



**Kariuki & 6 others (Suing on their behalf & as representatives of Kasarini Farmers' Co-operative Society & Karani Self Help Group) v Mbugua & 10 others (Environment & Land Case 557 of 2009) [2023] KEELC 16679 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16679 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 557 OF 2009  
AA OMOLLO, J  
MARCH 28, 2023**

**BETWEEN**

**MACHETHA KARIUKI ..... 1<sup>ST</sup> PLAINTIFF  
WAMBUI NJOROGE ..... 2<sup>ND</sup> PLAINTIFF  
WAMBUI NJAU ..... 3<sup>RD</sup> PLAINTIFF  
MARIA KAROKI ..... 4<sup>TH</sup> PLAINTIFF  
NYAMBURA KABIA ..... 5<sup>TH</sup> PLAINTIFF  
WANJIKU NGUGI ..... 6<sup>TH</sup> PLAINTIFF  
MUTHONI NJOKA ..... 7<sup>TH</sup> PLAINTIFF  
SUING ON THEIR BEHALF & AS REPRESENTATIVES OF KASARINI  
FARMERS' CO-OPERATIVE SOCIETY & KARANI SELF HELP GROUP**

**AND**

**SAMUEL GITHEGI MBUGUA ..... 1<sup>ST</sup> DEFENDANT  
GRACE MUTHONI GITHEGI ..... 2<sup>ND</sup> DEFENDANT  
SAMUEL MBUGUA KIBATHI ..... 3<sup>RD</sup> DEFENDANT  
MARGARET NYOKAB MBUGUA ..... 4<sup>TH</sup> DEFENDANT  
RUTH NJERI KABOGO ..... 5<sup>TH</sup> DEFENDANT  
MOSES MBUGUA MWANGI ..... 6<sup>TH</sup> DEFENDANT  
CHRISTINE MITHIRI MBUGUA ..... 7<sup>TH</sup> DEFENDANT  
ZACHARIA KIMEMIA GAKUNJU ..... 8<sup>TH</sup> DEFENDANT  
MARY WARURI GAKUNJU ..... 9<sup>TH</sup> DEFENDANT**



COMMISSIONER OF LANDS ..... 10<sup>TH</sup> DEFENDANT

REGISTRAR OF TITLES, NAIROBI ..... 11<sup>TH</sup> DEFENDANT

## RULING

1. The Plaintiffs/Applicants filed a notice of motion dated 17<sup>th</sup> August 2022 and supported by the affidavit sworn by Machetha Kariuki on the same date seeking for the following orders;
  1. Spent
  2. That this Honourable Court be pleased to enlarge time for the substitution of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants/Respondents.
  3. That this Honourable Court be pleased to substitute the deceased defendants with their respective legal representatives.
  4. That this Honourable court be pleased to grant leave to the Plaintiffs to further amend their plaint filed herein.
  5. That the Honourable Court be pleased to issue orders for reinstatement and/or revival of the Plaintiffs' claim against the deceased Defendants that have abated.
  6. That the costs of this application be provided for.
2. The Plaintiffs stated that the claim is for recovery of property known as LR.No. 7153/R [now L.R No.12825][Grant No.I.R 35930] situated within Kiambu County measuring approximately 377.2 Ha hereinafter referred to as "the suit property" in which the 1<sup>st</sup> to 9<sup>th</sup> Defendants through fraud secured the registration of the suit property in their respective names having altered relevant ownership documents belonging to the Plaintiffs who at the time were members of a registered society known as Kasarini Farmers' Co-operative Society and that in the course of the hearing of the matter the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> and 9<sup>th</sup> Defendants have since passed on.
3. The Plaintiffs stated that at the time of filing the suit, they were not aware that the two of the Defendants were deceased and only discovered around the year 2018 that the other Defendants had also passed on and that they have faced challenges in locating the whereabouts of the legal representative / Administrators of the deceased Defendants since the deceased Defendants did not reside on the suit property and the local administration have not been of any assistance.
4. The Plaintiffs further stated that they had discovered the following information that may assist the Court and Plaintiffs in establishing the legal representatives of the deceased Defendants;
  - a. That the 1<sup>st</sup> Defendant son, one Anthony Gacheru is the legal representative of the 1<sup>st</sup> Defendant.
  - b. That one George Kangethe Kabogo and Ndegwa Kabogo are the legal representatives of the estate of the 5<sup>th</sup> Defendant.
  - c. That one Timothy Gakunju is the legal representative of the estate of the 8<sup>th</sup> Defendant.
  - d. That one Ruth Wanjiku Gakunju, Esther Njeri Gakunju and Paul Ndiritu Ndungu are the legal representatives of the estate of the 9<sup>th</sup> Defendant.
  - e. That one Joseph Mbai is the legal representative of the estate of the 6<sup>th</sup> Defendant.



- f. That one Humphry Mwaura is the legal representative of the estate of the 3<sup>rd</sup> Defendant
  - g. That one Joseph Mbai Mbugua is the legal representative of the estate of the 7<sup>th</sup> Defendant.
  - h. That one Humphry Mwaura is the legal representative of the estate of the 4<sup>th</sup> Defendant.
5. The Applicants stated that their former Advocates M/s Githima Kioi & Company Advocates vide an application dated 13/6/2018 sought for the court's leave to inter alia amend the Plaintiff and substitute the deceased's Defendants with their respective legal representatives and the said prayer was granted and they filed the amended plaintiff but the file plaintiff did not identify by name the legal representatives of the deceased Defendants thus making it extremely difficult to serve them with court pleadings for purposes of enabling them to enter appearance and file their responses if any.
  6. The Applicants averred that they ought not to be made to suffer by the delay in substituting the name of the deceased Defendants within the requisite period since there seems to have been a sinister motive by the family of the deceased Defendants and that their claim against the deceased Defendants' estates have since abated and it is only fair that the said claims be revived and that no prejudice would be occasioned to the deceased's estates if the orders sought are granted.
  7. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the application vide Grounds of opposition dated 11<sup>th</sup> October 2022 and a replying affidavit sworn by Daniel Mukiri Githegi, son to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 11<sup>th</sup> October 2022.
  8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the suit against them has abated and that the Plaintiffs are seeking conflicting orders that cannot be brought within the ambit of application noting that they abandoned the suit and proceeded to file several complaints at the National Land Commission against the 1<sup>st</sup>-9<sup>th</sup> Defendants and that despite the court's orders issued on 11<sup>th</sup> October 2017 directing that parties comply with Pre-trial Directions, the Plaintiffs failed to comply within the stipulated time and that this application is in violation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' rights under Article 159 of the Constitution.
  9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants stated that he had previously sworn affidavits in this matter via a power of Attorney dated 5<sup>th</sup> June, 2017 donated by his mother, the 2<sup>nd</sup> Defendant, for the estate of the 1<sup>st</sup> Defendant and in the affidavit dated 23<sup>rd</sup> November 2018 paragraph 2 he informed the Plaintiffs that the 2<sup>nd</sup> Defendant is the executrix and beneficiary of the estate and that the 2<sup>nd</sup> Defendant having subsequently passed away, the suit has abated against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that the Law of succession Act Cap 160 offers a provision in law that they ought to have utilized before the suit abated and further relied on the contents and exhibits in his replying affidavit dated 23<sup>rd</sup> November 2018.
  11. The 4<sup>th</sup> Defendant filed Grounds of opposition dated 17<sup>th</sup> October 2022 and a replying affidavit sworn by Margaret Nyokabi Mbugua on the same date. The 4<sup>th</sup> Defendant contended that the application is bent on causing unreasonable delay to the conclusion of the suit, contrary to the Overriding Objectives as provided for under Section 1A, 1B, 3A and 3B of the Civil Procedure Act, Cap 21 Laws of Kenya and that the alleged cause of action having accrued in 1981, the suit and/or any subsequent amendments are statute barred by virtue of the provisions of Section 7 of the Limitation of Actions Act and also the suit has since abated by didn't of the provisions of Order 24 Rule 3(2) and Rule 4(3) of the Civil Procedure Rules.
  12. The 4<sup>th</sup> Defendant contended that the application is an abuse of the court process as the same orders had been sought in their application dated 13/6/2018 seeking leave to amend the Plaintiff by way of



- substituting the deceased Defendants and the same was dismissed stating that a suit which had been abated cannot be amended until the same is revived hence the motion is res judicata.
13. The 4<sup>th</sup> Defendant also stated that the proposed amendments if allowed will introduce a new cause of action different from the suit, that the Plaintiffs have not come to court with clean hands and also that Humphry Mwaura is not the legal representative of the estate of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.
  14. The 7<sup>th</sup> Defendant filed a replying affidavit sworn by Joseph Mbai Mbugua, a personal representative of the Estate of the 7<sup>th</sup> Defendant on 18<sup>th</sup> November 2022 stating that the suit against the 7<sup>th</sup> deceased Defendant who passed on in 2017 had abated as the statutory time limit of one (1) year had lapsed and that the information as to his estate's legal representatives is readily available in the public domain and that the Plaintiffs had been indolent to obtain the same.
  15. The 7<sup>th</sup> Defendant contended that the Plaintiffs had not demonstrated sufficient reasons to warrant the grant of the orders sought and that they had filed numerous applications delaying the hearing and determination of the suit such as application dated 13/6/2019 seeking to amend the Plaintiff that was dismissed making the instant application res judicata.
  16. The 8<sup>th</sup> and 9<sup>th</sup> Defendants opposed the application vide Grounds of opposition dated 17<sup>th</sup> October 2022 and replying affidavit sworn by Esther Njeri Gakunju, executrix in the Estate of the 9<sup>th</sup> Defendant on 27<sup>th</sup> October 2022. The Deponent contended that the suit against the 8<sup>th</sup> and 9<sup>th</sup> Defendants has abated and that the instant application is nugatory by operation of law and that it is fatally defective as it is made by representatives of a non-existent entity and the Plaintiffs have not proved that they are representatives of Kasarini Farmers' Co-operative Society.
  17. The Deponent also stated that the application cannot issue as against the 8<sup>th</sup> Defendant as he died before the institution of the suit and that the Plaintiffs cannot claim against the estates of the deceased 8<sup>th</sup> and 9<sup>th</sup> Defendants as they did not raise any claims during the entire process of succession noting that the said estates have already been distributed.
  18. The 8<sup>th</sup> and 9<sup>th</sup> Defendants contended that the previous Plaintiffs' Application dated 13/6/2018 to amend the Plaintiff was dismissed as evidenced in the annexed ruling "ENG4" and that no Amended Plaintiff had been filed and the previous Advocate on record was asked to advise the court on how they wished to proceed with the suit given that it had abated against the deceased Defendants noting that the 5<sup>th</sup> and 8<sup>th</sup> Defendants had passed on before filing of the suit.
  19. The 8<sup>th</sup> and 9<sup>th</sup> Defendants also contended that the Advocates on record for the deceased Defendants have always disclosed their instructing clients including the administrators of the estates and also noted that the National Land Commission is enjoined in the Application as the 10<sup>th</sup> Defendant whereas the amended plaintiff on record indicated 10<sup>th</sup> Defendants as the Commissioner of lands and that only the 4<sup>th</sup> Defendant is alive.
  20. The 8<sup>th</sup> and 9<sup>th</sup> Defendants stated that determination of this case has been delayed by the Applicants' forum shopping evidenced by the two constitutional petitions and claims at the National Land Commission and the numerous applications despite this court giving pre-trial directions with an aim of expeditiously hearing and determining the suit.
  21. The 8<sup>th</sup> and 9<sup>th</sup> Defendants contended that the claim against the deceased Defendants of suit property allegedly fraudulently registered in their names is statute barred and that that the Plaintiffs have not provided sufficient grounds to enable the court to exercise its discretion to extend time to revive the abated suit, substitute the deceased Defendants and to grant leave to further amend the Plaintiff to enjoin



- the administrators of the deceased Defendants to the suit and that great prejudice will be occasioned to them in the event the Application is allowed as prayed.
22. The 8<sup>th</sup> and 9<sup>th</sup> Defendants stated that the Plaintiffs were always aware of the legal representatives of the deceased 9<sup>th</sup> Defendant as she had responded to the numerous applications filed before court and that they had knowledge of their deaths in the year 2018 and filed the Application four (4) years later proving that they have been indolent.
  23. The 8<sup>th</sup> and 9<sup>th</sup> Defendants also stated that as proven at MK-1 page 4, a notice was issued pursuant to section 29 of the *Trustee Act* (Cap 167 of the Laws of Kenya) that persons having a claim against or interest of the estate of the late 8<sup>th</sup> Defendant were required to send particulars of the claim or interest in writing to the advocates therein before 30/10/2008 after which the executrix of the 8<sup>th</sup> Defendant was to distribute the estate to the beneficiaries entitled having regard only to the lawful claims and interests particulars of which she will have received and without being liable to any person whose claim or interest she will not have had notice of.
  24. The 8<sup>th</sup> and 9<sup>th</sup> Defendants also stated that the application ought not to be allowed to enjoin the names of the deceased Defendants' legal representatives as the law provides for joinder of parties and not names, the application simultaneously seeks orders to substitute the deceased Defendants with their respective legal representatives, this court did not allow any application by the Plaintiffs to amend their Amended Plaint and there is no evidence furnished of the current existence of any property known as LR No.7153/R or even LR No.12825 as no search of any property has been exhibited.

### Analysis

25. It is not contested that the suit has abated by virtue of Order 24 rule 4 (3) of the *Civil Procedure Rules* and in the application dated 17<sup>th</sup> August 2022 the Plaintiffs have sought that the same be reviewed. The issue for determination is whether the Plaintiffs have met the threshold for reviving the abated suit.
26. An abated suit is non-existent prior to it being revived and the court has a duty to consider the facts and justification presented by the Plaintiffs/Applicants for the delay and abatement.
27. In the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 Others* (2015) eKLR, the Court of Appeal explained the provisions of Order 24 of the *Civil Procedure* 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 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.”

28. In *Rukwaro Waweru v Kinyutho Ritbo & Another* (2015) eKLR, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.
29. It is no doubt that this court possesses discretionary powers to revive the abated suit but the discretion must be exercised upon being persuaded that there is sufficient cause. The Plaintiffs have stated that the delay was occasioned because they were unaware of the deaths of the Defendants and that even after becoming aware in the year 2018, there was a challenge in identifying the legal representatives of the deceased Defendants’ estates.
30. It is noteworthy that the Plaintiffs had filed a notice of motion dated 13<sup>th</sup> June 2018 seeking to amend the Plaint and substitute the deceased defendants with their respective legal representatives in which this court delivered a ruling dated 13<sup>th</sup> June 2019 pronouncing that the suit had abated and proceeded to strike out the said motion. This means that by the time of filing of that application in the year 2018, the Plaintiffs were aware of the deaths of the Defendants and who were the legal representatives of their respective estates. Despite that knowledge, the Plaintiffs filed the application for revival in August 2022, two years later after their application was struck out and four years (from 2018) from when they became aware of the demise of the deceased defendants.
31. From the pleadings, it is apparent that the 5<sup>th</sup> defendant died on 5<sup>th</sup> May 1997 while the 8<sup>th</sup> defendant died on 16<sup>th</sup> May 2008 with both dates falling before the date of filing of this suit. As observed by my brother Okongó J., the suit against the two defendants were a nullity and the same cannot be revived. The 3<sup>rd</sup> Defendant died on 19<sup>th</sup> October 2011 and the 9<sup>th</sup> Defendant died on 30<sup>th</sup> August 2013, more than 10 years to the date of filing of this application. It is only the 1<sup>st</sup> and 7<sup>th</sup> Defendants who passed on in the year 2017. I have indicated the dates of death to demonstrate that if the Plaintiffs had been diligent with the prosecution of their case, they would have learnt early enough of the demise of the four defendants and took steps for their substitution.
32. The Plaintiffs stated that they had challenges knowing who the administrators of the deceased defendants were as they only learnt of these deaths in the year 2018. However, the Plaintiffs failed to be specific on what these challenges were especially for the period between the year 2011 to 2018. The doctrines of equity states that equity aids the vigilant and not the indolent and in this case, the Plaintiffs were not vigilant at all. I am persuaded by the argument for the 8<sup>th</sup> and 9<sup>th</sup> Defendants that their estates had already been distributed and in the circumstances reinstating the case against them would be prejudicial.
33. The prejudice will be suffered even by the estates of the 1<sup>st</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> defendants. In summary, I find that there is no sufficient cause shown why the Plaintiffs delayed in bringing the application for substitution. Consequently, the application dated 17<sup>th</sup> August 2022 is dismissed with costs to the Respondents in the said application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MARCH 2023**

**A. OMOLLO**

**JUDGE**

**In the Presence of**

Mr Owang for Applicants



Mr Mc Court for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr Kahari for 3<sup>rd</sup> and 4<sup>th</sup> Defendants

Mugo for Wambugu for the 7<sup>th</sup> Defendants

Ms Gathi for Njagi for 8<sup>th</sup> and 9<sup>th</sup> Defendants

