



**Kalama v Katana; Katana & another (Applicant) (Suing as Administrators of the Estate of Robert Katana) (Environment & Land Case 122 of 2018) [2023] KEELC 16276 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16276 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 122 OF 2018  
EK MAKORI, J  
MARCH 16, 2023**

**BETWEEN**

**ALI OMAR KALAMA ..... PLAINTIFF**

**AND**

**ROBERT KATANA ..... DEFENDANT**

**AND**

**SIDI ROBERT KATANA ..... APPLICANT**

**KADZO KATANA KITSAO ..... APPLICANT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF ROBERT KATANA**

**RULING**

1. Notice of Motion dated September 19, 2022 seeks the following reliefs:
  - a. Leave to change the Defendants advocates on record from the firm of Abdullatif Abdalla Aboud & Company Advocates to the firm of Ruttoh Erica & Associates Advocates,
  - b. Order of substitution of the Defendant with the applicants as legal representatives.
  - c. Stay of execution of decree.
  - d. Order to set aside the judgment and leave to file a defence to the plaintiff's claim.



2. The application is opposed. There is on record affidavit in support of the same and a reply in opposition thereto. The court directed parties to file their written submissions. They complied.
3. This matter initially proceeded ex parte. The defendant was served, entered appearance on June 29, 2018 but did not file defence nor participate in the hearing that proceeded with the plaintiff testifying before this court – Olola J. Judgment was delivered in favour of the plaintiff on November 22, 2019. Execution set in with the Decree dated December 18, 2019, emanating from the judgment fully executed by the Land Office Kilifi registering the subject matter – title No Kilifi/Ngerenyi/310 in favour of the plaintiff.
4. Meanwhile, the defendant is said to have died on May 6, 2020. No substitution was ever made. From the record, two motions were made similar to the current one seeking substitution and setting aside judgment. They were never prosecuted.
5. Significant, the applicant contends that it will be germane to allow the firm of advocates to come on record to ventilate the applicant’s grievances. It will also be desirable to have substitution done because it will be untenable to execute against a deceased’s estate without substitution. To do so will be intermeddling with the estate of a deceased person.
6. It will further offend the law to execute a judgment one year down the line without a notice to show cause. That it is trite law that execution cannot proceed one (1) year after judgment. It is evident that the respondent is attempting to execute against a judgment that was delivered one (1) year after judgment running afoul Order 22 rule 18(a), *Civil Procedure Rules*.
7. On setting aside judgment, counsel for the applicant blames former counsel for not advising the applicant as appropriate resulting to the ex parte judgment in place. That from the affidavit of the applicant Sidi Robert Katana, it has been brought out clearly that his late father Robert Katana was old, sick and illiterate. He was unable to prosecute and follow up the case and relied completely on his advocates. That various courts have held that a client has a duty to follow up on his case. It is submitted that the present case invites the court for an exception in view of the conditions under which the defendant (deceased) was in.
8. The respondent thinks that the current application is bad in law and ought to be dismissed. With respect to the prayer for orders for a stay of execution of the decree, the plaintiff submits that the application has been overtaken by events because the execution of the decree was completed long before the filing of this application. In the decree issued on December 18, 2019, the court ordered that the registration of the defendant as owner of the suit property be canceled and that the plaintiff be registered as the owner in his place. A copy of the decree is exhibited in the plaintiff’s replying affidavit as exhibit No 1.
9. As such, there are no pending execution proceedings with regard to the decree that the court can order to stay as prayed for in the application. It is trite that a court of law cannot stop an event that has already taken place and that court orders are not issued in vain. In view of the foregoing, the order for a stay of execution should not issue.
10. With respect to the prayer for an order for the substitution of the deceased defendant with the applicants as legal representatives the plaintiff submits that the application for substitution has not been brought within the time allowed by law and also that at present there is no suit in which the applicants can join as legal representatives for a deceased party for the following reasons - in their supporting affidavit, the applicants have exhibited a copy of a certificate of death as exhibit No SRK-I, in which it is indicated that the deceased died on May 20, 2020.



11. Under the provisions of Order 24 Rule 4 (3) of the Civil Procedure Rules, an application for substitution of a deceased defendant ought to be made within one year of the death of the deceased defendant in default of which the suit abates.
12. In the present case, the period of one year from the date of death of the defendant lapsed on May 20, 2021. The application ought therefore to have been brought before May 20, 2021.
13. The present application was filed on September 19, 2022 which is long after the lapse of the one-year period prescribed in Order 24 Rule 4 of the Civil Procedure Rules. If the applicants have not contemporaneously with their present application also applied for the revival of the suit then their application for substitution must fail for there is no suit in which they can be joined as legal representatives.
14. With respect to the prayer for setting aside the judgment, the plaintiff submits that the same is sub judice, a previous application by the defendant, that is, Notice of Motion dated March 5, 2020 and that dated November 4, 2020 seeking orders setting aside the judgment dated November 22, 2019 and all consequential orders - unconditional leave to the defendant to file his defence are still pending.
15. The defendant was duly served with the decree as admitted by him in paragraph 5 of his affidavit sworn on March 5, 2020 and filed in support of the Notice of Motion dated March 5, 2020. The Plaintiff has exhibited a copy of that affidavit in his replying affidavit as exhibit No.5.
16. Section 6 of the *Civil Procedure Act* bars this Court from proceeding with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
17. The Plaintiff submits that a reading of the two applications for order to set aside the judgment shows that the matters of law and fact raised in both applications are substantially the same. In respect of the parties, the previous application was brought by the defendant while the present application has been brought by the applicants in their capacity as administrators of the estate of the deceased defendant. No reasons have been advanced by the applicants for the failure to prosecute the two previous applications the plaintiff submits that in view of the pendency of the two applications, the present application has been brought in abuse of the court process and should be struck off with costs to the plaintiff.
18. As for the prayer to set aside the judgment the record shows that the defendant was duly served with summons to enter an appearance and he entered an appearance on June 29, 2018 as shown in a copy of the memorandum of appearance exhibited in the plaintiff's replying affidavit as exhibit No 4.
19. In view of the foregoing, the onus is on the applicants to show that they were prevented from filing a defence due to sufficient cause, such as an excusable mistake, error, accident or inadvertence.
20. The plaintiff submits that the explanation given by the applicants is not sufficient. Blaming erstwhile advocates on record is not a good reason for the failure to file a defence. Litigants are expected to be proactive in litigating their cases and this may involve visiting their advocate's offices to follow up on their matters to know the progress of their cases.



21. There appears to have been no follow-up by the applicants on the instructions that the defendant gave the previous advocates with a view to knowing the progress of the case. As was stated by the court in the case of *Habo Agencies Limited-V-Wilfred Odhiambo Musinga [2015] eKLR*:

' it is not enough for a party in litigation to simply blame the Advocates on record for all manner of transgressions in the conduct of the litigation. Courts have emphasized that parties have a responsibility to show interest in and to follow up their cases even when they are represented by counsel.'
22. Had the applicants desired to defend the suit, they would have made every effort to become aware of what was happening in this suit and they would have sought appropriate reliefs much earlier. The decree was issued on November 22, 2019 and served upon the defendant on February 24, 2020 as admitted by the defendant in paragraph 5 of the affidavit sworn on March 5, 2020 and exhibited in the plaintiff's replying affidavit as exhibit No 5.
23. Considering the long period that has passed ever since the service of the decree upon the defendant the Plaintiff submits that the application has been brought too late in the day and that the applicants are guilty of laches. The discretion of the court should not be exercised to aide complacent or indolent litigants like the applicants who deliberately choose to ignore court processes.
24. On the question of prejudice to be suffered by either of the parties and whether it is in the interest of justice to set aside the judgment, the plaintiff submits that he stands to suffer more prejudice should the judgment be set aside. The Plaintiff has already been registered as the owner of the suit property and a title deed was issued to him obviously after payment of the requisite fees at the Land Registry. Upon registration, the parcel of land and all rights and privileges appurtenant thereto vested in the plaintiff. For these reasons the plaintiff submits that the application lacks merit and prays that it be dismissed with costs.
25. The issues, which fall for determination, are whether the current counsel should be allowed to come on record for the applicant, whether substitution should be allowed, whether the ex parte judgment and consequential orders should be set aside, and whether the suit be heard on merit. Who is to bear the costs?
26. I have carefully considered the evidence, material, and submissions placed before me by the warring parties. It is not disputed that the defendant is deceased and needed to have been substituted. It is also not disputed that during his lifetime he was aware of this suit. He was served with summonses and suit papers. He entered appearance but did not file a defence. The matter proceeded ex parte before this court (Olola J). After considering the materials placed before him, the learned judge decided for the plaintiff. A raft of orders were issued resulting in the decree from this court ordering for the cancellation of title in the name of the defendant to be replaced by the name of the plaintiff. The orders were duly executed and the matter ended there.
27. In his lifetime, the deceased attempted to set aside the orders of this court. It will seem from the record that the application was never prosecuted and remains pending. The successors of his estate attempted to reverse the orders of the court too. An application is pending similar to this one.
28. Advocate for the applicant has aptly and ably submitted for the need to have substitution done and the judgment herein set aside. Blame is placed squarely on the former counsel for the defendant – deceased. That he was not bringing up to speed the defendant on the progression of the suit to the detriment of the defendant – deceased and now his estate.



29. On the other hand, the plaintiff accuses the defence of laches, delays, and indolence on their part – failure to defend, and failure to have the deceased substituted a year after his demise leading to the abatement of the suit. No application for resuscitation has been made nor have sufficient grounds been proposed to overturn an otherwise regular judgment in place.

30. Order 24 Rule 4 of the Civil Procedure Rules provides that:

' Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4]

- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.'

31. In the case of *Aggrey Swaka Waswa v Patrick Omonge Khaemba; Thomas Mesback Omonge & 3 others (Proposed Respondents) [2020] eKLR* the court held as follows on the procedure to follow when a suit has abated against a defendant:

' This means that upon death of a defendant and on application the court has the discretion to substitute the deceased defendant and that after one year with no application the suit abates. In this matter it cannot be denied that the suit has abated. The deceased defendant died in 2018 and this application has been filed in 2020. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. 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. '

In the case of Titus Kiragu – v- Jackson Mugo Mathai (2015)eKLR it was held that:

'It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.'

Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of Rukwaro Waweru vs Kinyutho Ritho & 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.'

32. This matter was concluded by this court. Title documents changed hands from the deceased - defendant to the plaintiff. No effort was made to have the deceased substituted within a year after his demise nor do I have an application to have the suit revived or resuscitated and reasons for the delay in bringing the necessary application thereto provided for the court to consider as required by law. This ground alone disposes of the application without discussing the other issues whether to admit the current advocate or set aside the ex parte judgment. The orders then sought in the current application cannot stand. I have no pending suit. I down my tools.
33. The instant application – dated September 19, 2022 fails in limine and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 16<sup>TH</sup> DAY OF MARCH 2023.**

**E. K. MAKORI**  
**JUDGE**

