



Wanjohi v Mageria; Kamau (Intended Respondent) (Environment and Land Miscellaneous Application 6 of 2019) [2023] KEELC 16970 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 6 OF 2019
JO OLOLA, J
APRIL 27, 2023**

BETWEEN

MARY MUTHONI WANJOHI APPLICANT

AND

SAMUEL KAMAU MAGERIA RESPONDENT

AND

PETER THUKU KAMAU INTENDED RESPONDENT

RULING

1. By the Notice of Motion herein dated February 2, 2020, Mary Muthoni Wanjohi (the Applicant) prays for orders:
 1. That the Respondent Samuel Kamau Mageria be substituted with the intended Respondent Peter Thuku Kamau;
 2. That the suit be revived since it has abated; and
 3. That the costs of this application be provided for.
2. The application is supported by a brief Affidavit sworn by the Applicant wherein she deposes in the main as follows:
 - “2. That the Respondent passed away on a date I do not know;
 3. That the intended Respondent is the son of the deceased;
 4. That the intended Respondent may not be willing to file application for substitution to the advantage to await this suit to abate;



5. That due to my old age my desire is for this land dispute to be settled soon;
 6. That due to Covid-19 pandemic this matter has never been started never (sic) or mention for direction despite my advocate on record sending letters via email which have not borne any fruit;
 7. That the Court advised and/or ordered (the) Advocate for the Respondent to substitute the Defendant after he disclosed to Court that the original Defendant had died;
 8. That since the same has abated I pray (that) the same be revived; and
 9. That unless the prayers applied for in this suit are given, I will suffer irreparable damage and loss.”
3. In his Replying Affidavit sworn on April 26, 2022, Peter Thuku Kamau (the Intended Respondent) avers that his father Samuel Kamau Mageria died on June 3, 2017 and that by the time this Miscellaneous Application was filed, his father had already passed on.
 4. The Intended Respondent further avers that Karatina Resident Magistrate’s Land Case No 14 of 2001 that this suit relates to has been fully determined in favour of his late father.
 5. The Intended Respondent further avers that the suit herein is a nullity because it was filed long after his father passed on. He further avers that this present application is incompetent and fatally defective for the reason that he is not the Administrator of his father’s estate.
 6. I have carefully perused and considered the Applicant’s application and the Intended Respondent’s response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
 7. The circumstances leading to the application before me are rather interesting. This Miscellaneous Application was instituted on March 13, 2019. By a Notice of Motion application dated the same day, Mary Muthoni Wanjohi (the Applicant) sought the following orders against the Respondent named herein as Samuel Kamau Mageria:
 1. That the Resident Magistrate’s Land Case No 14 of 2001 filed at Karatina be transferred to (the) Environment and land Court (ELC Court) at Nyeri for hearing and determination.
 2. That the Applicant herein be granted leave to institute a substantive suit against the Respondent herein to enable her obtain her grandfather’s (Mohammed Kirienye’s) land parcel number Konyu/Gakuyu/549;
 3. That the suit be filed in the ELC Court (sic) for proper ends of justice;
 4. That any other or better relief be granted; and
 5. That the costs of this application be provided for.
 8. The Miscellaneous Application was thereafter fixed for hearing on July 17, 2019. On the said date, in proof of service of the application upon the said Respondent, the Applicant filed an Affidavit of Service sworn by her Advocate on record – Alexander Peter Kariithi wherein Counsel deposes as follows;



1. That on July 11, 2019, I proceeded to Gakuyu Sub-Location Konyu Location in Mathira Sub-County Nyeri County where I went at the home of one Samuel Kamau Mageria and I served him with a copy of Mention Notice dated July 12, 2019;
 2. That he accepted my service but declined to sign my copy;
 3. That he was known to me at the time of service;
 4. That I return herewith my copy duly served; and
 5. That the facts deposed to herein above are, true to the best of my knowledge information and belief.
9. How the Applicant’s Counsel purported to serve the Respondent and was able to swear an Affidavit to that effect will perhaps remain one of those mysteries of legal practice in this part of the world. As it turned out, on the date fixed for hearing, Messrs Nelko Masati & Company Advocates entered appearance for the said “Respondent”. On the same day, the said Law Firm filed a Notice of Preliminary Objection wherein they objected to the suit inter alia on the following grounds:
- “ 3. That the application as drawn and filed is incompetent as against the purported Samuel Kamau Mageria (deceased);
 4. That the suit is not properly before the Court and the omission is fatal to its validity;
 5. That this Court has no jurisdiction to hear, entertain or determine the suit;
 6. That the entire application is incompetent and it offends the provisions of Section 8 of the *Civil Procedure Act*, Cap 21 ...”
10. Upon being served with the Notice of Preliminary Objection, the Applicant through the same Advocate who purports to have served the Respondent now brings this application urging the Court to substitute the Respondent with Peter Thuku Kamau who is said to be his son and to revive the suit which is said to have abated.
11. The reason for the application for substitution is the fact that the Respondent had died on a date which the Applicant states she does not know. From a perusal of the Certificate of Death of Samuel Kamau Mageria annexed to the Intended Respondent’s Replying Affidavit, the said Samuel Kamau Mageria died on June 3, 2017, some two years before this Miscellaneous Application was filed and he was certainly therefore not the person the Applicant’s Advocate purported to have served on July 11, 2019.
12. As it were, it is trite law that a suit instituted against a person who at the time of filing the suit is already dead is a nullity. This Miscellaneous Application having been instituted two (2) years after the death of the Respondent was, as they say, dead on arrival. It being a nullity, the service of Summons and/or process issued in the suit and by whomsoever accepted the same was equally a nullity.
13. As was stated in the Indian Case of *Pratap Chand Mehta -vs- Chrisna Devi Mehta* AIR 1988 Delhi 287 cited in *Japhet Nzila Muangi vs Hamisi Juma Malee* [2022] eKLR:
- “... if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative;



you cannot even join any other party, because it is just as if no suit had been filed.”

14. Arising from the foregoing, it was clear to me that there was no suit herein capable of being revived in the manner sought by the Applicant. There being no suit, the Intended Respondent could not be substituted for a person who had no capacity to be sued as at the time the suit was filed.
15. It follows that the Motion dated February 2, 2022 and the Miscellaneous Application dated March 13, 2019 were both completely misconceived and without any basis in law. Both are hereby struck out with costs to the Intended Respondent.

Ruling dated, signed and delivered in open Court and virtually at Nyeri this 27th day of April, 2023.

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Court assistant - Kendi

J. O. Olola

JUDGE

