



**Maitai (As a Personal Attorney of John S ole Maitai v Saitieu; Olormaitai (As a Personal Representative of the Estate of John S ole Maitai - Deceased (Applicant) (Enviromental and Land Originating Summons E006 of 2021) [2024] KEELC 6830 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6830 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2021  
CG MBOGO, J  
OCTOBER 17, 2024**

**BETWEEN**

**EMMANUEL KOTOINE MAITAI (AS A PERSONAL ATTORNEY OF JOHN S OLE MAITAI ..... PLAINTIFF**

**AND**

**KOITAAT OLE SAITIEU ..... RESPONDENT**

**AND**

**TOPOIKA OLORMAITAI (AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN S OLE MAITAI - DECEASED ..... APPLICANT**

**RULING**

1. Before this court for determination is the notice of motion dated 27<sup>th</sup> March, 2024, filed by the applicant, and it is expressed to be brought under Order 24 Rules 1, 2, 3(2) and 7 (2), Order 50 Rule 5 and Order 8 Rule 3 of the Civil Procedure Rules seeking the following orders: -
  1. That this honourable court does extend time within which to substitute the plaintiff in the suit herein with the administrator to his estate.
  2. That this honourable court be pleased to revive the suit that has abated as against the plaintiff herein (John S. Ole Maitai).
  3. That this honourable court be pleased to substitute the name of the plaintiff John Ole Maitai (deceased) with that of the applicant who is the administrator ad litem of his estate.
  4. That this honourable court grants leave to the applicant to proceed with the matter on behalf of the estate of the deceased.



5. That the cost be in the cause.
2. The application is premised on its grounds on its face. The application is further supported by the affidavit of the applicant sworn on even date. The applicant deposed that the plaintiff in this matter died on 4<sup>th</sup> September, 2022, and with him died the power of attorney that he had donated to Emmanuel Kotoine Maitai who was prosecuting the matter on his behalf. The applicant further deposed that as a family, they did not know what was happening to the matter in court as the issue was between the deceased and Emmanuel Kotoine Maitai, and it took time before the family knew what was taking place as the said Emmanuel had relocated to Tanzania.
3. The applicant further deposed that upon enquiry, they took out letters of administration ad litem for purposes of prosecuting this suit. Further, that at the time the grant was signed, the matter had already abated though the court had not declared it as abated. The applicant further deposed that after acquiring the grant that was issued on 12<sup>th</sup> September, 2023, they embarked on looking for resources for giving instructions to an advocate and on 5<sup>th</sup> December, 2023, this matter came up for hearing, but it was declared as abated.
4. He further deposed that it is 3 months since the suit was declared as abated, and the application cannot be deemed as inordinate. Also, that the entire family resides on the suit land, the subject of this suit, and it would be in the interest of justice that the deceased's estate, be granted a chance to ventilate their case.
5. The application was opposed by the replying affidavit of the defendant/ respondent sworn on 29<sup>th</sup> April, 2024. The defendant/ respondent deposed that the deceased plaintiff filed the suit on 17<sup>th</sup> May, 2021, and that he never took any steps to have the matter set down for hearing since 7<sup>th</sup> June, 2022 until 4<sup>th</sup> October, 2023 when his advocates took steps to fix the matter for mention. Further, it was deposed that the applicant has been indolent in prosecuting the matter, a fact which has been shown by his conduct in failing to attend court, when the matter came up for mention severally and for hearing on 5<sup>th</sup> December, 2023, when the personal attorney of the deceased deliberately refused to attend court.
6. The defendant/respondent further deposed that no evidence has been provided that the plaintiff was away and never communicated to them what was happening in the matter. Further, that the applicant is guilty of laches and has not adduced sufficient reasons to warrant the grant of the orders sought. He further deposed that the applicant filed a notice of motion application dated 13<sup>th</sup> December, 2023 which was dismissed via the ruling delivered on 19<sup>th</sup> March, 2024, and that the applicant is now seeking similar orders as was in the previous application.
7. The defendant/respondent further deposed that the application is res judicata, and offends the express provisions of Section 7 of the *Civil Procedure Act*, as it seeks adjudication of prayers that have conclusively been heard and determined in this court. In conclusion, the defendant/respondent deposed that the application is grossly incompetent, and that it does not raise any reasonable cause of action to call for grant of the orders sought.
8. The application was canvassed by way of written submissions. The applicant filed his written submissions dated 15<sup>th</sup> August, 2024 where he raised two issues for determination as listed below: -
  1. Whether the application should be allowed in the interest of justice.
  2. Whether there is inordinate delay in bringing this application.
9. On the first issue, the applicant submitted that this is a case of adverse possession, where the deceased plaintiff together with his family, have resided on the suit land for 41 years, and it is in the interest of justice that the application be allowed in order for the estate to ventilate the case left pending by



the deceased. He submitted that the estate of the deceased through the representative is very eager to prosecute the case, and being aware that the issues raised are persuasive, the court is called upon to exercise its discretion in his favour.

10. On the second issue, the applicant submitted that the suit was prosecuted by a personal attorney of the deceased plaintiff and that when the plaintiff passed on, the power of attorney ended with his demise, and the suit thereafter became a family matter. Further, he submitted that a grant of letters ad litem was sought which gave the applicant the necessary locus, followed by the application dated 13<sup>th</sup> December, 2023. The applicant further submitted that having filed the application 3 months after the abatement of the suit, and after the ruling delivered on 19<sup>th</sup> March, 2024, the instant application cannot be said to be inordinate. He submitted that the dismissed application was a result of a minor blunder by his advocate, and this court is called to disregard the blunder in the interest of justice.
11. The defendant/respondent filed his written submissions dated 29<sup>th</sup> August, 2024 where it raised one issue for determination which is whether the plaintiff's application dated 27<sup>th</sup> March, 2024 offends Section 7 of the Civil Procedure Rules. While relying on the cases *Siri Ram Kaura versus M.J.E. Morgan*, CA 71/1960 [1961] EA 462, *Henderson versus Henderson* [1843-60] ALL ER 378, *Pangaea Holdings LLC & Another versus Hacienda Development Ltd & 2 Others* [2020] eKLR, *Maumbwa & 3 Others versus Kisemei* (Civil Appeal 9 of 2021), and *Abok James Odera versus John Patrick Machira*, Civil Application Nai. 49 of 2001, the defendant/ respondent submitted that the applicant brought up the issue of reviving and substitution of the suit after one year and three months, which was later contested and dismissed in a ruling delivered on 19<sup>th</sup> March, 2024, but still want to coat the issue on procedural technicalities that a client should not suffer from their advocate's error.
12. To buttress on this submission, the defendant/respondent relied on the cases of *Independent Electoral & Boundaries Commission versus Maina Kiai & 5 Others* [2017] eKLR, *Lotta versus Tanaki* [2003] 2 EA 556, *Apondi versus Canuald Metal Packaging* [2005] 1 EA 12, *Mburu Kinyua versus Gachini Tuti* [1978] KLR 69; [1976-80] 1 KLR 790 and *Churanji Lal & Co. versus Bhaijee* (1932) 14 KLR 28.
13. I have considered the application, replying affidavit and the written submissions. In my view, the issue for determination is whether the applicant has met the threshold for revival of the suit. It is not disputed that the plaintiff herein, John Salimanai Oloimaitai died on 4<sup>th</sup> September, 2022. The deceased instituted the Originating Summons dated 17<sup>th</sup> May, 2021, through a power of attorney donated to Emmanuel Kotoine Maitai. The applicant contended that the power of attorney died with the plaintiff and since Emmanuel Kotoine Maitai did not have capacity upon the death of the plaintiff, it took him time to obtain grant for purposes of prosecuting the instant suit. The applicant argued that they are keen on prosecuting the case as they have lived on the suit land for more than four decades.
14. Order 24 of the Civil Procedure Rules provides as follows: -
  - “ 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
  2. ....
  3. 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. ....

5. ....

6. ....

7.

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

- (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".  
(with emphasis)

15. From the above provision of the law, when a plaintiff dies as in the instant case, the legal representative of the estate of the deceased ought to follow due process in reinstating the suit. From the record in this file, the suit abated on 4<sup>th</sup> September, 2023, which necessitated the filing of the instant application. However, and on the other hand, the defendant/ respondent contended that the applicant does not warrant the grant of the orders for the reason that the application is res judicata.

16. Section 7 of the Civil Procedure Act, which provides as follows: -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. —(1) The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.



Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

17. From the above, it will be observed that for res judicata to apply, the issue in the latter suit must have been directly and substantially in issue in the former suit, between the same parties, or between parties under whom they are litigating. The Court of Appeal in the case of *Uburu Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996* held that: -

“In order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”

18. The defendant/respondent argued that the subject of this application which is on reviving and substitution of the suit has been previously contested and determined in the ruling delivered on 19<sup>th</sup> March, 2024. For the instant application to qualify for res judicata, there is need to compare the previous application and this application. The applicant filed the notice of motion dated 13<sup>th</sup> December, 2023, seeking revival of the suit, and the applicant to substitute the deceased plaintiff. The application was argued and canvassed by way of written submissions. I have perused the ruling delivered by this court on 19<sup>th</sup> March, 2024. In paragraph 23, this court noted that the applicant did not seek for extension of time as rightly averred by the defendant/ respondent to enable this court to consider whether indeed, sufficient causes have been shown to grant the said orders.
19. Further, in paragraph 25, the court noted that the applicant has not followed due procedure in seeking the extension of time after the abatement of the suit. This court dismissed the application on that ground. Having said the above, and looking at the ruling, the court did not pronounce itself on revival of the suit at any point, as it was constrained by the prayer seeking extension of time. Can the instant application be res judicata? Absolutely not for the obvious reasons stated above. The issue of revival of the suit and the substitution of the applicant has never been previously determined by this court. For this reason, I find that the instant application not res judicata.
20. Going into the merits of the instant application, and as stated earlier, the suit abated on 4<sup>th</sup> September, 2023, there was the notice of motion dated 13<sup>th</sup> December, 2023, which sought for revival of the suit, and which was dismissed on 19<sup>th</sup> March, 2024. It followed thereafter, that the applicant filed the instant application seeking for revival of the suit. The application has thus been filed without delay. The applicant argued that the deceased plaintiff had donated his powers to Emmanuel Kotoine Maitai who during this time was in Tanzania, and as a family, they did not know what was happening in court. He further argued that it took time for the family to come together and decide on who was to proceed with the suit. In *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2*



others Civil Appeal No.283 of 2015 [2017] eKLR the Court of Appeal emphasized the need to apply for 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.”

21. While I place reliance on the above cited authority, I am satisfied that the applicant has met the requirement in seeking extension of time to substitute the deceased plaintiff. Secondly, the applicant in my view has given a reasonable explanation with regard to having a family meeting as well as sourcing of funds to prosecute this case, which are in my view satisfactory.
22. I thus find merit in the notice of motion dated 27<sup>th</sup> March, 2024, and I proceed to grant the following orders: -
  - i. The suit is hereby revived.
  - ii. The deceased plaintiff, John S. Ole Maitai is hereby substituted with Topoika OlorMaitai.
  - iii. The plaintiff to file and serve his amended pleadings within 28 days from the date of this ruling.
  - iv. Mention on 4<sup>th</sup> December, 2024 before the Deputy Registrar.
  - v. Costs in the cause.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 17<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**17/10/2024.**



**In the presence of: -**

Mr. Meyoki Pere – C.A

