 2020, be substituted as the Appellant in place of the said Irungu Kibe, so as to proceed with the case to conclusion.
  - c. That the costs be in the cause.
  
2. The Application is supported by the grounds appearing on its face as well as the Supporting Affidavit of John Maina Kibe, sworn on 13<sup>th</sup> December, 2023.



3. The Applicant contends that he filed the current Application by virtue of the authority vested upon him by the 2<sup>nd</sup> Respondent James Mwangi Kibe, through an instrument of authority dated 13<sup>th</sup> December, 2023, annexed to his Supporting Affidavit even dated, and marked “A”. The Applicant contends that the Appeal abated in respect of the Appellant Irungu Kibe, on or around 10<sup>th</sup> August, 2020.
4. Further, he claims that the delay in filing the current Application for substitution is due to the long time taken by the Respondent/Proposed Appellant to obtain a grant of letters of administration in respect of the estate of Irungu Kibe, the original Appellant who died on 31<sup>st</sup>, May 2020.
5. The Applicant stated that he petitioned for a grant to issue to the nominee Margaret Waigwe Irungu, in respect of Misc. Succ. Cause No. E029 of 2023 (Chief Magistrate’s Court – Murang’a), since nominee was totally unwilling to take up the grant and substitute her deceased husband in the Appeal.
6. He further stated that the Court issued Grant to the aforesaid nominee on 9<sup>th</sup> March, 2023, and the same was confirmed on 21<sup>st</sup> November, 2023.
7. Further, that upon receiving the Grant, he acted expeditiously in mounting the current Application. It was the Applicant’s contention that the cause of action against the Appellant is alive and ongoing, hence the need for substitution. Further, that the case in question has reached an advanced stage as Judgment is pending execution.
8. It was the Applicant’s further contention that it is meet and fair that the Appeal be revived and Margaret Waigwe Irungu, be joined to the cause on behalf of her late husband Irungu Kibe by way of substitution.
9. He contended that the proposed Appellant does not stand to suffer any prejudice if the Court allows the prayer for substitution.
10. The Proposed Appellant opposed the present Application through a Replying Affidavit sworn on 29<sup>th</sup> January, 2024, and filed before the Court on 30<sup>th</sup> January, 2024.
11. She affirmed that her late husband who was the original Appellant died on 31<sup>st</sup> May, 2020. She described the subject Application as incompetent and amounting to an abuse of the Court process. Further, she averred that the Appeal which the Applicant seeks to revive through the present Application abated and is not capable of being revived.
12. She disclaimed having any interest in reviving the aforesaid Appeal which, she stated, did not survive the demise of her husband. She refuted the Applicant’s claim that he was unaware of the death of her husband for the reason that the Applicant resides in the same locality with the Proposed Appellant, and her late husband prior to his death.
13. It was her allegations that the Applicant ought to have filed an Application for nominee under Rule 14 of the 5<sup>th</sup> Schedule of the Probate and Administration Rules, rather than wait for the Proposed Appellant to be appointed as administrator with respect to the estate of her late husband, and thereupon serve her with the current Application.
14. It was her further contention that the subject Application was not served upon her from 6<sup>th</sup> March, 2023, when the same was filed. Further, that an Application such as the current one can only be brought by the administrator of the concerned estate and not by any other party.
15. The Proposed Appellant further alleged that two (2) years have lapsed since the Appeal abated, and the Applicant has failed to provide reasons for the delay in reviving the aforesaid Appeal. It was her



further contention that the reliefs sought in the current Application offend the provisions of Order 24 of the Civil Procedure Rules.

16. The Applicant filed a Further Affidavit on 12<sup>th</sup> February, 2024, in response to the Respondent's Replying Affidavit, wherein he stated that it was not necessary for the Respondent/Proposed Appellant to have an interest in the Appeal because it concerns an issue of real property (land). It was his disposition that the deceased, the original Appellant's interest in the subject land survived his demise.
17. He reiterated that he filed the Petition for nominee, which he annexed to his Supporting Affidavit, marked "D". He contended that the Respondent/Proposed Appellant is the author of the delay in respect of the subject Appeal. That the Respondent/Proposed Appellant declined the offer from the Chief – Kahuhia Location, Wangu Ward to issue her with a letter to assist her to file a Succession Cause in respect of her late husband's estate, and instructed her Advocates namely, T.M. Njoroge Advocates to issue a letter dated 24<sup>th</sup> August, 2020, addressed to the aforesaid Chief, demanding for the Chief to cease to deal with the matter as it was before the Courts. He Annexed the aforementioned Letter marked "A".
18. The Application was canvassed by way of written submissions.

### **Applicant's Submissions**

19. The Applicant filed his written submissions on 27<sup>th</sup> February, 2024, through the Law Firm of J.N. Mbutia & Company Advocates. He submitted that the Appeal lodged by Irungu Kibe dated 31<sup>st</sup> July, 2019, was dismissed with costs and that attempts to execute the decree thereof in respect of the taxed costs amounting to Kshs.87,675/- were unsuccessful.
20. It was further submitted that the Respondent/Proposed Appellant's objection as captured in her Replying Affidavit dated 29<sup>th</sup> January, 2024, does not pose any legal or factual challenge to the instant Application.
21. The Applicant cited the holding of the Court in the case of Julius Maina Kabiru V Kabiru Kanga'ra & Thomas Irungu Kigoi [2022] e KLR, to anchor the proposition that an application for substitution in respect of an abated suit ought to be preceded by an application for revival of suit or the two applications ought to be lodged concurrently. He also submitted that the subject Application cannot be faulted for flouting the aforementioned condition.

### **Respondent/proposed Appellant's Submissions**

22. The Respondent/Proposed Appellant filed written submissions on 5<sup>th</sup> March, 2024, through the Law Firm of T.M. Njoroge & Co Advocates.
23. She reiterated the averments contained in her Replying Affidavit to the effect that the present Application is vexatious, scandalous and amounts to an abuse of the due process of the Court.
24. She submitted that the Applicant did not provide any reasons for the failure to file the Application for substitution within one year following the demise of the original Appellant on 31<sup>st</sup> May, 2020.
25. It was further submitted that equity aids the vigilant and not the indolent, therefore, the Applicant is guilty of laches and the subject Application is bad in law and should be dismissed by the Court.
26. She affirmed that she has no interests in pursuing the Appeal and the Applicant cannot legally compel her to pursue the same. She refuted the claim that she delayed in procuring letters of administration in respect of her late husband's estate and submitted that the foregoing allegation was unsubstantiated by the Applicant.



27. The above are the pleadings, the annexures thereto, the rival written submissions and cited authorities, which this court has carefully considered. The court too has considered the relevant provisions of law, and finds the issues for determination are as follows;

- i. Is the Applicant entitled to the Orders sought?
- ii. Who should bear the costs of the Application?

**(i). Is the Applicant entitled to the Orders sought?**

28. Under the proviso to Order 24 Rules 3(2), of the Civil Procedure Rule, the Court has discretion to revive an abated suit/Appeal as held by the Court of Appeal in the case of Leo Silla Mutiso vs Rose Hellen Wangari Mwangi Nai. Civ Application No. 255 of 1997. Order 50 Rule 6 of the Civil Procedure Rules which provides as follows:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

29. Section 95 of the *Civil Procedure Act*, also grants the Court discretion to extend time fixed for doing any act under the *Civil Procedure Act* as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

30. The Court of Appeal in the case of Joseph Kirui V Said K. Keitany [2021] eKLR, invoked the provisions of Article 159 of *the Constitution* and allowed an application to revive an abated Appeal filed after 6 ½ years, and observed that;

“We have considered the applicants motion and the respondent’s reply. It is evident to us that although the applicant’s motion has been filed about 6½ years after the death of the deceased, the applicant has demonstrated that he made serious efforts in seeking to identify the persons concerned with the deceased’s estate but his efforts were not successful.

In the circumstances, we think that this is an appropriate situation in which the Court should apply Article 159 of *the Constitution*, revive the appeal and allow the application for substitution in order to give the applicant an opportunity in having his day in Court. This would allow for substantive justice and fairness.”

31. The Court is satisfied that the foregoing principles and provisions of the law apply to the subject application where the Court has been called to exercise its discretion in an application to revive an abated Appeal.

32. The Court holds and finds that the Applicant commenced the instant Application on 15<sup>th</sup> December, 2023, expeditiously upon confirmation of the Respondent’s limited grant on 21<sup>st</sup> November, 2023.



Accordingly, the Court holds and finds that the present Application does not amount to an abuse of the due process of the Court.

33. Further, the Court holds and finds that the deceased's interest in the subject Appeal survived his demise.
34. Consequently, the Court is minded to exercise its discretion to revive the Appeal which had abated on the death of the original Appellant.
35. For the above reasons, the Court finds and holds that the instant Notice of Motion Application dated 13<sup>th</sup> December, 2023, is merited. Consequently, the said application is allowed wholly in terms of prayers No. 1 and 2.
36. Costs to abide the outcome of the cause.

it is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**L. GACHERU JUDGE**

**Delivered online in the presence of:**

**Mr Ndonga H/b for Mr. Mbuthia for the Applicant**

**N/A for the Respondent**

**Joel Njonjo - Court Assistant.**

**L. Gacheru**

**Judge**

**27/06/2024.**

**FURTHER: This matter will be mentioned on 22<sup>nd</sup> July 2024, for further directions.**

**L. Gacheru**

**Judge**

**27/06/2024.**

