



**Mahuthu (Administrator of the Estate of Arthur Mahuthu Minjire) v Kenthill Heights Limited & another; Mahuthu (Applicant) (Environment & Land Case 320 of 2013) [2024] KEELC 6791 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6791 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT & LAND CASE 320 OF 2013**

**JM MUTUNGI, J  
OCTOBER 17, 2024**

**BETWEEN**

**FITZGERALD MURIITHI MAHUTHU (ADMINISTRATOR OF THE ESTATE OF ARTHUR MAHUTHU MINJIRE) ..... PLAINTIFF**

**AND**

**KENTHILL HEIGHTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MAHUTHU MINJIRE ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PATRICK MUTURI MAHUTHU ..... APPLICANT**

**RULING**

1. The Applicant filed the Notice of Motion application dated 10<sup>th</sup> January 2024, seeking the following orders;
  - a. This Honourable Court be pleased to extend the time within which to substitute the Plaintiff with the Administrator of the estate (“the estate”) of the late Arthur Mahuthu Minjire.
  - b. This Honourable Court be pleased to revive the suit, which has abated as against the Plaintiff, and to reinstate the orders in force prior to the abatement of the suit.
  - c. This Honourable Court be pleased to substitute the name of the Plaintiff herein, Fitzgerald Muriithi Mahuthu, with that of the Applicant who is the Administrator of the estate.
  - d. This Honourable Court be pleased to grant leave to the Applicant to proceed with the matter on behalf of the estate.
  - e. The costs of the application be costs in the cause.



2. The application is supported on the grounds on the body of the application and on the Supporting Affidavit, which the Applicant swore on 10<sup>th</sup> January 2024. The Applicant averred that the previous Administrator of the estate, who initiated the suit on behalf of the estate, passed away on 17<sup>th</sup> June, 2018.
3. The Applicant depones that he changed the Plaintiff's legal representation from the Firm of Ann Thugu & Co. Advocates to Jairus Otieno Advocates, who filed a Notice of change of Advocate on 15<sup>th</sup> July 2019. He further averred that through a letter dated 9<sup>th</sup> August, 2019 addressed to the Deputy Registrar, he informed the Court of the passing away of the Plaintiff and requested to have the case remain open as his family commenced the process of appointing and confirming a new Administrator at the High Court in Nyeri to assume responsibility for the case. The Applicant stated that he was appointed as the Administrator of the Estate through a Grant of Letters of Administration issued by the Probate Court at Nyeri on 10<sup>th</sup> March 2021, which was later affirmed by a Certificate of Confirmation of Grant issued on 23<sup>rd</sup> June 2022.
4. The Applicant stated that on 7<sup>th</sup> October 2022, he sent an application via email to the Deputy Registrar, where he sought to be substituted in the place of his late brother, the Plaintiff herein. The Applicant further stated that he did a follow-up email sent on 12<sup>th</sup> October 2022 and in response to this email, he stated he was informed by the Court Registry that the case had been dismissed for want of prosecution on 17<sup>th</sup> May 2022.
5. The Applicant further depones that upon perusal of the Court file by his Advocate, he discovered that the Notice to Show Cause issued on 14<sup>th</sup> April 2022 was mistakenly sent to Ann Thungu, the Plaintiff's former Advocate, instead of Jairus Otieno, his current Advocates on record.
6. The Applicant explained that on 19<sup>th</sup> November 2022, he filed a Notice of Motion, application seeking the Court to vacate and/or set aside the order given on 17<sup>th</sup> May 2022 dismissing the suit but the Notice of Motion was however dismissed by the Court vide a Ruling delivered by the Court on 21<sup>st</sup> September, 2023 where the Court ruled that the case had lapsed in accordance with Order 24 Rule 3. The court indicated that the reactivation of the case could only be achieved through an application such as the instant one.
7. The Applicant further explained that following the Plaintiff's death, he lacked locus standi and could therefore not file the application for substitution within the prescribed period of one year from the date of the Plaintiff's death. He asserted that after the Plaintiff's death, it was necessary for him to obtain Letters of Administration after consultation with family members which process took time, resulting in the letters being issued on 10<sup>th</sup> March 2021 and subsequently confirmed on 23<sup>rd</sup> June 2022.
8. Additionally, the Applicant averred that granting the orders sought in the application would not adversely affect the Defendants.
9. The Applicant filed a further application dated 6<sup>th</sup> February 2024 seeking the following:
  - a. Spent.
  - b. The Order of the Honourable Court made ex parte on 16<sup>th</sup> January 2024 be reviewed, varied and/or set aside.
  - c. Pending the inter parte hearing and determination of this application, all dealings over Land Parcel Nos. Kiine/Rukanga/3188, 3189 and any other portion arising out of the subdivision of Land Parcel Nos. Kiine/Rukanga/3188 and 3189 be restrained.



- d. Pending the inter parte hearing and determination of this application, the status quo on the ground of the properties be maintained to the effect that the Plaintiff's estate remains in possession and occupation thereof and the Defendants and/or their agents be restrained from carrying any activities on the ground or interfering with the aforesaid properties.
  - e. Pending inter parte hearing and determination of the application dated 10<sup>th</sup> January 2024 made by the Applicant herein, all dealings over the properties be restrained.
  - f. Pending the inter parte hearing the determination of the application dated 10<sup>th</sup> January 2024, the status quo on the ground of the properties be maintained to the effect that the Plaintiff's estate remains in possession and occupation thereof and the Defendants and/or their agents be restrained from carrying on any activities on the ground or interfering with the aforesaid properties.
  - g. Such further and other orders be made as this Honourable Court deems fit and expedient in the circumstances.
  - h. The costs of the application be costs in the cause.
10. The application is premised on the grounds on face of the application and in the Supporting Affidavits sworn by Pius Kanja Mahuthu and Jairus Otieno on 6<sup>th</sup> February 2024. Pius Kanja disclosed that he is related to the Applicant as his brother and currently resides on the disputed land parcels. Pius Kanja averred that on 5<sup>th</sup> February 2024, he conducted a title search for the property and discovered that the Respondents had performed a mutation, subdivided the property, and were seeking approval to transfer the newly subdivided plots. The Applicant contended there was clear demonstration that there was intent to deal with the suit properties in a manner that was prejudicial and adverse to the Plaintiff's interest.
  11. In his sworn Affidavit, Jairus Otieno as the Advocate for the Applicant, provided a detailed account of his circumstances that contributed to delay in filing the instant application. Counsel explained that on 9<sup>th</sup> October 2023, he was involved in a serious road accident where he sustained severe injuries where he required surgical intervention which procedure rendered him to be immobilized for the balance of the year which prevented him from gathering the necessary composure to prepare the application needed to revive the suit following the decision issued on 21<sup>st</sup> September 2023.
  12. Counsel explained that the three-month delay in filing the primary application to reinstate the suit was a direct consequence of the harrowing accident and the subsequent recovery period. He further stated that, upon his return to work and resumption of his professional duties on 10<sup>th</sup> January 2024, and following the instructions of the applicant, he promptly filed the application to revive the suit.
  13. The 1<sup>st</sup> Defendant/Respondent filed their Grounds of Opposition to the application for the revival of the suit dated 10<sup>th</sup> January, 2024 on 16<sup>th</sup> February 2024. The 1<sup>st</sup> Defendant/Respondent contended that after the expiry of one year after the Plaintiff's death, the suit abated as no application was made within the prescribed period to substitute the Plaintiff under Order 24 Rule 3(2) of the Civil Procedure Rules.
  14. The 1<sup>st</sup> Respondent argued that the Applicant's attempt to substitute the Plaintiff after a six-year delay was not only vexatious and unjustifiable but also prejudicial and constitutes an abuse of the Court process. Moreover, the 1<sup>st</sup> Respondent pointed out that the relief sought in the application dated 10<sup>th</sup> January 2024 is subject to the court's discretion and equity, necessitating the Applicant to demonstrate integrity and diligence in pursuing such relief.



15. I have considered the applications, the responses and the parties submissions and the key issues for determination are:
1. Whether the Court can extend the time within which the Plaintiff should have been substituted?
  2. Whether there are sufficient reasons to allow revival of the suit?
3. Whether the intended applicant should be substituted in place of the deceased Plaintiff?
4. Whether the order issued on 16<sup>th</sup> January 2024, should be reviewed, varied and/or set aside?  
Whether the Court should extend the time within which the Plaintiff should have been substituted.
16. Based on the information provided, it's clear that the Plaintiff died on 17<sup>th</sup> June 2018. Under the provisions of Order 24 Rule 3(1) and (2) of the Civil Procedure Rules, where a Plaintiff dies but the cause of action survives, the Court upon receiving a relevant application, can appoint the legal representative of the deceased as a party to the proceedings to continue with the case on behalf of the deceased estate. Additionally, Order 24 Rule 3(2) provides that if no application for such a substitution is made within one year, the suit will automatically abate in relation to the deceased Plaintiff.
17. Order 24 Rule 3 (1) and (2) provides the procedure applicable in substituting a deceased Plaintiff in case of death of one of several plaintiffs or of a sole Plaintiff.
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 subrule (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.
18. In the Case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR the Court of Appeal held that;
- “There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the Court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the Plaintiff’s legal representative to the suit.
- Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
- Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which



flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.”

19. In the Case of Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR the Court of Appeal emphasized the need to apply for an extension of time as follows;

“The sequence of the application under this procedure of what should happen in case of the death of a Plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues if no application is made within one year following his death...

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. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted...[Emphasis added]”

20. In the present suit, it is not disputed that the suit abated because the Applicant failed to file an application for substitution within the prescribed period of one year. Where the Legal Representative has not made an application to be joined as a party in the suit within one year, Order 24 Rule 3 (2) empowers Courts to extend the time where good reasons have been shown by the Applicant.
21. The applicant explained that the delay in proceeding with the case was due to the time taken for the issuance of the Letters of Administration for the Plaintiff’s estate and noted his prompt action once these documents were issued. He also stated that he had previously informed the Court about the Plaintiff’s demise through a letter dated 9<sup>th</sup> August 2019 and requested that the file remain open pending the issuance of the necessary Letters of Administration that would help him prosecute the case. Additionally, his Advocate on record swore an Affidavit explaining that the delay in reactivating the case was partly occasioned by the fact that he had been involved in a serious road accident which kept him out of his office for quite a while as he was recuperating.
22. Following the death of the previous appointed Administrator of the Estate of Arthur Mahuthu Minjire, the Plaintiff herein, there was necessity to have another Administrator appointed by the Succession Court and the Applicant’s Advocates vide a letter dated 9<sup>th</sup> August, 2019 wrote to the Court to affirm that efforts were being made by the family to have a substitute Administrator of the deceased



estate appointed who would take over the conduct of the instant case on behalf of the deceased estate. The new grant of Letters of Administration of the deceased estate were issued on 10<sup>th</sup> March, 2021 and were confirmed on 23<sup>rd</sup> June, 2022.

23. The Applicant vide an application dated 4<sup>th</sup> October, 2022 applied to be substituted in place of the deceased Administrator in the instant suit but was notified by the Court Registry that the application could not be processed since the suit had been dismissed for want of prosecution on 17<sup>th</sup> May, 2022. That prompted the Applicant to file the Notice of Motion application dated 19<sup>th</sup> November, 2022 seeking to have the dismissal order set aside and the suit reinstated. The Court vide its Ruling delivered on 21<sup>st</sup> September, 2023 determined that the suit having abated before the order of dismissal, the application was unsustainable as only an application for revival of the suit under Order 24 Rule 7(2) of the Civil Procedure Rules could revive the suit.
24. It was against the foregoing background that the Notice of Motion application dated 10<sup>th</sup> January, 2024 was brought. The application clearly is an Omnibus type of application in the sense that it seeks extension of time to substitute the Plaintiff; seeks revival of the suit that had abated; and substitution of the Applicant as Plaintiff in place of the deceased Administrator on behalf of Estate of Arthur Mahuthu Minjire (deceased). As the Court of Appeal observed in the Case of Rebecca Minide Mungole & Another –vs- Kenya Power & Lightning Co. Ltd & 2 Others (supra) there was nothing objectionable to making such an Omnibus application encompassing all the three prayers in a single application as the Applicant did. All that counts is whether the Applicant had sufficiently explained the cause of the delay to the satisfaction of the Court.

Order 24 Rule 7(2) of the Civil Procedure Rules provides as follows:-

7(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.

25. Under the above provision an abated suit may be revived if it is shown and/or demonstrated that the Plaintiff was prevented by a sufficient cause from continuing the suit. In the instant case the Applicant has demonstrated that his brother who was the Administrator of the estate of their father and in conduct of the suit as Plaintiff on behalf of the deceased estate died and the process to get another Administrator appointed took some time. I am satisfied that would constitute sufficient cause and would explain the delay. Equally the same reasons would explain the delay in applying for substitution of the Plaintiff. Order 24 Rule 3(2) of the Civil Procedure Rules provides for abatement of suits where no substitution of a deceased party is made within one year. The proviso however, permits the Court for good reason on application to extend the time for a party to apply for substitution. I have evaluated the circumstances of this matter and I am satisfied there was good reason for delay and accordingly extension of time is merited. The delay was not deliberate or inordinate and was excusable.
26. The Applicant's Notice of Motion application dated 10<sup>th</sup> January, 2023 has merit and I allow the same in terms of prayers (1), (2) and (3). The net effect is that the period for the Applicant to apply for substitution of the Plaintiff is extended, the suit is revived and reinstated and the Applicant is substituted in place of Fitzgerald Muriithi Mahuthu (deceased) to continue with the suit on behalf of the estate of Arthur Mahuthu Minjire (deceased).
27. The Notice of Motion dated 6<sup>th</sup> February, 2023 to which there has been no response by the Applicant, and which technically could not be made as there was no active suit, the same having abated basically



was seeking preservation of the suit property. As the suit by the Plaintiff seeks the cancellation and nullification of all transactions relating to the suit land LR No. Kiine/Rukanga/254 and the resultant subdivisions, the Court is satisfied there is necessity to preserve the suit land pending the hearing and determination of the suit. It would be pointless to proceed to hear the matter and make a determination when the land the subject matter may have been transferred out to other parties who may not be parties in the suit.

In the premises therefore the Court directs and orders that the parties shall observe and maintain the prevailing status quo in regard to the suit property and specifically there shall be no sale, transfer of the suit property, and/or any subdivisions arising therefrom pending the hearing and determination of the suit. The Court takes note that this is an old matter and hence there is need to facilitate the expeditious determination of the suit. In that regard the Court directs the parties to comply with the provisions of Order 11 of the Civil Procedure Rules within the next 45 days from the date hereof by filing their bundles of documents and witness statements. The suit is fixed for pretrial directions on February 24, 2025. The cost of the application shall be in the cause.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17<sup>TH</sup> DAY OF OCTOBER 2024.**

**J. M. MUTUNGI**

**ELC - JUDGE**

