



**Mutahi v Ndigithe & another (As Trustees of Mwhoti Women Group); Waruru (Applicant)  
(Environment & Land Case 140 of 2014) [2024] KEELC 7183 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7183 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 140 OF 2014  
JO OLOLA, J  
OCTOBER 31, 2024**

**BETWEEN**

**DICKSON WARURU MUTAHI ..... PLAINTIFF**

**AND**

**ESTHER NJOKI NDIGITHE ..... 1<sup>ST</sup> DEFENDANT**

**DORCAS WAMAITHA MATHENGE ..... 2<sup>ND</sup> DEFENDANT**

**AS TRUSTEES OF MWIHOTI WOMEN GROUP**

**AND**

**GRACE NYAMBURA WARURU ..... APPLICANT**

**RULING**

1. By a Notice of Motion dated 13<sup>th</sup> October 2023 as filed herein on 24<sup>th</sup> October 2023, Dorcas Wamaitha Mathenge and Esther Njoki Ndigithe sued herein as Trustees of Mwhoti Women Group (the Defendants) pray for the following:
  1. That the suit be dismissed under Order 24 Rule 3 (2) as the same has abated; and
  2. That the costs of the application be provided for.
2. The application which is supported by an Affidavit sworn by the Defendants' Advocate J. Kabira Kioni is premised on the grounds:
  - a). That the Plaintiff died on 15<sup>th</sup> November 2021;
  - b). That there has been no substitution by the Plaintiff's legal representative for a period of 2 years;
  - c). That the suit has therefore abated by operation of the law; and



- d). That the suit should therefore be dismissed with costs.
3. In response to the Defendant's application, one Grace Nyambura Waruru (the Respondent) has filed a Notice of Motion dated 22<sup>nd</sup> February 2024 praying for the following:
1. That this Honourable Court be pleased to issue an order that Dickson Waruru Mutahi the Plaintiff herein be substituted with Grace Nyambura Waruru to proceed with this case;
  2. That the Honourable Court do issue an order to revive and reinstate this suit for hearing and determination on merit; and
  3. That the costs of this application be provided for.
4. The second application is supported by an Affidavit sworn by the Respondent and is premised on the grounds:
- a). That the Plaintiff died on 15<sup>th</sup> November 2021;
  - b). That the subject matter and the cause of action survived the Plaintiff;
  - c). That the intended substitute is the legal representative of the Estate of the late Dickson Waruru Mutahi;
  - d). That the Applicant should be joined in the matter to help her proceed with the matter; and
  - e). That it is mete and just that the orders sought be granted.
5. I have carefully perused and considered the two applications and the responses thereto. I have similarly perused and considered the rival submissions placed before me by the Learned Advocates representing the parties.
6. By the First Application herein, the Defendants have urged the court to dismiss the suit on account of the fact that the same has abated. In response, the Plaintiff's Legal Representative has filed the Second Application to revive the suit and to have it heard and determined on merit.
7. From the material placed before the court, it was not in dispute that the Plaintiff- Dickson Waruru Mutahi passed away on 15<sup>th</sup> November 2021. In such circumstances, Order 24 Rule 3 of the Civil Procedure Rules provides as follows:

- “ 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 extend time.



8. On the other hand, 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.”
9. In urging the dismissal of the case, the Defendants aver that it has been over a year since the Plaintiff’s death and that the Plaintiff’s Advocate had not sought leave to either substitute or prosecute the matter. It is their case that the Defendants have been subjected to unnecessary anxiety due to the delay in the prosecution of the suit and hence their desire to have the same dismissed.
10. From the material presented to the court however, it was not entirely factual that as at the time the Defendants filed the Frist Application on 13<sup>th</sup> October 2023, the Plaintiffs had not taken any action to substitute the deceased. From Annexure “GNW 2” of the Supporting Affidavit to the Second Application, it is evident that the Plaintiff’s legal representative had applied for a Limited Grant of Letters of Administration Ad Litem in the year 2021 before the Chief Magistrates Court at Nyeri in Probate and Administration Cause No. 72 of 2021. Granted that the Plaintiff is said to have passed away in November 2021, it was evident that the application was made quite timeously.
11. When the matter came up for directions on 25<sup>th</sup> September 2023, the court record reveals that the Plaintiff’s Counsel informed the court in the presence of the Counsel for the Defendants that they had filed the ad litem application and sought for a month to confirm the position. Less than a month later, the Defendants filed the present application seeking to have the suit dismissed.
12. From a perusal of the Grant ad litem, it is apparent that the same was issued shortly thereafter on 30<sup>th</sup> November 2023 consequent to which the Plaintiffs made the application for the revival of the suit and the substitution of the legal representative.
13. The factors to be taken into account for the purpose of reinstatement of a suit were addressed in *Ivita –vs- Kyumbu (1984) KLR 441* where Chesoni J (as he then was) held as follows:
- “The test is whether the delay is prolonged and excusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and the Defendant; so both parties to the suit must be considered and the position of the Judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the Plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the Plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if the delay is prolonged, if the court is satisfied with the Plaintiff’s excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”
14. Applying the said principles and taking into consideration the fact that the Plaintiff’s legal representative sought a Limited Grant of Letters of Administration immediately after the Plaintiff’s death, and further that an application for the revival of the suit was made immediately after the Grant Ad Litem was obtained, it was apparent to me that the delay was excusable and not inordinate.



15. In the premises and given that the dispute herein concerns a piece of land claimed by both parties, I am persuaded that the interest of justice lies in reviving the suit and having the same heard and determined on merit.
16. Accordingly I dismiss the Defendant's Notice of Motion dated 13<sup>th</sup> October 2023 and allow the Plaintiff's Motion dated 22<sup>nd</sup> February 2024 in terms of Prayers 1 and 2 thereof.
17. Given the circumstances herein, the costs of the two applications shall however be borne by the Plaintiff.

**DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 31<sup>ST</sup> DAY OF OCTOBER, 2024.**

**In the presence of:**

Mr. Kabira Kioni for the Defendant.

Ms. Nanjala holding brief for Ombongi for the Plaintiff.

Court Assistant: Kendi

**J. O. OLOLA**

**JUDGE**

