



**In re Estate of Felix Mathenge (Deceased) (Succession Cause  
123 of 2013) [2025] KEHC 12426 (KLR) (3 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 12426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERUGOYA  
SUCCESSION CAUSE 123 OF 2013  
EM MURIITHI, J  
SEPTEMBER 3, 2025**

**IN THE MATTER OF THE ESTATE OF FELIX MATHENGE (DECEASED)**

**BETWEEN**

**MARY WAIRIMU MATHENGE ..... APPLICANT**

**AND**

**JENNIFER NJERI MATHENGE ..... RESPONDENT**

**ADMINISTRATOR OF THE ESTATE OF PRISCILLA WAMBUI**

**RULING**

1. By a Notice of Motion dated 22/11/2022, the Applicant seeks that:
  1. This court do revive this suit against the applicant (Priscilla Wambui) and substitute the deceased applicant with Jennifer Nejri Mathenge.
  2. Costs be provided for.
2. The application is premised on the grounds on the face of it and supporting affidavit of Mary Wairimu Mathenge, the Applicant herein sworn on even date. She avers that she filed a bill of costs dated 20/9/2019 but Priscilla Wambui died on 7/12/2020 before the bill was assessed. She prays that Jennifer Njeri Mathenge be substituted with Priscilla Wambui since she has obtained letters of administration in respect of her estate. The cause of action survives the death of Priscilla Wambui and she intends to prosecute this case to the end. In her view, no prejudice will be suffered by the Respondent if the application is allowed.
3. The Respondent swore a Replying Affidavit on 17/4/2024 in opposition to the application. She avers that the suit has abated and it is incapable of being revived, following the death of Priscilla Wambui, and thus there exists no cause of action. She never participated in the main suit and she should therefore not



be condemned to pay costs she is unaware of. The said bill of costs is dated 20/9/2019 while Priscilla died on 7/12/2020 and the delay of 1 year 4 months in prosecuting the bill has not been explained.

4. The Respondent raised a Preliminary Objection dated 13<sup>th</sup> April 2024 on grounds that:
  1. The suit has abated.
  2. The application is bad in law.
  3. There is no cause of action.
  4. This application lacks merit and is an abuse of the court process.

### **Submissions**

5. The Applicant urges that if a party dies before the satisfaction of the decree, the suit cannot abate for the mere reason of the death of the party, but it can only cease to be capable of execution in accordance with the provisions of law in regard to the period and manner of execution of decrees. She urges that the Respondent, as the legal representative of the estate of Priscilla Wambui, has a legal duty to take her place, and cites *Egylyne Chepchirchir Choge & another v County Council of Trans-Nzoia* [2022] eKLR, *Willis Onditi Odhiambo v Gateway Insurance Company Limited* (2014) eKLR and *Hudson Moffat Mbue v Settlement Fund Trustees & 3 Others* ELC No. 5704/1992 (UR). She urges that although the requirement for substitution does not apply to proceedings in execution, the law does not say that they cannot be made parties to the suit, and cites *Agnes Wanjiku Wang'ondy v Uchumi Supermarket Ltd* (2008) eKLR.
6. The Respondent did not file any submissions.

### **Determination**

7. The sole issue for determination is whether the Preliminary Objection has been properly raised, and, if not, whether on the merits the application is deserved.
8. What properly constitutes a preliminary objection has been defined times over including in the locus classicus case of *Mukisa Biscuit Company v Westend Distributor Limited* (1969) EA 696 as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

9. This court in *Meru Succession Cause No. 26/1988 In the Matter of the Estate of Thomas Mbui Njenge Alias Thomas Nchenge (Deceased) David Mbuko T. Mbui v Susan Gacheri* VOL. 8 NO. 62 held that:

“In the circumstances, a preliminary objection should only be raised where there are no disputations on matters of facts by parties. Although parties did not address the Court on the import and tenor of a preliminary objection, this Court finds this to be an important matter which has the potential of either granting or divesting this Court with jurisdiction to entertain the preliminary object which forms the subject of this Ruling. This Court cannot overlook the question of jurisdiction, even with respect to entertain the preliminary objection. Should this Court find that there any disputations of fact which will require it to look at evidence adduced and interrogate factual issues, the Court will not have jurisdiction to entertain the preliminary objection.”



10. The Respondent contends that consequent to the death of Priscilla Wambui, the suit abated and the pending bill of costs cannot be subjected to taxation.

11. Section 37 of the *Civil Procedure Act* provides that:

“(1) Where a judgment-debtor dies before the decree has been fully satisfied, the holder of the decree may apply to the court which passed it to execute the same against the legal representative of such deceased, or against any person who has intermeddled with the estate of such deceased. (2) Where the decree is executed against such legal representative, or against any person as aforesaid, he shall be liable only to the extent of the property of the deceased which has come to his hands and has not been duly disposed of; and, for the purpose of ascertaining such liability the court executing the decree may, of its own motion or on the application of the decree-holder, compel such legal representative to produce such accounts as it thinks fit.”

12. Order 24 Rule 3 provides that, “(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.”

13. Order 24 Rule 10 of the Civil Procedure Rules expressly exempts application of abatement in execution proceedings as follows; “Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order.”

14. I respectfully agree with A. Visram, J. (as he then was) on his admirable exposition of the position of substitution of deceased parties in execution proceedings as follows:

“I would uphold Mr Ndege’s submission that the lower court was wrong in holding that the “suit” had “abated”, because the application for substitution had not been made within one year as required under Order 23 Rule 4 (3). There was no suit pending before the lower court, and therefore, it could not have possibly “abated”. The suit in the lower court had been determined, and, in fact, the Judgment partly satisfied. There was nothing to “abate”. In any event, Rule 11 of Order 23 states that:

“Nothing in rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.”

So, clearly, the requirement for substitution in Order 23 Rule 4 (3) does not apply to proceedings in execution of an order as was the case before the lower court.

Secondly, was the application to “substitute” the personal representatives indeed necessary? In other words, was it necessary to enjoin the personal representatives to the suit? Order 30 Rule 1 would seem to say “NO”. This is what it states:

“Order 30 Rule 1: In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person, the trustee, executor or administrator shall represent the



persons so interested, and it shall not ordinarily be necessary to make them parties to the suit, but the court may, if it thinks fit, order them or any of them to be made parties.”

While the above rule states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit. In the case of Dhulla Harichand (*supra*), the Court said:

“In *Shailendranath Ghosh vs Surendranath De* (930, I.L.R. 57 Cal. p. 1137 at p. 1140) the learned Judges in appeal say: “O. XXII, Rule 12, Civil Procedure Code, lays down that the provisions as to abatement of a suit or appeal, in consequence of death or insolvency of a party, do not apply to execution proceedings. It follows, therefore, that the provision is for the benefit of a decree holder or his heirs and that the heirs need not take steps for substitution. This is clear from the decision of the Judicial Committee in the case of *Kedarnath Goenka vs Anant Prasad Singh* (L. R. 52 I. A. 188). There are two courses, either of which may be availed of by the heirs, that is to say, that they may apply immediately for carrying on the proceedings in execution of the decree or they may apply for fresh execution under O. XXI., r. 16, Civil Procedure Code (our O. XIX. R. 13) *Akhoy Kumar Talukdar v. Surendra Lal Pal* (1926, C. W. N. 735)”.

In (1934) I.L.R. 13 Pat. P. 777 *Khaja Mohamed Noor J.* says at p. 780: “No doubt, there is no express provision for substitution of the name of a representative of the deceased decree holder during the pendency of the execution proceedings but, as is apparent from a number of cases, such applications are filed and allowed, and the Courts have almost invariably treated such applications to be applications for continuation of the pending execution proceedings. It has been held more than once that the Code is not exhaustive. It is clear from O. XXII r. 12 read with rules 3 and 4 that an execution proceeding does not abate on the death of the decree holder. If so, there is no bar to the execution continuing at the instance of his representative”.

In my view, therefore, it was perfectly legitimate for the Appellant to seek “substitution” in the lower court, and the lower court erred not only in dismissing the application, but also in holding that the suit had “abated”.

15. This court finds that the suit against Priscilla Wambui did not abate, because the Respondent was duly appointed as the personal representative of her estate vide a limited Grant of letters of administration Ad Litem issued on 17/3/2022. Needless to state, the substitution sought is in respect of taxation of the Applicant’s bill of costs dated 20/9/2019. It follows that the death of Priscilla Wambui does not in itself result in the abatement of the pending taxation of the bill of costs, because taxation is a post judgment process.

## Orders

16. Accordingly, for the reasons set out above, this court finds that the Preliminary Objection dated 13/4/2024 was improperly raised and it is struck out.
17. On the merits, the Court finds that the application dated 22/11/2022 is merited and it is allowed as prayed.
18. The costs of the application shall be in the cause.

Order accordingly.

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF SEPTEMBER 2025.**



**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Ms. A. Thungu for the Applicant.

Ms. T. Kimotho for the Respondent.

