



Disja & 2 others v D'Costa & 3 others; Tembo & another (Interested Parties) (Environment & Land Case 1 of 1982) [2023] KEELC 16509 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16509 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 1 OF 1982
NA MATHEKA, J
MARCH 22, 2023**

BETWEEN

**NYALE MWANGO DISJA 1ST PLAINTIFF
KIT1 MWANGO NYALE 2ND PLAINTIFF
KHAMIS NYALE MWANGO 3RD PLAINTIFF**

AND

**VINCENT SABASTIAN D'COSTA 1ST DEFENDANT
SETTLEMENT AND ADJUDICATION OFFICER KILIFI 2ND DEFENDANT
LAND REGISTRAR KILIFI 3RD DEFENDANT
THE HON ATTORNEY GENERAL 4TH DEFENDANT**

AND

**MBIGO KADZO TEMBO INTERESTED PARTY
ARNOLD KARISA MUHAMBI INTERESTED PARTY**

RULING

1. The first application is dated 2nd August 2022 and is brought under Rule 3, 1 and 2 of the [High Court \(Practice and Procedure\) Rules](#) Cap 8, Sections 73(1), 78(2) and 80 of [Land Registration Act](#) No 3 of 2012 Revised 2016. Section 1A, 1B, 3, 3A of the [Civil Procedure Act](#) Cap. 21 Laws of Kenya seeking the following orders :
 1. That this application be certified as urgent and service be dispensed with in the first instance.
 2. That leave be granted for the Applicants' Application to be heard during this Court Vacation.



3. That the 1st Plaintiff Nyale Mwango Disja herein who died on 28th September 2008 be substituted with the administrator of his estate Kiti Mwango Nyale a.k.a. Kiti Nyale Mwango while Vincent Sabastian D' Costa who died on 16th June 2007 be substituted with the representative (s) of his estate (Leonard D' Costa).
 4. That the caution and or restriction registered on 20/4/2018 on the entries of parcel Kilifi/Mtwapa/II in favour of Leonard D' Costa representative of the estate of Vincent Sabastian D'costa deceased who was aware of this case, participated in the proceedings, testified in Court on 14/2/1984 and closed his case before he passes on after several decades be canceled and expunged from the records.
 5. Cost of the application.
2. It is premised on the sworn affidavit of the Khamis Nyale Mwango attached with annexures thereto and the grounds that this old suit was filed in Court on 4/1/1982 and Judgment was delivered on 13/2/2014 which has not been set aside but due to continuous obstacles at the Kilifi Land Registry the Court decree has not been executed to date. That the 1st Plaintiff Nyale Mwango Disja biological father of the 2nd and 3rd Plaintiffs testified in these proceedings on 11/5/1983 and died on 28/9/2008. That on 19/1/1982 the 2nd Defendant Vincent Sabastian D' Costa was served with the pleadings of this case on 3/5/1982, he entered appearance and filed Defence through his advocates and on 14/2/1984 he testified in Court in and closed his case. That in Malindi Resident Magistrate Court Criminal Case 369 of 1984 Republic Versus I. Vincent Sabastian D' Costa and 2. Shomari Mohamed the 1st Defendant in this case and his co- accused pleaded guilty on the charges of fraud and forging land documents for the suit land herein and were convicted on their own plea of guilty before sentenced by the Court. That while at the Kilifi Land Registry on 30/3/2020, the Applicants learnt that the 1st Defendant who closed his case on 14/2/1984 died after several decades on 16/6/2007. That when the judgment of this case was delivered, on 11/5/2015 the Applicants' then Advocates M/S S. O. Oguk & Co. Advocates served Mr. F. Nyakundi the then Land Registrar Kilifi with the said Court decree/order, certified copies of judgment and proceedings. That on the same day when the Land Registrar Kilifi was served, he wrote a letter to Court to verify the said order/decre which was dully verified by the Court but he refused, rejected and failed to execute the Court decree and the Court decree and orders were thereafter misplaced and lost in the Land Registry. That on 28/6/2022 the Land Registrar 3rd Defendant herein was re-served with another set of Court order, decree, Judgment and proceedings herein for execution. That on 29/6/2022 the Land Registrar wrote a letter to Court requesting for verification and sent his two officers to Court to verify the Court decree/order. That when the Kilifi Land Registrar received from his officers the certified true copies of the Court order, decree, Judgment and proceedings he refused, rejected and failed to execute the Court decree issued herein.
 3. That the firm of MK Mwangi Advocates LLP for the Applicants/Plaintiffs wrote a letter to the Kilifi Land Registrar requesting him to execute the Court decree and issue the 2nd and 3rd Plaintiffs with a title deed for parcel Kilifi/Mtwapa/11 as decreed by the Court. That on 20/7/2022 the Kilifi Land wrote a letter to the firm of MK Mwangi Advocates LLP informing them he was unable to implement the execution of Court decree issued herein because there was a caution registered on 20/4/2018 in favour of Leonard D' Costa and he advised the caution be removed under section 80 of the [Land Registration Act 2016](#). That according to the supporting affidavit to the caution registered on 20/4/2018 Leonard D' Costa is a representative of the estate of Vincent Sabastian D' Costa deceased who participated in these proceedings. That Leonard D'Costa's beneficiary interest on parcel Kilifi/Mtwapa/II devolved extinguished and ceased on 13/2/2014 when the Court delivered judgment and declared the suit land Kilifi/Mtwapa/II in favour of the 2nd and 3rd Plaintiffs. That since the interest of the estate of Vincent



Sabastian D' Costa was taken care of in these proceedings, Leonard D' Costa the representative of his estate has no legal basis to register and retain a caution on the suit land parcel Kilifi/Mtwapa/11 after the end of litigation.

4. That by 20/4/2018 when the representative of the estate of Vincent Sabastian D' Costa registered the caution on suit land Kilifi/Mtwapa/11 Judgment had already been delivered and the suit land did not form part of the free estate of Vincent Sabastian D' Costa to be devolved to the representatives of his estate including the said Leonard D' Costa. That from 20/4/2018 to date the said representative has not moved this Court for any orders and or appealed against the judgment delivered by this Court and the said caution is an obstacle to the execution of the Court decree. That the 1st Plaintiff Nyale Mwango Disja who died on 28/9/2008 be substituted with the administrator of his estate Kiti Mwango Nyale a.k.a. Kiti Nyale Mwango while Vincent Sabastian D' Costa who died on 16/6/2007 be substituted with his representative (s)/administrator(s) Leonard D' Costa. That though the Kilifi Land Registrar was duly served with Court decree/ orders to show and satisfy that there was no case pending on parcel Kilifi/Mtwapa/11 but to delay execution of the Court order of this old matter he deliberately refused, rejected and failed to remove the oppressive caution and instead created an impendent by unnecessary requiring a Court order to remove it. That execution of Court decree/orders should not be taken in circles and this Court should raise up and clear the way for execution. That it is in the interest of justice that this Honourable Court be pleased to intervene and grant leave for the Applicants application to be heard during this Court vacation, substitute the deceased parties, cancel and expunge the caution registered on parcel Kilifi/Mtwapa/11 to enable execution of the Court decree/order without any further delay.
5. In the grounds of opposition counsel for Leonard Da Costa who is the administrator of the estate of Vincent Sebastian D' Costa, sued as the 1st Defendant opposed the Plaintiffs' notice of motion dated 2nd August 2022 on the following grounds that the 1st Plaintiff died on 28th September 2008. The 1st Defendant died on 16th June 2007. No application to substitute the 1st Plaintiff or the 1st Defendant was made within a year of their respective deaths. Judgment was entered in this matter on 13th February 2014. The 1st Plaintiffs suit abated by the time of delivery of judgment. The Plaintiffs' suit against the 1st Defendant had abated by the time of delivery of judgment. No Court of law has jurisdiction over a dead party. The Court could therefore not enter judgment in favour of the deceased Plaintiff against the deceased Defendant. The judgment delivered on 13th February 2014 and the consequential decree issued on 16th June 2014 are therefore irregular and are to be set aside. The 2nd and 3rd Plaintiffs have not made any application for extension of time to apply for joinder of the deceased Plaintiffs or deceased Defendant's legal representative. The application is therefore fatally defective and bad in law.
6. The second application is dated 7th November 2022 and is brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 24 rules 3 and 4 and Order 45 Rule 1 of the *Civil Procedure Rules*, 2010 seeking the following orders;
 1. That judgement delivered on 13th February 2014 and the consequential decree issued on 16th June 2014 be reviewed and be set aside.
 2. The 1st Plaintiff's suit against the 1st Defendant be marked as having abated.
 3. The Plaintiff's suit against the 1st Defendant be, marked as having abated.
 4. Costs of this application be provided for.
7. It is based on the grounds that the 1st Plaintiff died on 28th September 2008. The 1st Defendant died on 16th June 2007. No application to substitute the 1st Plaintiff or the 1st Defendant was made within



a year of their respective deaths. Judgement was entered in this matter on 13th February 2014. The suit had abated by the time of the delivery of the judgement. Leonard Da Costa was granted letters of administration for the estate of the deceased on 17th June 2021.

8. The Plaintiffs stated that the 1st Defendant's application and grounds of opposition are calculated only to delay the determination of this matter and cause hardship to the Plaintiffs because as at now most of the Plaintiffs' witnesses are deceased and litigation should come to an end to allow the Plaintiff enjoy the fruits of the Court judgment. That before the Court made its Judgment it read and considered all the pleadings, documents and further considered the nature of the case, evidence, circumvents and merit of the case thereto and was persuaded convinced to enter Judgment in favour of the Plaintiffs against the Defendants.
9. There are two applications before Court, the Plaintiffs' application dated 2nd August 2018 and the 1st Defendant's application dated 7th November 2022. The issues that emerge from the applications are;
 - a. Whether the suit against the 1st Defendant abated upon his death on 16th June 2007.
 - b. Whether the caution registered against Land Parcel Kilifi/Mtwapa/11 ought to be removed by Court.
10. The suit herein was instituted vide a plaint dated 4th January 1982. The evidence was heard J.O Nyarangi JA (as he then was); the 1st Plaintiff gave evidence as PW1 on 11th May 1983, the 2nd Plaintiff as PW2 on 12th May 1982 and two other witnesses Bakar Dzovu (PW3) and Leonard Chalalau (PW4), after which the Plaintiffs closed their case on 20th July 1983. The Defendants adduced evidence, Simion Nyachae as DW1, the Vincent Sabastian D'costa, the 1st Defendant as DW2 on 14th February 1984 and closed the 1st Defendant's case. All parties closed their respective cases on 12th May 1984 and Court directed they be supplied with certified copies of typed proceedings. The matter was inactive for a decade until the 19th December 1995, when the Court directed that the 1st Plaintiff be discharged from acting for the 3rd Plaintiff as his next friend; since the 3rd Plaintiff was of the age of majority.
11. The matter was then active for another decade until the 6th February 2007 when the 1st Defendant filed a change of advocates to Maranga Maosa & Associates Advocates. The 1st Defendant died on 16th June 2007, as evidenced from his certificate of death dated 4th January 2012 (LCD-1). The suit once was again inactive until 13th February 2013 when the interested parties made an application to be enjoined into the suit as they laid claim to Kilifi/Mtwapa/11 by way of adverse possession. The interested parties did not call any witness and closed their case on 23rd October 2013. On 13th February 2014, the Court delivered its judgement and a decree issued on 11th March 2014.
12. After the 1st Defendant died on 16th June 2007, Leonard Da Costa was appointed as the administrator of his estate on 17th June 2021 vide the letters of administration issued in Mombasa CM SUCCCase No. 71 of 2020. Leonard Da Costa's application dated 2nd August 2022 seeks to review the said judgement issued on 13th February 2014 and the decree issued on 16th March 2014. His case is premised on the ground that judgement was delivered after the 1st Plaintiff and 1st Defendant died and that there was no substitution made within a year of their respective deaths as required by Order 24 Rule 3 and 4 of the [Civil Procedure Rules](#).
13. This Court has power to review its own judgements, Order 45 Rule 1 of the [Civil Procedure Rules](#) lays down the jurisdiction and scope of review. It provides that:

Any person considering himself aggrieved—



- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

14. The 1st Defendant has not been specific in his application dated 2nd August 2022 which of the three grounds, stipulated above, he relies upon when seeking a review of the judgement. It is therefore upon the Court to consider all the three grounds and their relevance in his application. The first ground for review is the discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was made. The 1st Defendant died on 16th June 2007, after all parties had closed their respective cases and from the Court proceedings, the firm of Maranga Maosa Advocates came on record for the 1st Applicant on 6th February 2007 and were on record till judgement was delivered. The advocate who were on record had every opportunity from 2007 till 2014 before the judgement was delivered to informed Court of the death of the 1st Defendant. The applicant has not demonstrated to Court that, the counsel who was on record was not only unaware of the death of the 1st Defendant but was also unable to know of his death to inform Court of the same the first ground for review fails on this premise.

15. The second ground for review is on account of some mistake or error apparent on the face of the record. An application for review is not an avenue for a party to seek the intervention of Court to reevaluate the evidence that was presented or how the judge applied or interpreted the law, as it would amount to the Court sitting on its own appeal. The Applicant is seeking to set aside the judgement herein on the ground that there was no substitution made after the 1st Plaintiff and 1st Defendant died. Is the death of the 1st Defendant an error apparent on the face of the record? In the Court's view, the Applicant is inviting this Court to consider that the Court would have reached a different conclusion had it been aware that the 1st Defendant was deceased. In *Nyamogo & Nyamogo Advocates v Kogo* (2001) EA 170 the Court held that;

“There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may be conceivably be two opinions can hardly be said to be an error apparent on the face of the record.”

16. Therefore, the application for review must fail, if it has not raised any sufficient ground and it has it has not been brought within a reasonable time. The judgement its seeking to review was pronounced on 13th February 2014 and the application was filed in Court on 7th November 2022. It is clear to Court that an eight-year delay in bringing the application is inordinate and no amount of sufficient explanation has been given for the delay. It is evident that the estate of the 1st Defendant was well aware



of this suit as they registered the caution against the title of the suit property on 20th April 2018 and took no further action in the suit.

17. From the proceedings, on 19th December 1995, the Court directed the 1st Plaintiff to cease acting as next friend to the 3rd Plaintiff who had acquired the age of majority. Further to that parties herein reached a consent dated 27th June 2012 and adopted by the Deputy Registrar on 29th June 2012 as an order of Court. In the said consent it was agreed that the 1st Plaintiff be substituted with Kiti Mwangi Nyale as the administrator of his estate, while the 1st Defendant be substituted by the legal representative of his estate. The said consent order has never been set aside, reviewed or varied it is therefore binding on the parties.
18. The question that arises therefore is whether a suit can abate after it has been heard, evidence adduced and pending the pronouncement of judgement. The main issue to consider is whether the cause of action survive the 1st Plaintiff and 1st Defendant? Where the cause of action relates to property, the rights in the suit property are in rem, they outlive the death of either party. Where a cause of action is purely of personal character, then a suit abates on the death of a party in a suit. It is the 1st Defendant's case that though there was a consent dated 27th June 2012, the Court never gave directions on the substitution or amendments of the pleadings; in my view no further directions were needed from Court since evidence had been adduced and all that was remaining was delivery of judgement. It was further argued that the parties did not comply with the orders of their consent order since no substitution of the deceased parties with their respective legal representatives was done. The 1st Defendant therefore based their case on the fact that the Court wrote the judgement with the dead parties in mind and its trite law that no Court has jurisdiction over a dead party.
19. A suit pending pronouncement of judgement will not abate for reason a party has died, in a case where the suit has been heard and parties adduced evidence. Even where the time prescribed by the law no steps have been taken to implead his legal representative. The High Court of India in *Bajinath Ram & others v Tunkowati Kuer & others* Manu/BH/0076/1962 (AIR 1962 Pat 285), construed abatement of a suit to only apply when the death of a party takes place prior to the conclusion of hearing of the suit. The Court applied the *Indian Code of Civil Procedure* 1908, Order 22 Rule 6 which provides that;

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

The Court held that, "Where, therefore one or two or more Plaintiffs or Defendants dies after the conclusion of the hearing and before delivery of judgement in a suit, it is not at all necessary to substitute the heirs and legal representatives of the deceased Plaintiff or Defendant. If no appeal is preferred, the decree becomes final and the execution of the decree may be taken out by or against the legal representatives of the deceased party."
20. The suit therefore did not abate as against the 1st Defendant by reason of his death because hearing of the suit had been concluded, the 1st Defendant had already given his evidence and closed his case as well as the other Defendants. The judgement that was pronounced by Court on 13th February 2014 as against the 1st Defendant had the same force and effect as if it had been pronounced before his death took place and is enforceable against his estate. Where a Court enters judgement and issues a decree it essentially confers rights to one party and liability to another. Unless and until these rights and liabilities



are varied or set aside they are binding to all parties therein including, the legal representatives of the deceased parties.

21. The last issue for determination is whether the caution registered on 20th April 2018 against Land Parcel Kilifi/Mtwapa/11 by Leonard Da' Costa claiming beneficiary interest should be removed by Court. Section 71 of the [Land Registration Act](#) makes provisions on who should lodge a caution and states that it can be lodged by a person claiming the right to obtain an interest in land capable of creation by an instrument registrable under the statute. While Section 73 of the [Land Registration Act](#) provides for the ways in which a caution can be removed. The discretion of Court to remove any caution placed on the suit property is provided by Subsection 1 which provides that;

“A caution may be withdrawn by the cautioner or removed by order of the Court or, subject to subsection (2), by order of the Registrar”.

22. Having found that the judgement entered on 13th February 2014 and decree issued on 16th June 2014, the Court finds it merited to exercise its discretion and remove the caution registered on 20th April 2018. Section 3A and 63 (e) of the [Civil Procedure Act](#), empowers Court to exercise its inherent powers and make necessary orders for the ends of justice to be met. An order removing the caution registered on 20th April 2018 as against the title of the suit property, will enable the Plaintiffs execute the decree and implement the judgement pronounced on 13th February 2014.

23. Consequently, I find the Plaintiffs application dated 2nd August 2022 has merits and is allowed, while the 1st Defendant's application dated 7th November 2022 lacking merit and is dismissed. The Court makes the following orders:

1. The Land Registrar Kilifi is directed to remove the caution registered on 20th April 2018 against Land Parcel Kilifi/Mtwapa/11 by Leonard Da Costa claiming beneficiary interest.
2. The costs of the applications dated 7th November 2022 and 2nd August 2022 are awarded to the Plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

