



Republic v District & another; Africa Brotherhood Church & 3 others (Interested Parties); Waema (Suing as the Legal Representative of the Estate of Waema Masila Malingo - Deceased) (Exparte Applicant) (Environment and Land Judicial Review Case 2 of 2017) [2023] KEELC 16528 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16528 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE 2 OF 2017**

TW MURIGI, J

MARCH 22, 2023

BETWEEN

REPUBLIC APPLICANT

AND

THE DISTRICT COMMISSIONER KIBWEZI DISTRICT 1ST RESPONDENT

THE DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER KIBWEZI DISTRICT 2ND RESPONDENT

AND

AFRICA BROTHERHOOD CHURCH INTERESTED PARTY

TITUS KANYSA INTERESTED PARTY

AND

ALPHAXARD MUTHUSI WAEMA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF WAEMA MASILA MALINGO - DECEASED) EXPARTE APPLICANT

AND

RABECCA KATIVO KAMOLO INTERESTED PARTY

ONESMUS NDUNDA MUINDI INTERESTED PARTY



RULING

1. By a Notice of Motion dated May 11, 2022 brought pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 24 Rule 3(2), Order 40 Rule 1 and 2 of the Civil Procedure Rules and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent.
 2. Pending the hearing and determination of the application herein inter partes, the Honourable Court be pleased to grant an order of injunction restraining the Respondents and Interested Parties from in any way interfering with the boundaries of the suit properties.
 3. Pending the hearing and determination of the suit herein (the substantive judicial review), the Honourable court be pleased to grant an order of injunction restraining the Respondents and Interested Parties from in any way interfering with the boundaries of the suit properties.
 4. The Honourable court be pleased to extend the time limited in law for the substitution of the deceased *ex parte* Applicant herein.
 5. The Honourable Court be pleased to allow the substitution of the name of the deceased *ex parte* Applicant with that of Alphaxard Muthusi Waema a joint Administrator of the Estate of the deceased Ex-Parte Applicant.
 6. Consequently, the Honourable Court be pleased to order the revival of the suit herein for the purpose of hearing and disposal.
 7. Costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the Applicant sworn on even date.

The *ex parte* Applicant's Case

3. The Applicant averred that the deceased *ex parte* Applicant instituted this suit but passed away on June 22, 2017. That there being no substitution, the suit abated. He further averred that the failure to substitute the deceased Applicant was not wilful or negligent but due to inaction on the part of the deceased previous Advocate. He averred that he had filed a similar application which was withdrawn, as it was defective.
4. The Applicant further averred that he has letters of administration and thus, he is competent to bring the present application. He further averred that unless a temporary order of injunction is issued, the Respondents as well as the Interested Parties will implement the Minister's decision which will prejudice his interest over the suit properties. He contended that it is only fair to revive the suit so that the protracted land case can be resolved once and for all.

The 1st Interested Party's Case

5. Opposing the application, the 1st Interested Party vide the replying affidavit of Timothy Ndambuki averred that the application is incompetent, bad in law, *res judicata* and an abuse of the Court process.



6. He further averred that the Applicant has not provided any sufficient cause to warrant the grant of the orders sought. He argued that the Applicant has been indolent in prosecuting the present application which ought to be dismissed as it is a waste of the Court's time.
7. The Interested Party contended that the Applicant woke up from his slumber and filed the present application after the commencement of the execution of the court order. He argued that the Applicant has not given any good reason why the application for judicial review that abated 5 years ago should be revived.
8. The application was canvassed by way of written submissions.

The Applicant's Submissions

9. The Applicants submissions were filed in Court on June 20, 2022.
10. Counsel for the Applicant identified the following issues for the Court's determination:-
 - i. Whether the instant application is *res judicata* to the previous application dated December 9, 2019.
 - ii. Whether time for substitution of the deceased *ex parte* applicant ought to be extended.
 - iii. Whether an order for revival ought to be issued as prayed.
 - iv. Whether an order for temporary injunction ought to be issued as against the Respondents as prayed.
11. On the first issue, Counsel submitted that the instant application does not offend the doctrine of *res judicata* since the previous application was not heard and determined. Counsel argued that the application was withdrawn upon the Applicant realizing that it was made prematurely and without leave of the Court.
12. On whether time to substitute the deceased *ex parte* Applicant can be extended, Counsel submitted that the delay in substituting the deceased *ex parte* Applicant was occasioned by the inaction on the part of his previous Advocate and not by the wilful or negligent acts on the part of the Applicant. Counsel argued that the mistake of an Advocate should not be visited upon the innocent litigant.
13. Counsel further submitted that the Applicant's previous Advocate filed a defective application seeking for the revival of the suit which had abated. He argued that the Applicant made all the efforts to bring the application for substitution but the same was frustrated by his previous Advocate.
14. Counsel urged the Court to invoke the provisions of Section 3A of the *Civil Procedure Act* and Article 159 (2) (a), (b), (c) and (d) of the *Constitution* to extend time to substitute the deceased *ex parte* Applicant so as to meet the ends of justice.
15. Counsel further submitted that it will be in the interest of justice to grant the order for substitution of the deceased *ex parte* Applicant as well as to revive the suit herein.
16. On whether an order of injunction should issue, Counsel submitted the law that governs applications for injunctions is premised under Order 40 Rule 1 and 2 of the *Civil Procedure Rules* while the conditions to be satisfied were laid down in the celebrated case of *Giella Vs Cassman Brown & Co Ltd* (1973) EA 358.
17. On the first condition, Counsel submitted that the Applicant has demonstrated vide the letter dated April 27, 2021 that the Respondents as well as the Interested Parties intend to implement the



impugned decision by the District County Commissioner Kibwezi District which will interfere with the boundaries/ownership of the suit properties. That unless restrained by an order of injunction, the 1st Respondent will survey the suit property which will greatly prejudice the Applicant's proprietary rights over the suit property.

18. On the second condition, Counsel submitted that the Applicant will suffer irreparable loss that cannot be compensated by way of damages if the 1st Respondent is allowed to implement the Minister's decision.
19. On balance of convenience, Counsel submitted that it tilts in favour of granting the orders sought.
20. To buttress his submissions Counsel relied on the list and bundle of authorities dated June 20, 2022.

The 1st Interested Party's Submission

21. The 1st Interested Party's submissions were filed in Court on June 15, 2022. In his submissions, Counsel reiterated the contents of the replying affidavit sworn by the 1st Interested Party. In addition, Counsel submitted that the Applicant has not offered any good reason to warrant the Court to exercise its discretion in his favour. Counsel relied on the case of *Rebecca Mijide Mungole & Another Vs Kenya Power & Lighting Company Ltd & 2 Others* (2017) eKLR to buttress his submissions.

The 1st And 2nd Respondents' Submissions

22. The 1st and 2nd Respondents submissions were filed in Court on October 5, 2022.
23. The Attorney General submitted that the only issue for determination is whether the Applicant is entitled to an order for extension of time.
24. Counsel submitted that under the provisions of Order 24 Rule 1 of the *Civil Procedure Rules*, the Court has discretion to substitute the deceased Plaintiff and if no application is made the suit automatically abates. The Attorney General submitted that the Applicant was indolent and only took action after receiving the letter from the Ministry of Lands and Planning informing him of their intention to implement the decision by the District Commissioner Kibwezi. The Attorney General contended that the Applicant was trying to cover up his indolence by heaping blame on his previous Advocate.
25. The Attorney General relied on the following authorities in support of its submissions;
 1. *Titus Kirangu vs Jackson Mugo Mathai* (2015) eKLR.
 2. *Itute Ingu & Another Vs Isumael Mwakavi Mwendwa* (1994) eKLR.
 3. *Archipas Mwakidoi Vs Issac Chikunyo Mwamuye* (2021) eKLR.

Analysis And Determination

26. Having considered the application, the grounds of opposition and the rival submissions, I find that the only issue for determination is whether the Applicant is entitled to the orders sought.
27. Order 24 of the *Civil Procedure Rules* governs the law on death and bankruptcy of the parties. Order 24 Rule 3 (2) provides as follows: -
 - (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 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.

28. It is clear from the above provision that a suit abates by operation of the law if no application is made within one year to substitute the deceased Plaintiff. It is not in dispute that the *ex parte* Applicant died on June 22, 2017. More than one year lapsed without any application for substitution being made. The suit automatically abated on July 22, 2018.

29. It is also not in dispute that the Court has discretionary power to revive an abated suit and to extend time within which a deceased party to a suit is to be substituted. The applicant has applied to have the suit revived under Order 24 Rule 7 (2) which provides as follows;

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon terms as to costs or otherwise as it thinks fit.”

30. Having considered the materials placed before me, I find that issue for determination is whether the Applicant has shown sufficient cause to warrant the grant of the orders sought. For the Court to exercise its discretion, the Applicant must prove that he was prevented by any sufficient cause from continuing the suit.

31. Sufficient cause was defined in the case of *Attorney General Vs Law Society of Kenya & Another* as follows:

“Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Black’s Law Dictionary, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

32. The principles applicable while considering an application such as the present one were stated by the Court of Appeal in *Said Sweilem Gbeithan Saanum vs Commissioner Of Lands & 5 others* (2015)eKLR as follows;

“.....if no application for substitution is made within 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..... 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.”

33. The Applicant averred that the delay in substituting the deceased *ex parte* Applicant was occasioned by the inaction on the part of his previous Advocate and not due to his negligence. He further averred that despite following up on the matter on numerous occasions, his previous Advocate failed to effect the substitution until the time provided in law ran out. That after he obtained the grant of letters of administration, his previous Advocate filed a defective application dated December 9, 2019 where he sought to revive the suit yet the suit had abated by operation of law.



34. The Respondents on the other hand argued that the Applicant obtained the grant of letters of administration on June 6, 2019 which is a longer period than is expected. It was further argued that the Applicant took action after he received the letter dated 27/04/2021 from the Ministry of Lands and Planning notifying him of their intention to implement the decision by the District Commissioner Kibwezi District.
35. The Interested Party averred that the application has been made five years after abatement of the suit which delay is unreasonable.
36. This takes us back to the question whether the Applicant has demonstrated that he was prevented by any sufficient cause from continuing the suit. The Applicant obtained the Letters of Administration ad litem in respect to the estate of the *ex parte* Applicant on June 6, 2019. Prior to that date, he could not legally apply to substitute the deceased *ex parte* Applicant. By the time the suit abated on July 22, 2018 he was still legally incapacitated.
37. The record shows that the Applicant filed a Notice of Motion dated November 9, 2016 seeking for an order to revive the suit and that upon revival the Applicant be substituted. It is also clear from the record that the application was withdrawn on July 28, 2021 with costs to the Interested Party.
38. The delay from the date when the Applicant took the first steps to obtain substitution is in my view inordinate. However, the Applicant maintains that the delay was occasioned by the inaction on the part of his previous Advocate. The Applicant argued that he should not be punished for the mistakes of his Advocate.
39. The general principle is that an Applicant should not suffer due to a mistake of its counsel. This was the position in *Lee G Muthoga Vs Habib Zurich Finance (K) Ltd & Another* Civil Application No. 236 of 2009 where the court held that;
- “It is widely accepted principle of law that a litigant should not suffer because of his advocates oversight, is well settled that mistake of counsel should not be visited upon the litigant.”
40. Having considered the explanation offered by the Applicant, I am satisfied that he has demonstrated that he was prevented by sufficient cause from continuing with the suit herein.
41. The next issue for determination is whether the present application is *res judicata* on account of the application dated December 9, 2019. The doctrine of *res judicata* is set out in Section 7 of the *Civil Procedure Act* which provides as follows;
- “No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
42. The essence of the doctrine of *res judicata* is to bring an end to litigation and a party should not be vexed twice over the same cause.
43. From the record, it is evident that the application dated December 9, 2019 was withdrawn on July 28, 2021 with costs to the Interested Party.



44. The application was not heard and determined. I therefore find that the present application is not *res judicata* on account of the application dated December 9, 2019. As regards the prayers for an injunction, I am of the view that the orders ought to be made after the suit has been revived.
45. In the end, I am satisfied that the Applicant has established sufficient grounds to warrant the grant of the orders sought. In view of the nature of relief sought in the suit, this Court finds and holds that it is in the interest of justice that the suit herein be determined on the merits.
46. The upshot of the foregoing is that the application dated May 11, 2022 is merited and I proceed to allow the same in the following terms:-
- a. This suit is hereby revived.
 - b. The deceased *ex parte* Applicant is hereby substituted with Alphaxard Muthusi Waema.
 - c. Costs in the cause.
 - d. To avoid further delay in this matter I will proceed to issue directions on the judicial review application dated May 12, 2010

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MARCH, 2023.

.....

HON. T. MURIGI

JUDGE

IN THE PRESENCE OF: -

Court assistant - Mr. Kwemboi

Waiyaki holding brief for Muumbi for the Applicant.

Ms Karanja holding brief for Mwombonu for the Respondents.

