



**Kasyoki (Suing as the Administrator and Legal Representative of the Estate of Kasyoki Maliti Deceased) v Kimuli; Tuli (Suing as the Legal Representative of the Estate of Mary Kimuli - Deceased) (Applicant) (Environment & Land Case 20 of 2018) [2023] KEELC 17245 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17245 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 20 OF 2018**

**TW MURIGI, J**

**APRIL 26, 2023**

**BETWEEN**

**AGNES KALUKI KASYOKI (SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE ESTATE OF KASYOKI MALITI DECEASED) ..... PLAINTIFF**

**AND**

**MARY KIMULI ..... DEFENDANT**

**AND**

**NDAMBUKI TULI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY KIMULI - DECEASED) ..... APPLICANT**

**RULING**

1. By a Notice of Motion dated 24<sup>th</sup> of August, 2022 brought pursuant to the provisions of Articles 40 & 159 of the *Constitution* of Kenya, Order 24 Rule 4 & 7, Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicant seeks the following orders: -
  1. Spent.
  2. That pending the hearing and determination of this application, this Court be pleased to issue an order staying the execution of the judgment issued on December 15, 2021 by this Court and all other consequential and or subsequent orders or decree.
  3. That the Court be pleased to set aside the proceedings and judgment dated December 15, 2021 and all other consequential and or subsequent orders and/or Decree.



4. That a declaration do issue that the suit herein abated on February 3, 2020 thus the proceedings herein, the resultant judgment and Decree are null and void and the file herein be closed forthwith.
5. That the cost of the application be awarded to the Applicant.
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 Applicant's Case**

3. The Applicant averred that he is the personal representative of the Estate of the deceased Defendant who died intestate on February 3, 2019. He further averred that the Plaintiff's suit against the Defendant abated one year after her demise as no substitution was done. It was averred that this case proceeded undefended on the grounds that the Defendant had filed a Defence on June 19, 2019 which is a clear indication of fraud on the part of the Plaintiff as the Defendant was deceased by then.
4. He contended that by the time the Court issued directions on April 19, 2021, the Plaintiff's suit against the Defendant had already abated by operation of law. He argued that failure by the Defendant's beneficiaries to respond to the citation in Makueni P&A No 182 of 2020 does not revive the suit nor confer jurisdiction upon the Court to proceed without the Legal Representative of the deceased Defendant.
5. He further averred that no Legal Representative was appointed to act for the deceased Defendant as the citation in Makueni P&A No 182 of 2020 was not completed.

### **The Respondent's Case**

6. In opposing the application, the Respondent *vide* her replying affidavit sworn on November 16, 2022, averred that the firm of Stanley Nthiwa & Co Advocates is improperly on record as they had not sought leave to come on record for the Applicant.
7. She further averred that the Defendant through her Counsel wrote to her Advocate indicating that she wanted to proceed with matter by way of administering a Kamba traditional oath (Kithitu) and not before the Court. She further averred that after the Defendant's beneficiaries were cited in Makueni CMCC No 182 of 2020 to take up the matter but failed to do so, the Court directed that the matter proceeds as an undefended suit.
8. She argued that the suit had not abated as the Court had issued directions on the same. She contended that the application is an appeal through the back door as the Applicant did not appeal against the judgment. She contended that the Court does not aid the indolent and urged the Court to dismiss the application with costs.

### **The Response**

9. In his supplementary affidavit sworn on December 1, 2022, the Applicant averred that the firm of Stanley Nthiwa & Co Advocates is on record for the Applicant and not for the deceased Defendant who is yet to be substituted.
10. He further averred that the Court has no jurisdiction to order for substitution of parties where the suit has already abated unless the parties first apply to revive the suit which in this case has not been done. He maintains that the directions issued on April 19, 2021 were irregular as the suit had abated by operation of law.



11. He further averred that as the legal Representative of the Estate of the Defendant, he did not instruct the Defendant's Advocate to write to the Plaintiff's Advocate informing him of the deceased Defendant's intention of not pursuing the matter in Court. He maintains that he has satisfied the legal conditions for the grant of stay of execution of the judgment and urged the Court to allow the application
12. The application was canvassed by way of written submissions.

### **The Applicant's Submissions**

13. The Applicant's submissions were filed on December 18, 2022.
14. Counsel for the Applicant identified the following issues for the Court's determination:-
  - i. Whether the suit abated and if so what are the legal consequences.
  - ii. Whether the firm of Stanley Nthiwa & Co Advocates is properly on record for the Applicant.
15. On the issue of whether the suit has abated, Counsel submitted that upon the demise of the Defendant on February 3, 2020, this suit automatically abated by operation of the law as no application was made within one year to substitute the deceased Defendant with her legal representative.
16. Counsel further submitted that the citation was filed out of time and therefore it has no legal effect on the suit. Counsel contended that after the suit abated, the proceedings conducted thereafter were null and void as the suit was non-existent. Counsel further submitted that a deceased party cannot be substituted with a legal representative unless the suit is first revived.
17. On whether the firm of Stanley Nthiwa & Co Advocates is properly on record for the Applicant, Counsel submitted that his firm is on record for the Applicant and not for the deceased Defendant.
18. He argued that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* are not applicable in the present application as the Applicant has not been substituted in place of the deceased Defendant by an order of the Court. Counsel contended that the firm of Stanley Nthiwa & Co Advocates is properly on record for the Applicant and not for the deceased Defendant.

### **The Plaintiff's/respondent's Submissions**

19. The Respondent's submissions were filed in court on January 19, 2023.
20. Counsel for the Plaintiff raised the following issues for the Court's determination:-
  - i. Whether the application is an abuse of the Court's process as it is brought before this Honourable Court by a firm which is improperly on record for failing to file a Notice of Change of Advocates.
  - ii. Whether or not this suit abated.
  - iii. Whether the Applicant has met the prerequisites conditions for stay of execution of judgment issued on December 15, 2021.
  - iv. Whether the Court should exercise its discretion to set aside all the proceedings, judgment dated December 15, 2021 and all other consequential and/or subsequent orders or decree.
  - v. Whether the Court can issue a declaration based on an application by the Applicant.



21. On the issue of whether the firm of Stanley Nthiwa & Co Advocates is properly on record for the Applicant, Counsel contended that the Applicant has not filed a consent or a formal application to appoint the firm of Stanley Nthiwa to take over the matter from the firm of Munyasya and Co Advocates.
22. Counsel argued that the application should be struck out as it offends the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) as neither the Applicant nor his Advocate have sought leave of Court to come on record.
23. Counsel argued that the Applicant is a stranger to the suit since no application has been made to substitute him in place of the deceased Defendant. To support his argument Counsel relied on the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#).
24. On the issue of whether or not the suit has abated, Counsel submitted that despite being cited in Makueni CMCC No 182 of 2020, the Legal Representative of the Estate of the Defendant failed take up the matter on behalf of the Estate of the late Mary Kimuli. Counsel went on to submit that the Defendant *vide* a letter dated February 27, 2019 abandoned this matter and opted to proceed by way of administering a Kamba oath.
25. Counsel submitted that the judgment delivered on December 15, 2021 is competent as the suit proceeded undefended way before the demise of the Defendant.
26. On the issue of whether the Applicant has met the threshold for the grant of stay of execution, Counsel submitted that the Applicant has not satisfied the conditions laid down in Order 42 Rule 6 of the [Civil Procedure Rules](#).
27. Counsel went on to submit that the Applicant has not demonstrated that he will suffer substantial loss if the orders sought are not granted. In addition, Counsel submitted that there has been inordinate delay in making the application. Lastly, Counsel submitted that the Applicant has not provided security for costs.
28. On the issue of whether the Court should exercise its discretion to set aside the proceedings and the judgment, Counsel reiterated the contents of the Respondent's replying affidavit and submitted that the proceedings and the judgment are regular. Counsel argued that the Applicant has failed to establish sufficient cause why the proceedings and the judgment should be set aside.
29. On whether the Court can issue a declaration in an application, Counsel submitted that a declaration order is a substantive order which can only be granted after a suit or petition is heard and determined. He urged the Court to dismiss the application with costs.

### **Analysis and Determination**

30. Having considered the pleadings, application and the rival submissions this Court is called upon to determine the issue of representation as it goes to the root of this application.
31. The Respondent averred that the application is an abuse of the Court process as it offends the provisions of Order 9 Rule of the [Civil Procedure Rules](#). He averred that the firm of Stanley Nthiwa & Co Advocates is improperly on record as it has not filed a consent or sought leave of Court to come on record for the Applicant.
32. The Applicant on the other hand averred that the provisions of Order 9 Rule 9 are not applicable as the firm of Stanley Nthiwa and Co Advocates filed the instant application on his behalf and not on



behalf of the deceased Defendant. He further averred that he has not been substituted in place of the deceased Defendant by an order of the Court.

33. Order 9 Rule 9 of the *Civil Procedure Rules* provides as follows;

"Where there is a change of Advocate or where a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court-

- a. Upon an application with notice to all parties; or
- b. Upon a consent foiled between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

34. It is therefore clear that under the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* leave of Court must be obtained when an Advocate seeks to come on record post judgment.

35. It is not in dispute that judgment was delivered on December 15, 2021. The firm of Stanley Nthiwa and Co Advocates filed a Notice of Appointment on September 9, 2022. The Applicant contended that the firm of Stanley Nthiwa and Co Advocates has brought this application on his behalf and not that of the deceased Defendant. At this juncture the issue for determination is whether the Applicant has the locus standi to present the instant application. The Court in the case of *Alfred Njau and Others v City Council of Nairobi* (1982) KAR 229, defined the word *Locus Standi* as follows;-

"the term *Locus Standi* means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings."

36. Locus standi relates mainly to the legal capacity of a party.

37. The Respondent averred that the Applicant is a stranger to the proceedings herein as he has not been substituted in place of the deceased Defendant. The Applicant deposed that he is the personal representative of Mary Kimuli deceased. In this regard, he annexed a grant of letters of administration to his supplementary affidavit.

38. Although the Applicant is the legal representative of the Estate of Mary Kimuli, it is not in dispute that he has not been substituted in place of the deceased Defendant. The record shows that the Applicant is not a party to this suit. The Applicant therefore has no capacity to bring the present application.

39. From the grounds in support of the application and the supporting affidavit, it is clear that the Applicant has brought this application on behalf of the deceased Defendant.

40. It is not in dispute that the application before the Court is one filed post judgment and therefore the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* ought to apply.

41. I note that the Advocate for the Applicant filed a Notice of Appointment to come on record in this matter and did not comply with the said provisions.

42. It is evident that the firm of Stanley Nthiwa and Co Advocates is irregularly on record for the Applicant as they came on record after judgment without leave of Court.

43. The irregularity can be cured after the firm takes the appropriate measures stipulated in the rules to come on record.



44. Having found that the firm of Stanley Nthiwa and Co Advocates is improperly on record for the Applicant, I will not delve into the other issues raised in the application.
45. In light of the foregoing, the application dated August 24, 2022 is struck out with costs to the Respondents.

**RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 26<sup>TH</sup> DAY OF APRIL, 2023.**

**HON. T. MURIGI**

**JUDGE**

In the presence of: -

Court Assistant – Mr. Kwemboi

Mr. Muthiani for the Plaintiff/Respondent.

Ms. Muthoki holding brief for Nthiwa for the Applicant.

