



**Maina v Maina; Langat (Being the Legal Representative of the Estate of Kiplangat Arap Maina - Deceased) (Applicant); Bett (Being the Legal Representative of the Estate of Kibet Arap Maina alias Job Kibet Maina - Deceased) (Interested Party) (Environment & Land Case 100 of 2005) [2024] KEELC 5473 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5473 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERICHO  
ENVIRONMENT & LAND CASE 100 OF 2005**

**LA OMOLLO, J**

**JULY 25, 2024**

**BETWEEN**

**KIPLANGAT ARAP MAINA ..... PLAINTIFF**

**AND**

**JOB KIBET MAINA ..... DEFENDANT**

**AND**

**PHILIP KIMUTAI LANGAT (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIPLANGAT ARAP MAINA - DECEASED) ..... APPLICANT**

**AND**

**ZACHARIAH KIPKOECH BETT (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIBET ARAP MAINA ALIAS JOB KIBET MAINA - DECEASED) ..... INTERESTED PARTY**

**RULING**

**Introduction.**

1. This ruling is in respect of the Applicant's Notice of Motion application dated 15<sup>th</sup> April, 2024. The said application is expressed to be brought under Article 159 (2)(d) of the *Constitution* of Kenya, Order 24 Rule 3, 4 & 7(2) & Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A, 1B & 3A of the *Civil Procedure Act*.
2. The application seeks the following orders;



- a. That this Honourable Court be pleased to grant leave to the Applicant to revive the suit against the Defendant.
  - b. That the Court be pleased to extend time to substitute the deceased Plaintiff and Defendant.
  - c. That this Honourable Court do cause the legal representatives of the deceased Plaintiff and Defendant namely Philip Kimutai Langat and Zachariah Kipkoech Bett respectively to be substituted and be made parties in this suit and proceed with this suit on their behalf.
  - d. That such other and/or further directions be given by this Honourable Court to meet the ends of justice.
  - e. That the costs of this application be in the cause.
3. The application is supported by the grounds on its face and the affidavit of one Philip Kimutai Langat sworn on 15<sup>th</sup> April, 2024.

### **Factual Background.**

4. The Plaintiff commenced the present proceedings vide the Plaint dated 7<sup>th</sup> September, 2005 which plaint was amended on 7<sup>th</sup> March, 2007. He seeks the following orders;
- a. An order that the transfer of land parcel number Kericho/Sosiot/604 in favour of the Defendant and the subsequent sub-division into Kericho/Sosiot/1655 and 1656 is null and void ab initio.
  - b. Mesne profits.
  - c. Costs of the suit.
  - d. Interest on (b) and (c) above at Court rates.
  - e. Any other relief this Honourable Court may deem fit.
5. The Defendant filed an Amended Statement of Defence and Counterclaim on 16<sup>th</sup> September, 2009 wherein it prays that the Plaintiff's suit be dismissed with costs.
6. The application under consideration came up for hearing on 20<sup>th</sup> May, 2024 and reserved for ruling.

### **The Applicant's Contention.**

7. The Applicant contends that the Plaintiff instituted the present suit against the Defendant herein vide the Plaint dated 7<sup>th</sup> September, 2005 which plaint was amended on 7<sup>th</sup> March, 2007.
8. It is the Applicant's further contention that the orders sought in the amended plaint are that the transfer of land parcel number Kericho/Sosiot/604 in favour of the Defendant and the subsequent subdivision into parcel No's Kericho/Sosiot/1655 and 1656 be declared null and void ab initio.
9. The Applicant also contends that the Plaintiff, who was his father, executed a power of attorney in his favour and further contends that he testified in this suit on his father's behalf while he (his father) was still alive and that the Plaintiff's case was closed on 28<sup>th</sup> March, 2012.
10. The Applicant contends that his father, the Plaintiff herein, died on 17<sup>th</sup> December, 2013.
11. It is the Applicant's contention that the Interested Party/Respondent herein also had a power of attorney executed in his favour by his father; the Defendant herein.



12. It is also the Applicant's contention that the Defendant was given an opportunity to give his evidence but he never showed up and his case was therefore closed on 6<sup>th</sup> December, 2021.
13. The Applicant deposes that on 28<sup>th</sup> April, 2022 the Court delivered its judgement wherein the Plaintiff's suit succeeded and adds that the Court in its judgement found that the subdivision of land parcel No. Kericho/Sosiot/604 into 1655 and 1656 was null and void and ordered that the name of the Plaintiff be reinstated as the registered proprietor of land parcel No. Kericho/Sosiot/604.
14. The applicant also deposes that the Interested Party/Respondent herein filed an application dated 31<sup>st</sup> July, 2023 wherein he contended that his father (the Defendant) died on 23<sup>rd</sup> December, 2013 and this suit had abated as against him. The Applicant deposes that the Court delivered a ruling on the said application on 21<sup>st</sup> March, 2024 wherein the Court while relying on Sections 1B and 3A of the [Civil Procedure Act](#), found that the suit had abated and there was no pending application for reinstatement and substitution on record.
15. The Applicant contends, therefore, that there was an error apparent on the face of the record and consequently, the judgement delivered on 28<sup>th</sup> April, 2022 is null and void.
16. It is his contention that from the application dated 31<sup>st</sup> July, 2023, the Interested Party/Respondent has shown willingness and intention to continue the suit on behalf of the Defendant.
17. It is also his contention that the main issue for determination is whether the Defendant had through fraud pretended to be the Plaintiff herein and caused to be registered as the owner of land parcel No. Kericho/Sosiot/604 as was held by the Court in its judgement delivered on 28<sup>th</sup> April, 2022.
18. It is further his contention that the Interested Party/Respondent is now employing technicalities to safeguard his father's fraudulent acts which should be countenanced by this Court.
19. The Applicant contends that the Court in its judgement delivered on 28<sup>th</sup> April, 2022 analyzed the evidence and found in the Plaintiff's favour save that there was an error on the face of the record which was to the effect that the parties to the suit had died and not substituted.
20. He also contends that the said error was not fatal to the suit and was curable in law by making an application for reinstatement and substitution as expressly provided under Order 24 Rule 7(2) of the [Civil Procedure Rules](#).
21. The applicant further contends that it is imperative to note that the Plaintiff had testified and closed his case during the lifetime of the Defendant and that it was only the Defendant who had not testified.
22. It is the Applicant's contention that he has been advised by his advocates on record that this is a Court of Law and equity and that equity cannot suffer a wrong without remedy.
23. It is also the Applicant's contention that this Court should not allow the Defendant to benefit from his wrong doing and he therefore invites the Court to reinstate the suit and substitute the parties for substantive justice to be rendered.
24. It is further the Applicant's contention that it is in the interest of justice that the application is allowed and the respective legal representatives continue the suit on behalf of both the Plaintiff and the Defendant adding that justice should be delivered without undue regard to technicalities.
25. He ends his deposition by stating that he has proffered sufficient cause for reviving the suit and the substitution of both the Plaintiff and Defendant.
26. There was no response to the application.



27. None of the parties filed submissions.

**Analysis and determination.**

28. I have considered the application and the following issues arise for determination;

- a. Whether the Applicant's application has merit.
- b. Who shall bear costs of the application?

29. The Applicant is seeking that the suit against the Defendant be revived and upon such revival, time be extended to substitute the deceased Plaintiff and Defendant.

30. The Applicant is also seeking that after time has been extended, he be substituted in place of the deceased Plaintiff and the Interested Party/Respondent be substituted in place of the deceased Defendant.

31. Order 24 Rule 3 and 4 of the [Civil Procedure Rules](#) provides as follows;

“3.

- (1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.
- (2) Where within one year no application is made under sub rule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff:

Provided the Court may, for good reason on application, extend the time.”

“4.

- (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the Court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.
- (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.”



32. It is not disputed that the Plaintiff died on 17<sup>th</sup> December, 2013 and since he was not substituted within a year the suit abated on 17<sup>th</sup> December, 2014. It is also not disputed that the Defendant died on 23<sup>rd</sup> December, 2013.
33. Order 24 Rule 7 (2) of the Civil Procedure Rules provides as follows;
- “(2) 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.”
34. The Court of Appeal in Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR held as follows;
- “Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased Plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased Plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again, it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers.” (Emphasis Mine)
35. As was held in the above cited judicial decision, once a Plaintiff has died and a period of one year lapses before substitution, the suit abates.
36. A legal representative intending to revive a suit must first seek for extension of time and only after time has been extended, can the legal representative be joined as a party. Once the legal representative has been joined as a party, he can then make application to revive the suit.
37. As afore stated, the Applicant is seeking for extension of time to substitute the deceased Plaintiff and Defendant and once time has been extended, he be substituted in place of the Plaintiff and the Interested Party/Respondent be substituted in place of the Defendant.
38. It is important to note that only a Legal Representative of an estate of a deceased party can apply to be substituted.
39. A perusal of the Applicant’s application dated 15<sup>th</sup> April, 2024 shows that no grant of letters of Administration of the Estate of the deceased Plaintiff Kiplangat Arap Maina has been annexed.



40. In *John Muthee Matumo v Thomas Gerishon & 4 others* [2022] eKLR the Court held as follows;

“It will be noted that a Plaintiff is at liberty to apply to Court for revival of an abated suit. That is what the Plaintiff seeks in prayer (i) of this application. However, I do not see how I can revive an abated suit where there is no Legal Representative appointed for the deceased Defendant. The procedure should first be to have a person appointed to represent the estate of the deceased before an application for revival of an abated suit can be made.”[Emphasis mine]

41. In the above cited judicial decision, the Plaintiff sought the revival of an abated suit and yet no Legal Representative of the estate of the deceased Defendant had been appointed. The Court held that a Legal Representative has to first be appointed to represent the estate of a deceased party before an application for revival of an abated suit can be made.

42. As previously stated, no grant of letters of administration has been annexed to the Applicant’s application to show that he is the Legal Representative of the estate of the deceased Plaintiff. That being the case, this Court cannot revive an abated suit where no Legal Representative has been appointed for the estate of the deceased Plaintiff.

**Disposition.**

43. The upshot of the foregoing is that the Applicant’s application dated 15<sup>th</sup> April, 2024 lacks merit and it is hereby dismissed with no order as to costs.

44. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 25<sup>TH</sup> DAY OF JULY, 2024.**

**L. A. OMOLLO**

**JUDGE.**

In the presence of: -

Mr. Kefa for the Plaintiff/Applicant.

Mr. Koske for the Interested Party/Respondent

Court Assistant; Mr. Joseph Makori.

