



**Onyango v Angaga (Environment & Land Case 133 of 2018)
[2023] KEELC 16735 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND CASE 133 OF 2018
MN KULLOW, J
MARCH 28, 2023**

BETWEEN

HERMAN ORWA ONYANGO PLAINTIFF

AND

JOSEPH NDUAT ANGAGA DEFENDANT

RULING

1. The Defendant/Applicant herein filed an application dated November 30, 2022 seeking the following orders: -
 - a. That this Honourable Court be pleased to make an Order that the suit herein has abated.
 - b. That the costs of this Application be in the cause.
2. The application is based on the 7 grounds thereof and on the Applicant's Supporting Affidavit sworn on even date. The applicant avers that he is the registered owner of the suit parcel. That sometimes, in the year 2018, the plaintiff instituted the present suit and similarly obtained injunctory orders pending the final determination of the suit. However, the substantive suit has never been heard since 2018 to date.
3. It his claim that during the intervening period the plaintiff died on 25/9/2021 but has never been substituted, more than a year since his death. He thus contends that the suit herein has since abated by operation of the law.
4. He further claims that he stands to suffer great prejudice unless the orders sought are granted since the plaintiff successors continue to deny him the use of his property, alleging that the interim orders are still in place. He urged the court to allow the application.
5. The Application herein was canvassed by way of written submissions. The Applicant filed his written submissions together with authorities which I have read and considered.



6. The Plaintiff/ Respondent neither filed a Replying Affidavit nor submissions in response to the instant Application. Be as it may, I will proceed to render my Ruling as hereunder;
7. The sole issue for determination before me is whether the instant Application is merited and I will proceed to discuss the same on account of;
 - i. Whether the suit has abated
8. The Applicant contends that the Plaintiff herein died sometimes on September 25, 2021 but has never been substituted even though it has been more than a year since his death. That there being interim injunctory orders in place, he continues to suffer great prejudice when in fact the Respondents are not keen on prosecuting the substantive suit since its institution in 2018. He urged the court to grant the orders sought.
9. The Plaintiff/ Respondent despite being given an opportunity to respond to the allegations made by the Applicant failed to file any response thereto and has thus not given any explanation why the orders sought by the Applicant should not be granted.
10. Order 24 Rule 3(2) of the Civil Procedure Rules provides the legal framework on the abatement of suits and states 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 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.”

11. The provisions on Rule 3(2) above are very clear on what happens where a sole plaintiff dies and no Application for substitution by the legal representatives, has been made to substitute the dead Plaintiff within a year; the suit automatically abates where the action does not survive.
12. I have looked at the record herein and I note that upon the death of the Plaintiff, his beneficiaries/ successors were given an opportunity to regularize his substitution pursuant to the provisions of the Law of Succession Act. The matter has subsequently come up in court on several occasions to confirm the status of the said substitution but there has never been any representative and/or explanation tendered for the delay in filing the substitution thereof. Further, there was no response to the instant Application and this court is therefore unable to find in favor of the Respondent's estate as there has never been explanation tendered on the delay occasioned, there is no indication whether succession proceedings have been instituted at all or whether a grant of letters of administration has been issued to any of the beneficiaries/ successors or at all.



13. The Plaintiff having died on the 25/9/2021, it has been a period of 14 months since his death, thus at the time of the filing of the instant Application, the 12 months' period had since lapsed. Therefore, by reason of effluxion of time, the said suit has abated.

14. The Court of Appeal in *Said Sweilem Gbeithan Saannum -v- Commissioner Of Lands & 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.”

15. Guided by the above decision; this court finds that there being no Application for substitution of the plaintiff or for the extension of time within the requisite 1 year (12 months), the suit has abated. Further, there has been no sufficient justification or explanation tendered for the extension of the interim orders of status quo/ injunction in place at the expense of the Applicant; the Plaintiff's successors have not shown any interest in prosecuting the matter to its logical conclusion.

16. The upshot of the foregoing analysis is that the application dated November 30, 2022 is merited. The Plaintiff's suit is hereby struck out with costs to the Applicant and any consequential orders issued are hereby vacated. It is so ordered.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA EMAIL AT MIGORI ON 28TH DAY OF MARCH, 2023.

MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

Court Assistant - Tom Maurice/Victor

