



REPUBLIC OF KENYA



KENYA LAW
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Miwa v Kenya Commercial Bank Limited & 2 others (Environment & Land Case 175 of 2018) [2023] KEELC 16798 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16798 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 175 OF 2018
LL NAIKUNI, J
MARCH 28, 2023

BETWEEN

PETER MWALIMU MIWA PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

AUTOLAND & ESTATE LIMITED 2ND DEFENDANT

PETER MATHIGU GICHAMBA 3RD DEFENDANT

RULING

I. Introduction

1. The application before this Honorable Courts is the Notice of Motion dated July 26, 2022 by “The Autoland & Estate Limited” - the 2nd defendant/applicant. It was brought under the provisions of sections 1A, 1B and 3A of the *Civil Procedure Act* cap. 21, Order 24 Rule 3 Order 51 Rule 1 and Rule 3 of the *Civil Procedure Rules*, 2010 Act, of the Laws of Kenya.

II. The 2nd Defendant/Applicant’s case.

2. The 2nd defendant/applicant sought for the following orders:-
 - a. That this honorable court be pleased to make an order that the suit herein abated on the November 27, 2005 and consequently order that the suit is dismissed with costs to the defendants to be paid by the Administrator of the Estate of the Deceased plaintiff.
 - b. That costs of this Application be paid to the defendants by the Administrator of the Estate of the Deceased plaintiff.



3. The application by the 2nd defendant/applicant was premised on the grounds, testimonial facts and averments founded under the 11 paragraphed supporting affidavit sworn by the Randolph M. Tindika, an Advocate of the High Court of Kenya practicing as such in the conduct of the suit on behalf of the 2nd defendant/applicant together with two (2) annexures marked as “RMT – 1 & 2” annexed thereto. He averred that:
 - a. The deponent was an Advocate of High Court and having the conduct of this suit on behalf of the 2nd defendant thus competent to swear this affidavit
 - b. The Deceased plaintiff – Peter Mwalimu Miwa, instituted this suit through a Plaintiff dated the September 16, 2000 arising out of a land dispute relating to all that parcel of land known as Land Reference numbers Mombasa/Block/IX/270 (Hereinafter known as “The Suit Land”).
 - c. As fate would have it, unfortunately the Plaintiff died on the November 28, 2004, which position was communicated by the duly appointed Legal Administrator of his Estate. Annexed in the application and marked “RMT - 1” is a copy of the said Certificate of Death.
 - d. Despite knowing that the Deceased plaintiff was dead, no application for substitution was filed within one (1) year as provided under the provisions of the law. Hence, it follows that this suit herein abated on the November 27, 2005 as against the 1st, 2nd and 3rd defendants herein.
 - e. The Estate of the Deceased applied for Grant Letters of Administration and the said letters of confirmation of grant were granted on the September 2, 2009 which was five (5) Years after the demise of the Plaintiff. Annexed hereto and marked. “RMT- 2” is a copy of the said Certificate of Confirmation of a Grant.
 - f. The Administrator of the Estate of the Deceased Plaintiff filed the Notice of Motion Application dated June 11, 2012, more than seven (7) years and five (5) months after the death of the Deceased Plaintiff and more than six (6) years and five (5) months after the abatement of the suit and up to date the same has never been prosecuted, more than ten (10) years after it was filed.
 - g. The Administrator of the Estate of the Deceased knew of the demise of the Deceased yet did not take any steps to have had a substitution done within the time allowed in the Rules.
 - h. The suit herein thus could not proceed nor stand having abated more than sixteen (16) years and five (5) years ago and thus ought to be dismissed with costs to the Defendants.
4. The plaintiff/respondent’s case
5. The Plaintiff/respondent responded to the application through a 23 Paragraphed replying affidavit dated September 2, 2022. It was sworn by Rashid Ali Mbwiza, an Advocate of the High Court of Kenya and together with two (2) annexures marked as “RAM – 1 & 2” attached thereof. He averred that
 - a. He was an Advocate who had been in conduct of the suit on behalf of the plaintiff and hence competent to swear the affidavit herein.
 - b. The 1st defendant filed an application dated 5th June 2018 seeking dismissal of the Plaintiff’s suit for want of prosecution and on further grounds that the suit abated. (Annexed was a copy of the application marked as “RAM – 1”).
 - c. The Application came up for directions on February 14, 2019 where Counsels indicated to court that they had agreed to abandon the said application dated June 5, 2018.



- d. By the consent of the parties, on 14th day of February 2019, the Application was abandoned.
- e. Thereafter the issue of abatement had been settled and parties sought time to comply with the provision of Order 11 of the Civil Procedure Rules 2010.
- f. The court ordered the 1st defendant to comply with the provision of Order 11 of the Civil Procedure Rules, 2010 within 21 days of service of the Plaintiff's documents.
- g. However, todate, the 1st defendant, had yet complied with the provision of Order 11 of Civil Procedure Rules, 2010 as directed, despite service of the Plaintiff's list of documents. On September 22, 2021, while before the Honorable Justice Munyao the matter came up for mention to take up a hearing date. The applicant sought 14 days to file their statements but the court only gave him 7 days to file any documents and the matter was fixed for hearing on November 29, 2021.
- h. On November 29, 2021, the honorable courttook Judicial notice of the failure by the defendants to file those documents yet and in the absence of the plaintiff, granted the parties an extension of 21 days to fully comply and the 3rd defendant to file an application to cease from acting.
- i. A hearing date of March 2, 2022 was given by the honourable court. While the plaintiff was ready to proceed the defendants against raised concerns needing more time to obtain more documents where the court found the 1st and 2nd defendants to be very casual.
- j. Therefore, it was apparent that the defendants seemed uninterested on seeing this matter heard to finality. Any delay in prosecution had been occasioned by the disappearance of the file which prompted the 1st defendant to file an application for dismissal for want of prosecution dated June 5, 2018. (Annexed herewith was a letter dated April 17, 2014 marked as "RAM – 2").
- k. This was a matter that involved the estate of Peter Mwalimu Miwa (deceased) who had a number of beneficiaries and who were still very interested in proceeding with this matter.
- l. This was a land matter that concerned the deceased property and the administrator's efforts to protect the same from loss hence the need for it to be heard to its logical conclusion. If the Application was allowed the Plaintiff and the beneficiaries of the estate of Peter Mwalimu Miwa shall be greatly prejudiced and suffer irreparable loss.
- m. It was in the interest of justice that this suit was heard and determined to finality. They were ready to abide by any conditions the Court would give in relation to the hearing of the matter and hearing the same concluded expeditiously.
- n. The Application herein was devoid of merit and was a technicality meant to defeat access to justice and the same should be dismissed with costs.

VI. Analysis and Determination

6. I have had a chance to critically assess and consider the pleadings herein being the Notice of Motion application dated July 26, 2022, the responses and the cited authorities, the provision of the Constitution of Kenya, 2010 and the statures particularly Order 24 of the Civil Procedure Rules, 2010 which sets out what should transpire when any of the litigants die.
7. For the court to arrive at an informed, fair and just decision, the honorable court has crafted two (2) main issues for its consideration. These are:-



- a. Whether the Notice of Motion application dated July 26, 2022 has merit to wit the court finds that the suit herein abated on the November 27, 2005 and consequently order that the suit stands dismissed with costs to the defendants to be paid by the Administrator of the Estate of the Deceased plaintiff.
 - b. Who will bear the costs of this Application?
Issue No. a). Whether the Notice of Motion application dated July 26, 2022 has merit to wit the court finds that the suit herein abated on the November 27, 2005 and consequently order that the suit stands dismissed with costs to the defendants to be paid by the Administrator of the Estate of the Deceased Plaintiff.
8. Under this sub heading are on the issues that pertains to when a party in a suit dies while the cause of action still subsists. These legal parameters are well set out under Order 24 of the Civil Procedure Rules, 2010 entitled: "Death And Bankruptcy Of Parties". From the provision of Order 24 Rule 3, for instance, provides procedure to be followed in case of death of one of the several or sole Plaintiff. It provides that:-
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 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.
9. From the documentary evidence available, being the Certificate of Death herein, it is a fact that the plaintiff herein passed on the November 28, 2004. Indeed, upon the demise of the deceased, the estate of the Deceased plaintiff in the year 2005 applied for the Grant letters of Administration and Confirmation. On August 23, 2010 they were issued with the said letters Grant Letters which is close to twelve (12) years now. To date, there has been no Application for substitution s made within the required stipulated one (1) year period by the provisions of the law. Indeed, there has been no efforts made whatsoever to appoint a legal representative of the estate to substitute the deceased Plaintiff. My keen reading of the averments made out in the Replying Affidavit by the Deceased Plaintiff and sworn by his Advocate are all geared towards justifying why the suit should not abate rather than seeking for substitution through appointment of a Legal Representative. Even for the sake of argument the suit was to be allowed to proceed as urged by the Learned Counsel for the Deceased Plaintiff, on what basis of law would that stand without any substitution being undertaken as first step in the given circumstance? Clearly, the Learned Counsel was completely misguided on his interpretation of the provision of Order 24 Rules 3 (1) and (2) of the Civil Procedure Rules, 2010.
10. Resultantly, it follows that this suit has abated as against the defendants. Legally speaking, a careful reading of Order 24 Rule 3 (2) reveals that the suit automatically abated by operation of law and it is not necessary to make an application to have the suit marked as abated. The Rule also provides for an application by the defendant for costs of an abated suit. Nevertheless, it is not uncommon, and neither is it out of place, for the defendant to seek an order to have a suit marked as abated.
11. The 1st defendant on the other hand contends that the 1st defendant filed an application dated June 5, 2018 seeking dismissal for want of prosecution and on further grounds that the suit abated. The



Application came up for directions on February 14, 2019 where Counsels indicated to court that they had agreed to abandon the said application dated June 5, 2018. The decision to abandon the Application was by Consent of parties on that 14th day of February 2019.

12. Thus, this suit having abated, the provision of Order 24 is silent on what then should happen to the interim orders. Order 40 Rule 7 of the [Civil Procedure Rules](#) provides that :-

7. Any order for an injunction may be discharged, or varied, set aside by the court on application made thereto by any party dissatisfied with such order.

13. In my own view, I strongly feel that the current situation in the instant case is sufficiently addressed by the provisions of Order 40 Rule 6 of the [Civil Procedure Rules](#), 2010. The same provides for the lapse of an injunction. It states that :-

6. Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.

14. The suit herein has not been determined yet and twelve (12) months have lapsed since the interim orders of injunction were granted. Therefore, by dint of the provisions of Order 40 Rule 6 of [Civil Procedure Rules](#), 2010, the injunction has lapsed. Even without the assistance of the provision of Order 40 Rule 6, I believe that an abated suit is as good as a dismissed suit. Once it abates, all orders granted therein are automatically vacated and I deem them as having been so vacated.

ISSUE No b). Who will bear the Costs of the application?

15. This leaves this court with the issue as to costs. It is now well established that Costs is at the discretion of the Costs. Costs mean the award that is granted to a party at the conclusion of a legal action or proceedings in in any litigation. The proviso of the provision of section 27 (1) of the [Civil procedure Act](#), cap. 21 holds that costs follow the event. By events it means the outcome or results of the legal action. (See the Court of Appeal cases of [Rosemary Wambui Munene v Ihururu Dairy Co – operatives Societies Limited](#) (2014) eKLR and “[Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited](#) (2016) eKLR).

16. The 2nd defendant has asked for Costs of this application to be paid to the defendants by the Administrator of the Estate of the Deceased Plaintiff. The provision of Order 24 Rule 2 (3) provides that the court may award the defendant costs of an abated suit. The word “may” rather than “shall” are used meaning that the Court has discretion on the award of costs. It is my own view that, the courts should be slow in awarding costs of an abated suit to the defendant unless it is apparent clear and plain that the suit was frivolous or that from the very onset that the Plaintiff had a wholly unmeritorious claim.

17. On the contrary, as things stand herein, it is apparent that the plaintiff herein seem to have had a fairly legitimate and solid claim. Hence, I think it would not be just for me to order his estate to shoulder the costs of this suit. In the unfortunate circumstances of this suit, justice will best be done if each party bears their own costs.

VI. Conclusion & Disposition

18. In long analysis, the honorable court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Clearly, the 2nd defendant has a case against the Estate of the deceased. It is in the foregoing that I find:-



- a. That the Notice of Motion application dated June 26, 2022 be and is hereby found to be with merited and hence allowed.
- b. That the suit by the plaintiff herein be and is hereby marked as abated under the provision of Order 24 Rules 3 (1) and (2) of the Civil Procedure Rules, 2010 and hence it stands closed.
- c. That an order be and is hereby made that all orders herein including the interim orders of injunction are hereby vacated.
- d. That each party will bear its own costs.

It is so ordered accordingly.

RULING DELIVERED VIDE MICROSOFT TEAMS VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF MARCH 2023.

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HON. JUSTICE L. L. NAIKUNI, (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

- a. **M/s. Yumna, Court Assistant.**
- b. **M/s. Ndirangu holding brief for Mr. Mbwiza Advocate for the Plaintiff**
- c. **Mr. Kariuki Henry Advocate for the 1st Defendant**
- d. **M/s. Wambaa holding brief for Mr. Thuo Advocate for the 2nd Defendant**
- e. **No appearance for the 3rd Defendant.**

