



**Kamau v Director General, Kenya Agricultural and Livestock Research  
Organisation & another (Environment & Land Case 26 of 2024)  
[2024] KEELC 7346 (KLR) (Environment and Land) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7346 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIVASHA  
ENVIRONMENT AND LAND  
ENVIRONMENT & LAND CASE 26 OF 2024  
MC OUNDO, J  
NOVEMBER 7, 2024  
(FORMERLY NAKURU ELC 344 OF 2022)**

**BETWEEN**

**LYDIA MUTHONI KAMAU ..... PLAINTIFF**

**AND**

**THE DIRECTOR GENERAL, KENYA AGRICULTURAL AND LIVESTOCK  
RESEARCH ORGANISATION ..... 1<sup>ST</sup> DEFENDANT**

**HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Vide a Complaint dated 13<sup>th</sup> September 2017, the Plaintiff instituted a suit against the 1<sup>st</sup> Defendant herein seeking an order of Permanent Injunction against it from trespassing onto Land Registration No. 4358 (Original Number 425/2/41/2), that it removes the barriers erected on the said parcel of land, and lastly for General Damages, costs of the suit and the interest thereon. However, during the pendency of the suit, on 29<sup>th</sup> May, 2023 the court was informed that the Plaintiff had passed away.
2. Subsequently, what is before me for determination is a Notice of Motion Application dated 8<sup>th</sup> May, 2024 brought under the provisions of Article 159 of *the Constitution* of Kenya 2010; Section 1A, 1B & 3A of the *Civil Procedure Act*; Order 24 Rule 7 (2), Order 51 Rule 1 of the Civil Procedure Rules, and other enabling provisions of the law seeking where the Applicant for the following orders;
  - i. That the court be pleased to extend the period for the substitution of the Plaintiff with the Legal representative upon the lapse of 12 months from 30<sup>th</sup> October, 2021, the date of the Plaintiff's death.



- ii. Upon the grant of prayer (i) above, the court be pleased to substitute the Plaintiff with her legal representative James Gathogo Kamau.
  - iii. Upon the grant of prayers 1 and 2 above, the court be pleased to revive and/or reinstate the instant suit.
  - iv. The court grants leave to amend the Plaint and other pleadings.
  - v. Such other, further or incidental orders or directions as the court shall deem just and expedient.
3. The said application was supported by the grounds therein as well as the supporting Affidavit of an even date, sworn by James Gathogo Kamau, the Plaintiff's Legal Representative who deponed that pursuant to the demise of the Plaintiff on 30<sup>th</sup> October, 2021, a Grant of Letters of Administration Intestate had been procured on 21<sup>st</sup> December, 2022 vide a succession cause had been filed in Ruiru Magistrates Court being Succession Cause No. E101 of 2022.
  4. That the firm of Messrs. Wachira Wanjiru & Co. Advocate who had been seized with the instant suit from the institution of the same had on 14<sup>th</sup> September, 2017 abandoned the Plaintiff's interest compelling her appoint counsel from the law firm of Messrs. Kimani, Kiarie & Associates Advocates.
  5. That despite knowledge of the Plaintiff's death, and having full instructions to continue the representing her interest in the instant suit, the deceased's Plaintiff former Counsel had sought numerous adjournments citing lack of sufficient instruction to substitute the Plaintiff.
  6. That a scrutiny of the proceedings would evidence minimal activity between the period of December 2019 and May, 2023 during which time the Plaintiff had fallen ill and died on 30<sup>th</sup> October, 2021. That even after being seized of the matter, it would have been incumbent of the deceased Plaintiff's Counsel to file an application for extension of time to file for joinder or substitution of the Plaintiff with her legal representative but he had failed to do so. That the court was thus clothed with inherent powers and discretion to grant an order for extension of time.
  7. That guided by the spirit of Article 159 of *the Constitution* of Kenya, the technicality ought not be meted against the deceased Plaintiff to prejudicially drive her out of the seat of justice especially in view of the fact that there was a pending order for Consolidation of this suit with Nairobi ELC No. E094 of 2023, and an application dated 20<sup>th</sup> September, 2023 for joinder of parties. That further, the rules of natural justice would be violated were the deceased Plaintiff condemned unheard.
  8. In response and in opposition to the Application, the 1<sup>st</sup> Defendant filed its Grounds of Opposition dated 10<sup>th</sup> June, 2024 seeking that the same be struck out and/or dismissed with costs on grounds that; -
    - i. The suit before the court abated on 31<sup>st</sup> October, 2022 since the Plaintiff died on 30<sup>th</sup> October 2021 therefore the firm of Kimani Kiarie & Associates was improperly on record having not sought leave as contemplated under Order 9 Rule 9 of the Civil Procedure Rules.
    - ii. That the Notice of Change of Advocates was filed on 19<sup>th</sup> February 2024, two years after the suit had abated without leave of the court as contemplated under Order 9 rule 9 of the Civil Procedure Rules.
    - iii. That there being no suit, the application before the court was improper because the same ought to have been revived first, as contemplated under order 24 Rule 7(2) of the Civil Procedure Rules, in a separate application and not as an omnibus application such as the one before the court.



- iv. That the Applicant has sat on their rights if any and was guilty of laches. There was no good reason given for not filling the said application within the stipulated period of time.
  - v. That the Application before the court was an abuse of the court process and could only be considered once the suit is revived.
9. The 2<sup>nd</sup> Defendant did not participate in the instant Application.
10. The application was disposed of by way of written submissions as directed on 14<sup>th</sup> May, 2024, wherein the Applicant summarized the factual background of the matter before framing two (2) issues for determination as follows; -
- i. Whether the court can extend time for substitution of the Plaintiff;
  - ii. Whether the change of representation of the Plaintiff would hinder the prayed orders.
11. On the first issue for determination as to whether the court could extend the time for substitution of the Plaintiff, the Applicant's reliance was hinged on the provisions of Order 24 Rules 4(3) and 7(2) as well as the decided case of Attorney General v Law Society of Kenya & another [2013] eKLR to submit that whereas an application for substitution ought to be made within one year of the death of a party, the court had discretion, for good reason, to extend the time within which to make a legal representative of a deceased Plaintiff a party to a suit that had abated. That further the court had discretion to revive an abated suit if there was sufficient cause. That until the filing of the instant Application, the Applicant held a legitimate expectation that an application for substitution of the Plaintiff had been properly filed by the Plaintiff's Counsel on record at the time while awaiting the issuing of Letters of Administration. That the foregoing qualified as "sufficient cause" that had prevented the Applicant from applying for substitution of the Plaintiff in the suit as envisioned by Order 24 rule 4(3) of the Civil Procedure Rules due to insufficient representation.
12. That further, the Defendants had continued participating in the instant suit by attending court on various dates well beyond 1<sup>st</sup> November 2022 despite the suit having abated by operation of law wherein the 1<sup>st</sup> Defendant had on 18<sup>th</sup> April, 2023 even recommended for the suit to be consolidated with Nairobi ELC. No. E094 of 2023. That interestingly, it had not been until an application for substitution of the deceased Plaintiff had been made, a period of 16 months since the suit had abated, when the lapse had been recognized.
13. That the instant Application had been brought without undue delay shortly after the Applicant's current Advocate on record had entered appearance on 19<sup>th</sup> February, 2024. That the Application for extension of time was justified as it was in the interest of justice that a litigant should not suffer because of his Advocate's oversight. He placed reliance on the decision in the case of Mbaya Nzalwa v Kenya Power & Lighting Co. Ltd [2018] eKLR to submit that the court had inherent powers and jurisdiction to grant the orders sought herein.
14. On the second issue for determination as to whether the change of representation of the Plaintiff would hinder the prayed orders, reliance was placed on the provisions of Order 9 Rule 9 of the Civil Procedure Rules to submit that the said provision contemplated a scenario when a change of Advocate was effected after the delivery of a judgement but did not in any way contemplate a scenario where the suit had abated. That in any case, the instant suit had abated due to the failure of the Plaintiff's former Advocate on record who instead of correcting the error, had continued to appear in court as though the suit was subsisting.



15. In conclusion, he submitted that the court had discretion to grant the prayed orders in order to rectify the oversight and the procedural lapse of the Plaintiff's previous counsel on record so that the substantive merits of the case could be adjudicated. That further, granting the orders as herein prayed aligned with the principles of justice and fairness, preventing undue prejudice to the Plaintiff who had a legitimate interest in the resolution of the matter. That it was thus in the interest of justice, equitable and reasonable to allow the Application dated 8<sup>th</sup> May 2024 and dismiss the 1<sup>st</sup> Defendant's Grounds of Opposition dated 10<sup>th</sup> June, 2024.
16. In their submissions, the 1<sup>st</sup> framed its issues for determination as follows;
  - i. Whether the firm of Kimani Kiarie & Associates are properly on Record.
  - ii. Whether the Application dated 8<sup>th</sup> May, 2024 should be struck out.
17. On the first issue for determination as to whether the firm of Kimani Kiarie & Associates were properly on record, reliance was hinged on the provisions of Order 9 rule 9 of the Civil Procedure Rules as well on the decision in the case of S.K Tarwadi v Veronica Muehlmann [2019] eKLR to submit that the instant suit had abated on 31<sup>st</sup> October, 2022 one year after the death of the Plaintiff 30<sup>th</sup> October, 2021 at which time she was represented by the firm of Wachira Wanjiru & Company Advocates. That subsequently, the incoming firm of Kimani Kiarie & Associates ought to have filed an application for leave to come on record or a consent and having failed to so comply, they were improperly on record. They thus prayed that the said firm's Notice of Change of Advocates dated 19<sup>th</sup> February, 2024 be struck out.
18. On the second issue for determination as to whether the Application dated 8<sup>th</sup> May, 2024 should be struck out, the 1<sup>st</sup> Defendants' contention was that having found that the firm of Kimani Kiarie & Associates was not properly on record, the Application was also improper. That even if the said firm were properly on record, the provisions of Order 24 Rule 7 of the Civil Procedure Rules contemplated that once a suit had abated, the Applicant would first make an application to revive the suit before any other applications for amendment of pleadings were done and that the same ought not be done in an omnibus application such as was done in the instant case. That the procedure was that the suit be first revived and thereafter an application for substitution or any other application be made in a different processes as orders could not be granted in an omnibus application.
19. That further, the reasons advanced by the Applicant for seeking the revival of the instant suit were not satisfactory as there was indolence on their part in following up with the matter thus the court should not exercise its discretion in their favour. That the Applicant had in the instant Application sought various orders including leave to amend the Pleadings. That it was trite that where a party sought to amend a Pleading in a suit, the Draft Pleading ought to be attached to the Application. In the instant matter, the draft Amended Pleadings had not been attached to the Application and therefore leave to amend the Pleadings should not be granted. Reliance was placed in a combination of decision in the case of Daniel Ngetich v K-Rep Bank Limited [2013] eKLR.
20. That having demonstrated the fundamental flaws in the instant Application which flaws could not be cured due to non-compliance with the Law and Statute, the Plaintiff's Application dated 8<sup>th</sup> May, 2024 should be struck out with costs to the 1<sup>st</sup> Defendant.

### **Determination.**

21. I have considered the Application herein wherein the applicant seeks an extension of time to substitute the deceased Plaintiff with her legal representative James Gathogo Kamau. The Applicant further seeks



- that the court revives and/or reinstates the instant suit which abated by operation of law and thereafter grant leave to the Applicant to amend the Plaintiff and other pleadings. The Applicant's quest for the said orders was argued to be the inadvertency of the deceased's Plaintiff's former Advocate to apply for the substitution of the deceased's Plaintiff and/or apply for the extension of time upon the lapse of 12 months after the Plaintiff's death.
22. In response to the application, the 1<sup>st</sup> Respondent filed its grounds of opposition to the effect that the Applicant's application was omnibus. That pursuant to the abatement of the suit on 31<sup>st</sup> October 2022, the firm of M/S Kimani Kiarie & Associates had not sought for leave to come on record for the Plaintiff as contemplated under Order 9 Rule 9 of the Civil Procedure Rules and therefore were improperly on record. That there being no suit before court, the application was improper as contemplated under Order 24 Rule 7(2) of the Civil Procedure Rules. That therefore this application ought to be struck out.
23. The application was disposed of by way of written submissions which I have considered and the issues for determination as follows:
- i. Whether the firm of M/s Wachira Wanjiru & Co. Advocate is properly on record.
  - ii. Whether the suit by the deceased Plaintiff should be revived, and if so, whether the deceased Plaintiff should be substituted.
24. Indeed, it is not in dispute that the suit herein abated on 31<sup>st</sup> October, 2022 the Plaintiff herein having died on 30<sup>th</sup> October, 2021 and there having been no application for her substitution and/or extension of time to so apply. It is also not in dispute that whereas the Plaintiff herein had been represented by the firm of M/s. Wachira Wanjiru & Co. Advocate before the suit had abated, the instant Application has been filed by the firm of M/S Kimani, Kiarie & Associates Advocates who had come on record by filing a Notice of Change of Advocates dated 19<sup>th</sup> February, 2024.
25. The provisions of Order 9 rule 9 of the Civil Procedure Rules provide as follows:
- “When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
- (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be”
26. The Applicant has contended that provisions of Order 9 rule 9 of the Civil Procedure Rules contemplated a scenario when a change of Advocate was effected after the delivery of a judgement but did not in any way contemplate a scenario where the suit had abated.
27. A suit ceases or terminates so far as the deceased Plaintiff is concerned and no fresh suit can be brought on the same cause of action, but the abatement does not preclude the continuance of a pending suit on the same cause of action to the exclusion of the legal representative of the deceased Plaintiff.
28. So, what is the effect of an abatement of a suit, does it operate as a judgment of court?
29. The Black's Law Dictionary (10th ed. 2014), defines a judgment as a decision of a court regarding the rights and liabilities of parties in a legal action or proceeding. That Judgments generally provide the court's explanation of why it has chosen to make a particular court order. Would therefore an abated suit be defined as a determination of the rights of the parties before court? I have tried to look at our



jurisprudence on this question to no avail. My reasoning would be that an abatement of a suit does not amount to a judgment of the same on the merits of the case, nor does it extinguish the title of the Plaintiff or his/her legal representative to the subject matter of the suit. It is also to be observed that an abatement of a suit neither operate as res judicata to the suit nor does it preclude the defence to the subject matter of the suit.

30. Indeed when it is said that a suit has abated, it only means that the suit was never there or was in a state of animated suspension wherein the same can only be revived by an order of the court. Indeed an abatement, in the sense of the common law, is an entire overthrow or destruction of the suit, so that it is quashed or ended. But in the sense of a Court of equity, an abatement signifies only a present suspension of all proceedings in the suit, for the want of proper parties capable of proceeding therein. At common law a suit, when abated, is absolutely dead. But a suit in equity, when abated, is merely in a state of suspended animation, and it may be revived.(see Kelly v. Rochelle, 93 South W.R 164, CA Texas)
31. Can something that is therefore non-existent or is in a state of animated suspension said to have decided anything in order to create a bar to the principle of res judicata, I say no as a decision must be given on the merits on the controversy after hearing the parties.
32. Order 24, rule 7 of the Civil Procedure Rules which provides as follows:

“

“(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.”
33. From the effect of abatement or dismissal of a suit as provided for under Order 24 Rule 7, no fresh suit can be brought on the same cause of action but a party can only apply either for revival of the suit or setting aside of the dismissal order. It is thus clear that an abatement of a suit, is not similar to a judgment and therefore the argument that the application was not properly before the court as Counsel had failed to comply with the provisions of Order 9 rule 9 of the Civil Procedure Rules fails. I find that vide a Notice of change of Advocates dated 19<sup>th</sup> February, 2024, the firm of M/S Kimani, Kiarie & Associates are properly on record.
34. Having so found, the second issue for determination would be whether time should be extended to revive this suit that had abated on 31<sup>st</sup> October, 2022 by operation of law after the death of the Plaintiff and there having been no application made within one year of her death to substitute her with her legal representative.
35. Order 24 Rule 3(1) (2) and Order 24 Rule 7 (2) of the Civil Procedure Rules provides for the effect of death of one of several Plaintiffs or of sole Plaintiff 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 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.”

Order 24 Rule 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.”

36. 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 to the proceedings. Thus if no such application is made within one year or within the time extended by leave of the court, the suit shall abate and no fresh suit can be brought on the same cause of action.
37. The effect of an abated suit is that it is non-existent therefore there needs to be made an application to revive the same and thereafter seek an extension of time to apply for substitution of the deceased Plaintiff with her legal representative.
38. The principles applicable while considering an application such as the present one were stated by the court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR, held as follows;

“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. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See *M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997* where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in *KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994*. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced



and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in *MacFoy v United Africa Co. Limited* (1961) 3 All ER 1169, that

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...”

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.

39. Having found that the suit herein abated on the 31<sup>st</sup> October, 2022 by operation of law, the intended Plaintiff has averred that following the death of the Plaintiff, he had obtained the letters of administration on 21<sup>st</sup> December 2022, as the legal representative of the deceased Plaintiff which was after one year upon the demise of the Plaintiff, prior to which date he could not legally apply to substitute the deceased Plaintiff. That he was then precluded from filing an application for substitution within the prescribed time due to inaction on the part of the Counsel who had been handling this case on behalf of the Plaintiff. The 1<sup>st</sup> Defendants did not take issue with this line of argument.
40. I find that it is sufficient for purposes of Order 24 Rule 7(2) of the Civil Procedure Rules for the Applicant to have demonstrated that by the time this suit abated on 31<sup>st</sup> October, 2022 he had been legally incapacitated for want of letters of administration.
41. Before I make my final determination, it is worth noting that the suit having abated on 31<sup>st</sup> October, 2022, its effect was that it had ceased to exist in the eyes of the law and therefore all proceedings and orders made on after 31<sup>st</sup> October, 2022 save for the proceedings in relation to this application are really of no effect having been made by the court unaware that the case was no longer legally in existence. See *Said Sweilem Gheithan Saanum* (supra),
42. In conclusion and in view of the nature of relief sought in the suit and that it is in the interest of justice that the suit be determined on the merits, it is herein ordered as follows:
  - i. This suit is hereby revived.
  - ii. The deceased Plaintiff is hereby substituted with her legal representative Mr. James Gathogo Kamau.
  - iii. The Plaintiff to file and serve an amended Plaint to reflect the substitution within 14 days of delivery of this ruling.
  - iv. Costs shall be in the cause.

**DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**

