



Gachu & another v Ndocha & another (Environment & Land Case 41 of 2008) [2023] KEELC 17229 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 41 OF 2008**

OA ANGOTE, J

APRIL 27, 2023

BETWEEN

ALEX NJOROGE GACHU 1ST PLAINTIFF

MARGARET WANJIKU 2ND PLAINTIFF

AND

GEOFFREY NYAKUNDI NDOCHA 1ST DEFENDANT

SAVANNAH DEVELOPMENT COMPANY LIMITED 2ND DEFENDANT

RULING

1. In the application dated October 22, 2021, the 1st Defendant/ Applicant sought for the following orders:
 - a. That the Honourable Court be pleased to set aside the proceedings that took place on October 4, 2021.
 - b. That this Honourable Court be pleased to mark the suit by one Stephen Mungai Gachu (deceased) as having abated on August 9, 2018 following his death and/or demise on August 10, 2017.
 - c. That there be an order awarding the costs so far incurred by the 1st Defendant in defending the abated suit instituted against him by one Stephen Mungai Gachu (deceased).
 - d. That the Honourable court does expunge all and/or any reference to one Alex Njoroge Gachu from all and/or any pleadings filed in this matter after August 9, 2018 and especially the amended plaint jointly filed by one Alex Njoroge Gachu and one Margaret Wanjiku as well as the amended defence and counter-



claim by the 1st Defendant together with the reply thereto by the two named Alex Njoroge Gachu and Margaret Wanjiku.

- e. That there be an order striking out the suit by one Margaret Wanjiku against the 1st Defendant.
 - f. That the costs of and incidental to this application be provided for.
2. This application is supported by the grounds on the face of it and the Affidavit sworn by the 1st Defendant, who deposed that this suit was instituted against the Defendants by the Plaintiffs, Stephen Mungai Gachu and Margaret Wairimu in a Plaint dated February 12, 2008; that the 1st Plaintiff died on August 10, 2017 and that between August 10, 2017 and August 9, 2018, no application to substitute the 1st Plaintiff with his legal representatives was made.
 3. It was deposed by the 1st Defendant that the 1st Plaintiff's suit automatically abated on August 9, 2018; that there has never been made an application to revive the abated suit and that on November 28, 2018, the Plaintiffs orally stated that they intended to amend the Plaint to substitute the 1st Plaintiff after obtaining a limited grant of representation, by which time the suit had abated.
 4. The 1st Defendant/Applicant averred that the amended Plaint, which introduced Alex Njoroge Gachu and purported to substitute the 1st Plaintiff into the proceedings, is a nullity as there was no suit against the 1st Plaintiff to which Alex Njoroge Gachu could be substituted into.
 5. It was the Applicant's averment that the honorable court on October 4, 2021 took the evidence of Alex Njoroge Gachu and Margaret Wanjiku; that these proceedings were a nullity as the abated suit of the 1st Plaintiff was prosecuted by a stranger and that the suit was founded on two sale agreements between the 1st Plaintiff and the 1st Defendant, to which neither Margaret Wanjiku nor Alex Njoroge Gachu were a party.
 6. It is the 1st Defendant's case that Margaret Wanjiku and Alex Njoroge Gachu are not clothed with the necessary locus to enforce the two sale agreements and that Margaret Wanjiku cannot maintain her remaining suit against the 1st Defendant given the doctrine of privity of contract.
 7. The 2nd Plaintiff/Respondent opposed the application vide a Replying Affidavit dated February 7, 2022. She averred that the suit could not abate as she was a party to the suit and when the 1st Plaintiff, her husband, passed on, the suit survived; that when their advocates made the oral application on November 28, 2018 seeking to amend the Plaint and substitute the 1st Plaintiff, the Applicant did not oppose the same and that the application was granted by the Court.
 8. According to the 2nd Plaintiff/Respondent, regularizing of pleadings could not be done in time and that on March 13, 2019, they filed an application seeking enlargement of time to regularize and file the amended Plaint; that this application was served upon the Applicant, who did not oppose it and that the court allowed the application.
 9. It was deposed that the Amended Plaint was filed on February 22, 2019 and served on the 1st Defendant on May 21, 2019; that the Applicant filed an Amended Statement of Defence and Counterclaim on June 6, 2019 and that Alex Njoroge Gachu and the Respondent obtained letters of administration to enable them to proceed with the substitution of the 1st Plaintiff, which were served upon the Applicant.
 10. It was the 2nd Plaintiff's/Respondent's deposition that the term 'purchaser' in the sale agreement states that it shall include his successors and assigns where the context permits; that Alex Njoroge Gachu and herself qualify as the deceased's successors and assigns; that the letters of administration issued on



September 26, 2018 have granted the Plaintiffs locus standi to be rightful parties in these proceedings and that there was inordinate delay in filing this application.

Submissions

11. This suit was canvassed by way of written submissions. The 1st Defendant's/Applicant' Counsel submitted that the application was not opposed by Alex Njoroge Gachu and thereby should be allowed as it relates to him.
12. Counsel submitted that the suit instituted by the 1st Plaintiff abated on August 9, 2018 and that this suit has never been revived as outlined under Order 24 of the *Civil Procedure Rules*. The 1st Defendant relied on the cases of *Mukulu Kaula & Another v Agnes Milele & 3 Others* [2019] eKLR, *Kenya Farmers Co-operative Union Limited v Charles Murgor (Deceased) /a Kaptabei Coffee Estate* [2005] eKLR and the Court of Appeal's decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Co Ltd & 2 Others* [2017] eKLR.
13. It was Counsel's submission that the 2nd Plaintiff does not have locus standi to file a case against the 1st Defendant as she is not a party to the sale agreement and as such, she is bereft of any cause of action and that the suit is thus an abuse of the court process.
14. The Applicant's counsel submitted that the doctrine of estoppel does not apply to matters stemming from express provisions of the law. Counsel relied on the case of *Henry Muthee Kathurima vs Commissioner of Lands & another* [2015] eKLR.
15. Counsel for the 2nd Plaintiff/Respondent submitted that the Applicant is estopped from going back against that which he endorsed; that the Applicant and/or his advocates failed to raise any concerns with respect to the application dated March 12, 2019 to enlarge time to file the amended Plaintiff and that the Applicant, upon being served with the amended Plaintiff, filed his Amended Defence and Counter-claim and complied with pre-trial directions.
16. The Respondent's counsel relied on the case of *Mcllkenny v Chief Constable of West Midlands* [1980] All ER 2027, which is quoted in *748 Air Services Limited v Theuri Munyi* [2017] eKLR. They also relied on the definition of the term 'waiver' in the case of *Banning v Wright* (1972) 2 All ER 987, quoted in *748 Air Services Limited v Theuri Munyi* [2017] eKLR.
17. Counsel further submitted that the Applicant had waived his right and was undeserving of the orders sought and that as was held in the case of *Rajnikantbhetsi Shah v Habib Bank AG Zurich* [2016] eKLR, where waiver is implied from conduct, the court has to consider the circumstances of the case to establish conduct inconsistent with the continuance of the right.
18. It was also Counsel's submission that the Respondents qualify to be the successors, assigns and beneficiaries of the deceased, defined in the contract and included in the term 'purchaser'; that vide the grant of Letters of Administration intestate dated September 26, 2018, the Plaintiffs were appointed as co-administrators of the estate of the deceased; and that the said Letters of Administration granted the Respondents the locus standi to be rightful parties in these proceedings.

Analysis and Determination

19. Upon consideration of the application, affidavits evidence and submissions filed by the parties, the following are issues that arise for consideration:
 - a. Whether the 2nd Plaintiff's suit survived the 1st Plaintiff's demise



b. Whether Alex Gachu was rightfully enjoined in this suit

20. The facts of this case are that the late Stephen Mungai Gachu together with his wife, Margaret Wanjiku, jointly sued the Defendants seeking specific performance of a sale agreement between the parties with respect to parcel of land known as Nairobi Block 82/782 Savannah Estate Phase 1 (the suit land).
21. Stephen Mungai Gachu, the 1st Plaintiff, thereafter died on August 10, 2017. The 1st Defendant/Applicant has averred that no application to substitute the deceased was sought within a year, as prescribed under Order 24 Rule 3(2) of the Civil Procedure Act, an assertion the Respondents have not denied.
22. Order 24 Rule 2 of the Civil Procedure Rules provides that where one of multiple Plaintiffs dies and the suit survives, the court shall note the same and the matter shall proceed at the instance of the surviving Plaintiffs or against the surviving Defendants.
23. In this matter, the suit was filed jointly by the late Stephen Mungai Gachu and his wife, Margaret Wanjiku. The 1st Defendant/Applicant has prayed that the suit against the 2nd Plaintiff be dismissed on the ground that she lacks locus standi as she was not a party to the sale agreements in issue in this suit.
24. In the case of Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, the court held as follows as relates to locus standi:

“Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”

25. This suit is seeking to enforce two sale agreements to which the late Stephen Mungai Gachu and the 1st Defendant were parties. The 1st Defendant/Applicant argues that the 2nd Plaintiff is precluded from pursuing this suit in her personal capacity as she is barred by the doctrine of privity of contract, which dictates that a contract cannot be enforced by a third party. This position was held by the Court of Appeal in Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & Another [2015] eKLR as follows:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

26. A similar finding was made by the Court of Appeal in Aineah Likuyani Njirah vs Aga Khan Health Services [2013] eKLR:

“4. Privity of contract is a long-established part of the law of contract. In the earlier part of the last century, it was identified by Viscount Haldane LC as one of the fundamental principles of the English Contract Law. See Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd. The essence of the privity rule is that only the people who actually negotiated a contract (who are privity to it) are



entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any of its terms nor have any burdens from that contract enforced against him.”

27. In *William Muthoo Muthoni vs Bank of Baroda* [2014] eKLR, the Court of Appeal considered the exceptions to the doctrine of privity of contract as follows :

“The appellant’s father did not bring himself within the well-known exceptions to the doctrine of privity of contract. For example, he did not demonstrate the existence of:

- i. a collateral contract to the one in question in which he was a party,
- ii. an agency relationship in which the appellant transacted on his behalf,
- iii. a trust by which the appellant contracted and held the property in trust for him (the witness),
- iv. an express provision or implied term in the agreement made for the benefit of the appellant’s father.”

28. In this suit, it is not disputed that the 2nd Plaintiff was not party to the sale agreements. However, considering that she was the wife of the 1st Plaintiff, the issue of whether an agency relationship arose in the entire transaction between the 1st Plaintiff and the 1st Defendant in which the 1st Plaintiff transacted on her behalf, or a trust relationship existed is debatable.

29. That being so, and without interrogating the documents on record and the two exceptions to the doctrine of privity of contract which the 2nd Plaintiff may fall into, I decline to hold at this stage that the suit did not survive the and Plaintiff upon the demise of the 1st Plaintiff.

30. The next issue for consideration is whether Alex Gachu was rightfully enjoined in this suit in the place of the deceased 1st Plaintiff. Order 24 Rule 3 (1) and (2) of the *Civil Procedure Rules* provide as follows:

“

“(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 subrule (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.”

31. The Applicant has also relied on the binding decision by the Court of Appeal in *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others* [2017] eKLR, where the court held that where a suit has abated, it is imperative that an application be made for extension for joinder of the deceased Plaintiff’s legal representative.



32. In this matter, it is not disputed that this suit abated on August 9, 2018 upon the failure to apply for substitution of the deceased 1st Plaintiff with his legal representative within one year of his death. The suit by the 1st Plaintiff therefore abated by operation of the law.
33. When this matter was mentioned before this court on November 28, 2018, counsel for the Plaintiffs made an oral application to file an amended Plaintiff and indicated that they had been issued with a grant ad litem. The Applicant thereafter sought leave to file a Defence and counterclaim. The court granted the parties leave to amend their pleadings and thereby allowed the substitution of the 1st Plaintiff.
34. The Plaintiffs filed their amended Plaintiff on February 12, 2019 and the 1st Defendant/Applicant filed an Amended Defence and Counterclaim dated June 6, 2019. The parties thereafter set down the matter for hearing.
35. The Applicant has sought that the proceedings and the pleadings filed by the Plaintiffs be expunged from the record of the court because the 1st Plaintiff should not have been substituted in the first place before reviving the suit.
36. This court has already held that the 1st Plaintiff's suit might have survived the death of the 1st Plaintiff. Secondly, the Applicants are estopped from claiming that this suit had abated and the substitution of the 1st Plaintiff is unlawful as they acquiesced to its revival.
37. The term 'acquiescence' is defined in *Halsbury's Laws of England*, 4th Edition, Volume 16 at page 994 as follows:
- “The term is, however, properly used where a person having a right, and seeing another person about to commit or in the course of committing an act infringing upon that right, stands by in such a manner as really to induce the person committing the act, and who might otherwise have abstained from it, to believe that he assents to its being committed; a person so standing by cannot afterwards be heard to complain of the act.”
38. The Court of Appeal in *Serah Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, also held that silence and participation in legal proceedings constitutes waiver. They quoted with approval the English case of *Leonidas D* [1985] 1 WLR 925, in which Robert Goff LJ stated that: -
- “We should add that we see the same difficulty in invoking the principle of equitable estoppel in such circumstances. It is well settled that, that principle requires that one party should have made an unequivocal representation that he does not intend to enforce his strict legal rights against the other, yet it is difficult to imagine how silence and inaction can be anything but equivocal.”
39. Closer home and in similar circumstances, this court in *Boniface Mutwiri Kungania v Japhet Kirimi M'rinkanya* [2022] eKLR held as follows:
- “Given the actions and the participation of the defendant and his lawyers on record from December 11, 2019, up to the filing of the notice of motion dated October 28, 2021, they are estopped by silence and acquiescence from raising the issues of abatement.”
40. In the circumstances, this court enters a finding that the Applicant acquiesced to the joinder of Alex Njoroge Gachu and revival of this suit vide the Amended Plaintiff dated February 12, 2019. Such acquiescence can be further inferred by the conduct of the 1st Defendant/Applicant in filing



an Amended Defence and Counterclaim and its participation in this suit. The delay in filing the application was unreasonable and constitutes laches.

41. Lastly, considering that the hearing of this suit has already concluded, with the Plaintiffs having adduced evidence and the Defendants having chosen not to do so, it is only just that this suit be disposed of on its merits.
42. For those reasons, the application dated October 22, 2021 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF APRIL, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Macharia holding brief for Kabathi for Plaintiff/Respondent

Mr. Malanga for 1st Defendant

Court Assistant - June

