



REPUBLIC OF KENYA



KENYA LAW
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**Mohamed v Arthur & another (Environment & Land Case
324 of 2017) [2023] KEELC 16931 (KLR) (26 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16931 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 324 OF 2017

SM KIBUNJA, J

APRIL 26, 2023

**[1ST DEFENDANT'S NOTICE OF MOTION DATED THE 18TH
AUGUST 2022 AND PLAINTIFF'S CHAMBER SUMMONS DATED
29TH NOVEMBER 2021 BUT FILED ON THE 29TH NOVEMBER 2022]**

BETWEEN

IBRAHIM MUSA MOHAMED PLAINTIFF

AND

MWANATUMU ATHUMAN ARTHUR 1ST DEFENDANT

LAND REGISTRAR, MOMBASA 2ND DEFENDANT

RULING

1. The 1st defendant filed the notice of motion dated the 18th August 2022 brought under Order 24 Rule 3 (1) & (2), Rule 7 (1), and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking for the plaintiff's suit to be deemed to have abated and costs. The application is premised on the three grounds on its face and supported by the affidavit sworn by Mchangamwe Said Mohamed, the administrator of the estate of the late Mwanatumu Athuman Arthur, the 1st defendant, on the 18th August 2022. It is the 1st defendant's case that the plaintiff died on the 31st December 2020 and more than one year has since passed without an application to substitute him being filed. That the plaintiff's suit should therefore be deemed to have abated and the 1st defendant be awarded costs.
2. The application is opposed by the plaintiff through the three grounds of opposition dated the 1st November 2022 filed through counsel for the plaintiff and administrators of the estate of Ibrahim Musa Mohamed, deceased. It is also opposed through the affidavit sworn by Musa Ibrahim Musa, a child of the deceased plaintiff and co-administrator of his estate. It is their case that the application is fatally defective, waste of time and incompetent. That plaintiff's case was heard and closed on the 12th November 2019, while the defence case was heard and closed on the 29th January 2020. That while



waiting for the outcome of the suit, the defendant and plaintiff died on the 22nd February 2020 and 31st December 2020 respectively. That the notices of motion dated the 22nd July 2020, 6th October 2020 and 18th August 2022 are still pending determination. That the defendant has not been formally substituted and the application dated 18th August 2022 is therefore fatally defective. That the children of the plaintiff filed Mombasa Kadhi Succession Petition No. 207 of 2021 and concurrently sought and obtained from the Chief Magistrate's court, Mombasa, limited grant of letters of administration Ad Litem that was issued to Musa Ibrahim Musa, Abdi Ibrahim Musa Warda, Ibrahim Musa and Mohamed Ibrahim Musa on the 25th October 2022. That the suit survived the deceased and ought to continue to final determination, and the application should be dismissed.

3. On their part Musa Ibrahim Musa, Abdi Ibrahim Musa, Warda Ibrahim Musa and Mohamed Ibrahim Musa, the 1st to the 4th applicants and administrators of the estate of Ibrahim Musa Mohamed, the deceased plaintiff, filed the chamber summons application dated the 29th November 2021 seeking for the substitution of the deceased with the applicants for purposes of these proceedings. The application is based on the twelve (12) grounds on its face and supported by the affidavit of Musa Ibrahim Musa, 1st applicant, sworn on the 29th November 2022, more or less restating the deposition in answer to the 1st defendant's notice of motion already summarized above. The chamber summons is brought under sections 1, 1A, 1B, 3, 3A and 63(e) of *Civil Procedure Act*, section 13 of *Environment and Land Court Act*, Articles 1, 2, 3, 10, 12, 19, 20, 21, 22, 23, 24, 25, 28, 39, 40, 47, 48, 50, 60, 64, 159, 162, 165, 169 258 and 259 of the *Constitution* 2010.
4. The chamber summons application is opposed by the plaintiff through the replying affidavit sworn by Joseph Karanja Kanyi, advocate for the plaintiff, sworn on the 2nd December 2022, deposing inter alia that their application for substitution dated 22nd July 2020 was allowed on the 8th October 2020. That the application dated 6th October 2020 to reopen defence is yet to be determined and that dated the 18th August 2022 was due for hearing on the 6th December 2022. That the delay in filing the chamber summons has not been explained.
5. The learned counsel for the 1st defendant and plaintiff filed their submissions dated the 15th February 2023 and 23rd February 2023 respectively which the court has considered.
6. The following are the issues for the court's determinations on the two applications;
 - a. Whether the plaintiff's suit has abated.
 - b. If the answer to (a) above is in the affirmative, whether there is a case in which the applicants may be substituted for the deceased plaintiff.
 - c. Who pays the costs in each of the applications.
7. The court has carefully considered the grounds on each of the applications, the affidavit evidence, the submissions by the learned counsel, the superior courts decisions cited thereon and come to the following findings;
 - a. That as can be seen from the affidavit evidence of both sides, Ibrahim Musa Mohamed, the plaintiff died on the 31st December 2020. That it follows that by the time the 1st defendant filed their notice of motion dated the 18th August 2022 seeking to have the plaintiff's suit be deemed as abated, a period of over one year seven months had lapsed from the date of his death. That



Order 24 Rule 3 of Civil Procedure Rules makes provision on the legal consequences of death of a plaintiff(s). At subrule (2) it provides that;

“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.” [emphasis mine]

The court has perused the record and there is no evidence of any application to substitute the deceased plaintiff having been filed within one year of his death. It follows therefore that by the dictates of the law as set out above in mandatory terms, the plaintiff’s suit stood abated on or about the 1st of January 2022, as no application to substitute the deceased had been filed before the expiry of one year from the date of his death.

- b. That the applicants chamber summons dated the 29th November 2021 and filed on 22nd November 2022 seeks for the court to be pleased to substitute the four named applicants for the deceased plaintiff. This application was filed over three (3) months after that of the 1st defendant’s notice of motion on the plaintiff’s suit abatement was filed, and almost two years from the date of death of the plaintiff. By operation of Order 24 Rule 3(2) of the *Civil Procedure Rules*, the plaintiff’s suit had stood abated on or about 1st January 2022, and by the 29th November 2022 when the chamber summons was filed, there was no suit in existence that the applicants can be substituted for the deceased plaintiff as they seek. That going by the Court of Appeal decision in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Co. Ltd & 2 others* CACA No. 283 of 2015, what the applicants could probably have done is to first seek to have time to apply to substitute to be extended, before moving the court to be allowed to substitute the deceased plaintiff.
- c. That having come to the above conclusions, it follows that the 1st defendant’s application has merit while that by the applicants has no merits. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the 1st defendant is entitled to costs against the estate of the deceased plaintiff in respect of the notice of motion and against the applicants in the chamber summons application.

8. In view of the above findings, the court orders as follows;

- a. That the 1st defendant’s notice of motion dated the 18th August 2022 has merit and is allowed in terms of prayer (1) with costs against the estate of the deceased plaintiff. For avoidance of doubt the plaintiff’s suit is hereby deemed to have abated on or about 1st January 2022.
- b. The Applicants chamber summons dated the 29th November 2022 has no merit and is dismissed with costs to the 1st defendant.
- c. The file be closed.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 26th DAY OF APRIL 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.



In the presence of:

Plaintiff: Absent

Defendants : Absent

Applicants : Absent

Counsel: mr. Ngonze for Plaintiff/Applicant

Ms Mango for M/s Kiti for 1st & 2nd Defendants respectively.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

