



REPUBLIC OF KENYA



In re Estate of Otui Ene Keriation Dukuny (Deceased) (Succession Cause 21 of 2015) [2023] KEHC 27366 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEHC 27366 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
SUCCESSION CAUSE 21 OF 2015
FM MUTUKU & SN MUTUKU, JJ
OCTOBER 31, 2023**

IN THE MATTER OF ESTATE OF OTUI ENE KERIATION DUKUNY (DECEASED)

RULING

1. Under determination are the Summons General dated 19th January 2022 and the Notice of Preliminary Objection (PO) of the same date. Both were filed by the Citees. The PO seeks to have Chamber Summons dated 6th December 2021 filed by the Citors' dismissed for reasons that this cause has abated pursuant to the directions of this court (Nyakundi, J) issued on 11th December 2018 and that the said Chamber Summons is an abuse of court process and that costs be awarded to them.
2. The Summons General seeks orders directed at the Citors to deposit Kshs 500,000-, as security for costs, in court within 30 days failing which the Chamber Summons dated 6th December 2021 shall be dismissed. The main ground relied upon by the Citees is that this cause has abated but despite that fact and while the Citors were aware of the fact, they have instituted multiple applications against the Citees.
3. The Summons General is brought under section 1A, 3 and 3A of the *Civil Procedure Act*, and Order 26 Rule 1 of the *Civil Procedure Rules*. It is supported by an affidavit sworn on the same date by Karori Kiriaton, one of the Citees, to the effect that this suit abated after the expiry of one year following the death of the only surviving administrator leading to the court, Hon Nyakundi J., declining to deliver judgment on 11th December 2018 on the ground that the matter had abated.
4. It is further deposed that the Citors have not prosecuted their application for revocation of the grant for more than 4 years after the death of the administrator but have instead filed the applicants dated 27/4/2021 and 6/12/2021 while fully aware that the matter had abated and therefore this is an abuse of court process. It is deposed that the inclusion of the Citors to this cause is unnecessary and unwarranted as they are not administrators and therefore, they should be ordered to pay 500,000 as security for costs because their ability to settle costs is unascertainable.
5. In opposition to the PO and Summons General, the Citors have filed a Replying Affidavit dated 21st February 2022 in which it is deposed that the concept of abatement does not apply to succession



matters; that Order 24 is not one of the provisions of the Civil Procedure Rules imported into the Law of Succession Act under Rule 63 of Probate and Administration Rules; that the Citees are deliberately stalling the matter by failing to comply with directions of the court issued on 1th December 2018; that this has in turn made it impossible for them to prosecute their application and that the family of the deceased has complied with the directions of the court by filing an application for substitution of the administrator dated 8th February 2019. The Citors refuted claims by the Citees that the confirmation of grant issued in regard of the deceased's estate was executed and the estate distributed.

Parties' Submissions

6. This matter was canvassed through written submissions. In their submissions dated 24th May 2022, the Citees have raised two issues for determination:
 - i. Whether the Cause has abated as per the Orders of 11th December 2018.
 - ii. Whether the Citors be ordered to deposit Kshs. 500,000 as security for costs.
7. On the first issue, it was submitted that matter had abated by the orders of 11th December 2018; that the matter can only be revived by an application for substitution of the administrators and that this was never done. They relied on Nathaniel Wanjobi Nderitu -vs- James Mwangi Nderitu & another [2015] eKLR, where the court stated that:

“The next issue relates to abatement. The Law of Succession has no specific provision catering for this issue. Where the law is not exhaustive or exclusive or clear a party seeking such an order may seek leave of the court and the court may exercise its inherent powers to make orders that are in the interest of justice. Indeed, in this instant case the Petitioner/ applicants have sought such orders under the provisions of Rules 49 and 73 of the Probate and Administration Rules.”
8. They further argued that they did not rely on Order 24 of the Civil Procedure Rules but rather the Preliminary Objection is purely premised on the order issued on 11th December 2018; that the order was not challenged through an appeal or review and that the estate had been fully distributed and therefore there was no substance to enable the revival of the suit.
9. On the second issue for determination, it is submitted that they have been dragged to court by the Citors on numerous applications; that since the estate was fully distributed, the Citors should not let the Citees incur legal costs and other auxiliary expenses unnecessarily; that the Citors should therefore be directed to deposit security for costs as prayed for in the summons dated 19th January 2022.
10. The Citees submissions are dated 23rd May 2022. They submitted that Order 26 of the Civil Procedure Rules is not applicable as succession proceedings are governed by the Law of Succession Act and the regulations made thereunder; that Rule 63 of the Probate and Administration Rules is specific on the civil procedure rules applicable in succession proceedings that Order 26 is not one of them and therefore the Citees' application is an abuse of the process of the court.
11. On whether the Notice of Preliminary Objection is based on the points of law they submitted that the Citees have not specified any provision of the Law of Succession Act or Probate and Administration Rules to support their claim that the Citors' case has abated by operation of the law. They submitted that lack of specific law to back their claim makes their first ground mere hearsay; that the issues raised in regard to the directions of the court issued on 18th December 2018 and 17th January 2019 are issues of fact and not law and can only be ascertained after the parties tender evidence in trial and therefore the Preliminary Objection does not meet the requisite threshold.



12. On whether the Chamber Summons is an abuse of court process is not a point of law and can only be ascertained during the hearing of the application and on evaluation of the evidence adduced, they relied on *Mebbu Gelan Kelil Andoters -vs- Abdul Kadir Shariff Abdirhim and Others* [2015] eKR where the court held that,

“The preliminary objection raised herein apart from the same being blurred and marred with factual issues, it is also vague. An averment that the suit is bad in law, misconceived and disclosed no reasonable cause of action cannot be entertained and sustained through a preliminary objection.”

13. They submitted that the Citees have been fighting very hard to ensure that their case does not proceed to its conclusion, and it is for that reason that they humbly request the court to invoke section 54 of the *Law of Succession Act*, paragraph 14 of the 5th Schedule, in order to appoint an administrator from the Citees so as to kick start the case once more.

Analysis and Determination

14. The record of the court file shows that the Citors are claiming purchaser’s interest in the estate of the deceased, the late Otui Ene Keriaton Dukuny. They claim that their names were not included in the Certificate of Confirmation of Grant as purchasers and therefore they sought to have the Grant revoked. The court, Hon. Nyakundi, J, took evidence but before he delivered judgment the administrators of the estate died. The Judge directed, 11th December 2018, that by Virtue of the death of the administrator before the delivery of judgment, the claim had abated unless there was substitution of the administrators of the estate.

15. The record shows that no substitution of the administrators has been made, hence the on-going litigation.

16. For good order, I will adopt the issues identified by the Citees in their submissions as follows:

- i. Whether the Cause has abated as per the Orders of 11th December 2018.
- ii. Whether the Citors be ordered to deposit Kshs. 500,000 as security for costs.

17. Abatement of a suit is provided for under Order 24 of the *Civil Procedure Rules*. Order 24 provides elaborate procedure to be followed where a plaintiff dies, or defendant dies, and the cause of action survives. The issue here is whether Order 24 applies to succession causes. Before determining that issue, I will deal first with what a Preliminary Object is and its effect to pending suits.

18. A Preliminary Objection was described as consisting of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit (see *Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd* (1969) EA 696) In *Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others* [2015] eKLR, the Supreme Court of Kenya stated as follows in respect to Preliminary Objection:

“Thus, a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts.”

19. A suit that has abated ceases to exist in law. Where a suit ceases to exist in law, the court has no business determining that which does not exist in law. In other words, the court has no jurisdiction to determine that which does not exist. See *Wallace Kinuthia v Anthony Nd’ung’u Muongi & 3 others* [2013] eKLR



and *Kenya Farmers Cooperative Union Limited vs Charles Murgor (Deceased) T/A Kaptabei Coffee Estate*, (2005) eKLR. In the latter case, Hon. Waweru J. stated as follows:

“But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted, and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.”

20. Coming back to Order 24, it is clear to me that its applicability to succession causes has been raised in this matter. Rule 63 of the *Probate and Administration Rules* has imported certain *Civil Procedure Rules* as specifically stated under that Rule into the *Law of Succession Act*. It provides that:

Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50 (Cap. 21, Sub. Leg.), together with the *High Court (Practice and Procedure) Rules* (Cap. 8, Sub. Leg.), shall apply so far as relevant to proceedings under these Rules.

21. As clear as day, Order 24 of the *Civil Procedure Rules* is not one of the Rules mentioned in the above provisions. Order 24 deals with abatement of suits by the operation of the law when substitution is not made within one year after the death of a Defendant. Succession matters are *sui generis*. The *Law of Succession Act* provides a complete regime in its application and procedures. Under Rule 73 of the *Probate and Administration Rules*, saves the inherent powers of this court, sitting as a probate court, to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. Rule 73 provides that:

Saving of inherent powers of court

Nothing in these Rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

22. To my mind, parties in a succession cause are not left helpless with no provision to rely on to approach the court on any issue for ends of justice to be met. They are at liberty to invoke the provisions of Rule 73 of the *Probate and Administration Rules*.
23. Abatement of a suit by the operation of the law denies the court jurisdiction to determine that matter for such a matter ceases to exist. Abatement of a suit is a point of law and has the effect of finally determining a matter before the court. However, Order 24 of the *Civil Procedure Rules* does not apply to succession matters by dint of the operation of Rule 63 of the *Probate and Administration Rules*. What this means to me is that parties to a succession cause can still come to court to pursue their claim even after the death of an administrator or deceased so long as their action has survived the death of an administrator or deceased.
24. The claim by the Citors is that they bought land from the deceased. In the interest of justice, they are enabled by the law to pursue that claim and adduce evidence to support the claim. The court will therefore be able to make a finding, based on the evidence adduced and decide. I hold the view that the order of Justice Nyakundi does not state that the Citors have no recourse under the law. It would be



- a miscarriage of justice if they were to be shut out before they pursue their claim under the law and a determination has been made. Indeed, the door is still open for them to do so. There is a window for substitution of the administrators as shown in the order of Justice Nyakundi.
25. The consequence of my finding is that the PO lacks merit and is hereby dismissed.
 26. On the issue of security for costs, it is clear to me that the Citors are desperate because of lack of an avenue to ventilate the issues affecting them due to non-action by the Citees to substitute the administrators. This is the reason, in my considered view, why they are filing application after another. They are seeking justice which seems elusive to them. In my view, justice to them can only be seen to have been done after the issues they are raising have been adjudicated upon and determined by the court. They are seeking a forum to argue their case. That forum has so far been denied them because the Citees have failed to take action and substitute an administrator of the estate of the deceased. The only time this court can determine if it is true that the Citors' claim of having bought land from the deceased is true is after they are afforded a chance to adduce evidence to support their case and the court to decide of the issue.
 27. Order 26 of the Civil Procedure Rules is one of the Orders imported into the Law of Succession Act by dint of Rule 63 of the Probate and Administration Rules. It is applicable where the court finds justification to order for payment of security. In this case however, it is my view that the prayer for payment of security is not justified. I have noted that the Citors have invoked the Probate and Administration Rules that have been amended. The latest Rules as found on Kenya Law has Order 26 as one of the Orders imported into the Law of Succession Act by dint of Rule 63 of Probate and Administration Rules. The Summons General is therefore not merited for it seeks to put more bottlenecks against the Citors' chances of seeking justice. The Summons General is hereby dismissed.
 28. Let the parties, under good counsel of their legal representatives, take appropriate action and move the court to take this matter from the position it is in, to the next level. It is not for this court to tell the parties what they ought to do. This court is an impartial arbiter and will guide appropriately once moved by the parties.
 29. Consequently, the PO and the Summons General are hereby dismissed. Costs are payable by the Citees to the Citors. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 31ST DAY OF OCTOBER 2023.

S.N. MUTUKU

JUDGE

