



REPUBLIC OF KENYA



Imbwaka v Maindu (Deceased); Lyuba & 3 others (Intended Respondent) (Land Case E006 of 2021) [2023] KEELC 17336 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
LAND CASE E006 OF 2021**

E ASATI, J

MAY 11, 2023

(FORMERLY KAKAMEGA HC ELC NO.203 OF 2017)

**IN THE MATTER OF AN APPLICATION FOR ORDERS UNDER SECTION 8,
387 AND 38 OF THE LIMITATION OF ACTIONS ACT CAP 22 LAWS OF KENYA**

AND

IN THE MATTER OF LR NO.TIRIKI/BULUKHOBA/1497 MEASURING 0.9.HA

BETWEEN

TIMONA MAKENZIE IMBWAKA APPLICANT

AND

MARKO LIUBA MAINDU (DECEASED) RESPONDENT

AND

**ALFRED LIUVA MAINDU, JACKSON LYUBA MTOTO & NOLECAH
KHATENJE LYUBA INTENDED RESPONDENT**

NOELECAH KHATENJE LYUBA INTENDED RESPONDENT

JOYCE IMBITI LIUVA INTENDED RESPONDENT

BEATRICE ABISHAJI LIUVA INTENDED RESPONDENT

RULING

1. This ruling is in respect of the application dated February 8, 2023 brought pursuant to the provisions of Section 1A, 1B, 3A, 3B of the *Civil Procedure Act* Order 29 rule 4(1)(2) and rule 7(2), Order 40 rule 1 and 2 of the *Civil Procedure Rules 2010*. It seeks the orders that:-



- a. The application be certified urgent and its service be dispensed with.
 - b. The honourable court be pleased to revive the suit.
 - c. Upon reviving the suit, the honourable court be pleased to substitute the Respondent herein Marko Liuba marko (now deceased) with Alfred Liuva Maindu, Jackson Lyuba Mtoto and Noelecha Khatenje Lyuba (the joint legal representatives of the deceased and in their individual capacity).
 - d. That the honourable court be pleased to grant leave to enjoin Joyce Imbiti Liuva, Noelecha Khatenje Lyuba and Beatrice Abishanji Lyuba as 2nd, 3rd and 4th Respondents respectively.
 - e. That the honourable court be pleased to grant an order of temporary injunction restraining the intended Respondents either by themselves servants or agents from entering, utilizing, cultivating, tilling, interfering with peaceful habitation of the applicants of the applicants and use of LR No Tiriki/Bulukhoba/1497 pending the hearing and determination of this application and the entire suit.
 - f. That this honourable court grant order of status quo ante on suit property pending hearing and determination of the suit.
 - g. That costs of this application be provided for.
2. The grounds upon which the application is brought are that the case herein was commenced in Kakamega ELC Case No203 of 2017 vide Originating Summons dated 25th April and filed on June 14, 2017. That the Respondent herein died on the October 22, 2020 while the matter was still ongoing in Kakamega. That the court was informed of the death and leave sought to substitute the deceased granted. The matter was later transferred to Vihiga at ELC on September 9, 2021 following the establishment of Environment and Land Courts Vihiga. The matter came up for mention on various dates. That the court was informed that citation application had been filed at Hamisi. The cause at Hamisi prolonged due to the citees being adamant to take out letters of administration in respect of the estate of deceased till September 14, 2022 when they filed Succession Cause 101 of 2022 and Special Gazette Notice issued on the 6th November, 2022. That various mention dates have been set since October 25, 2021 to last date of November 9, 2022 in which the court was made aware the Citees had begun succession process under Succession 101 of 2022 but grant had not yet been given till December 21, 2022. Letters of Administration were granted on the December 21, 2022 to Alfred Liuva Maindu, Jackson Liuba Mtoto and Nolecah. The statutory period for making application for substitution of the deceased lapsed on the October 22, 2021, resulting to the abatement of the suit herein. That the issuance of the aforementioned letters of administration grants the first critical step for application for revival and subsequently substitution of the deceased with the administrator of his estate. That LR. No Tiriki/Bulukhoba/1497, without knowledge of the applicant, was transferred to three daughters of the deceased respondent namely Joyce Imbiti Liuva, Noelecah Khatenje Lyuba and Beatrice Abishanji Liuva while the cause herein was proceeding and title issued to them as proprietors on the March 27, 2019. That it is from the above predicament over the transmission of proprietorship from the deceased Respondent to proposed Respondents that the applicant seeks that the above-mentioned proprietors be enjoined in the cause. That the Applicant has been utilizing the said property for his use and stay without interference and this has been the status. That the status quo was disrupted on the January 24, 2023 when one Alfred Lyuba, one of the administrators of the deceased's estate, forcibly gained entrance to the land parcel, caused a tractor to enter the land and tilled it in preparation for the harvest season to the disadvantage of the harmonious stay, utilization or the property and applicant's claim for adverse possession herein. That status quo ante and temporary order of injunction be issued over the



said property for applicant to continue with its possession and utilization until determination of the suit herein. That it is in the interest of justice that the prayers sought be granted.

3. The application was supported by the averment in the Supporting Affidavit sworn by the applicant, Timona Makenzie Imbwaka on February 8, 2023 and the annexures thereto.
4. The application was opposed vide the contents of the Replying Affidavit sworn by Alfred Liuva Maindu on April 4, 2023 and the annexures thereto.
5. The application was by consent of the parties canvassed by way of written submissions.
6. Written submissions dated March 6, 2023 were filed on behalf of the Applicant by the firm of Shitsama & Co. Advocates. Counsel submitted that Order 24 rule 7(2) of the *Civil Procedure Rules* gives the court discretion to revive an abated suit if there is sufficient proof that the Applicant was prevented by any sufficient cause from continuing the suit. That in the present suit, the deceased original Respondent died on October 21, 2020 but the beneficiaries failed and/or refused to take out letters of administration forcing the applicant to file citation No139/2021 at Hamisi Court. That it was not until December 21, 2022 that Letters of Administration to the estate of the deceased were granted vide Succession Cause No101 of 2022 at Hamisi. That this is what caused the delay in substituting the deceased.

Counsel relied on the case of *Mbaya Nzulwa v Kenya Power & Lighting Company Ltd.* [2014]eKLR and to support his submissions.

7. Counsel submitted further that the beneficiaries of the deceased have encroached into the suit property and should be restrained by an order of the court. Counsel relied on the case of *Pius Kipchirchir Kogo v Frank Kimeli Lenai* (2018)eKLR to submit that the Applicant will suffer irreparable injury unless an order of temporary injunction is granted. Counsel also relied on the case of *Giella v Cassman Brown* (1973)EA 358 and *Mrao Ltd v First American Bank of Kenya Ltd* (2003)eKLR to submit that the Applicant has demonstrated the grounds for grant of temporary injunction.
8. Written submission dated April 4, 2023 were filed on behalf of the Respondent by the firm of S.B.A Mukawa & Co. Advocates. Counsel submitted that the Applicant had sued the Respondent Marko Liuba Maindu posthumously and he intends to enjoin him with his children namely Alfred Liuva Maindu, Jackson Lyuba Mtoto, Noelecah Khatenje Lyuba, Joyce Imbiti Liuva and Beatrice Abashaji Liuva. That this means Liuva will remain unsubstituted. That the appellant will need to have Liuva substituted. That substitution of a deceased person is normally done by way of petition pursuant to the provisions of Rule 14 of the Fifth schedule of the *Law of Succession Act* Cap 160 laws of Kenya. That the Respondent was contemplating making an application for the suit to be struck out because the provisions under Order 3 rule 1 *Civil Procedure Rules* were not complied with. That the suit ought to have been brought by way of Originating Summons.
9. Counsel further submitted that the applicant has included land parcel number Tiriki/Bulukhoba/1497 which belongs to the daughters of Liuba and that this is vexatious and frivolous. Relying on the provisions of section 19 of the *Environment and Land Court Act*, Counsel submitted that where a suit is not instituted by a plaint or Originating Summons the Defendant is denied the opportunity to know the nature of the claim so as to file his Memorandum of Appearance and Defence. That the suit was filed in the form of a citation. Counsel prayed that the application be declined.
10. I have considered the application and the grounds in support thereof as contained in the Supporting Affidavit. I have also considered the grounds of opposition as contained in the Replying Affidavit. I have considered the submissions filed by Counsel for the respective parties. The substantive prayers in the application are five (5) namely



- (i) a prayer for revival of the suit,
- (ii) a prayer for substitution of the deceased Respondent,
- (iii) a prayer for joinder of parties,
- (iv) a prayer for temporary injunction and
- (v) a prayer for maintaining of the status quo ante.

11. The grounds for reviving of a suit which has abated and for substitution of a deceased party are contained in Order 24 rule 7(2) *Civil Procedure Rules* which provides that

“The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”

I have considered the grounds advanced in the application as to why the plaintiff could not continue with the suit after the death of the Respondent until the suit abated. I find the explanation plausible. As regards substitution of the Respondent, I have seen the Certificate of Death annexed to the application showing that the Respondent Marko Liuba Maindu died on October 22, 2020. I have also seen the copy of grant of Letters of administration dated December 21, 2022 issued in Hamisi Succ Cause No 101 of 2022 showing that the proposed Respondents herein namely Alfred Liuva Maindu, Jackson Lyuba Mtoto and Noelecah Khatenje Lyuba are the administrators of the estate of the deceased Respondent. It is in the interest of justice that the deceased Respondent be substituted with the proposed Respondents so as to enable continuation and determination of the suit on merit.

12. On joinder of parties, the application seeks to join 3 more parties as Respondents. These are the daughters of the deceased namely Noelecah Khatenje Lyuba, Joyce Imbiti Liuva and Beatrice Abishaji Liuva. This means that Noelecah Khatenje Lyuba will participate in the suit as an administrator of the estate of the deceased and on her own behalf as a registered proprietor of the suit land. The reason given for seeking to join them in these proceedings is that the suit property was in the pendency of this suit transferred and registered in their names. A copy of the title deed attached to the Supporting Affidavit shows that the title deed in respect of suit land was issued to the proposed Respondents on 27th March 2019. This suit was filed in the year 2017 and as per the copy of register filed with the Originating Summons, the suit land was as at that time registered in the name of the deceased Respondent. It is my humble view that for the real issues in controversy to be adjudicated conclusively in this matter the proposed Respondents are necessary parties.
13. The last 2 prayers are for temporary injunction and maintaining of status quo ante. Both prayers are aimed at preserving the suit land pending hearing and determination of the suit. I have noted from the court record that the court issued an order for maintaining of status quo on June 20, 2018 when it ordered that

“the status quo be maintained in respect of the applicant’s occupation of the land parcel No Tiriki/Bulku7khoba/1497 pending hearing and determination of the suit.”

This order has not been lifted. It is proper that the same status quo be maintained pending the hearing and determination of the suit.

14. The result is that I find the application to be merited allow it and make the following orders:



- a. The suit herein is revived and reinstated for hearing.
- b. The Respondent, Marko Liuba Maindu, deceased, be and is hereby substituted with Alfred Liuva Maindu, Jackson Lyuba Mtoto & Nolecah Khatenje Lyuba
- c. Nolecah Khatenje Lyuba, Joyce Imbiti Liuva and Beatrice Abishaji Liuva be and are hereby joined as the 2nd, 3rd and 4th Respondents in this suit.
- d. The order of status quo issued on June 20, 2018 to remain binding on all the parties herein pending hearing and determination of the suit.
- e. Costs of the application to abide the main suit.

Orders accordingly.

RULING, DATED AND SIGNED AT VIHIGA AND READ VIRTUALLY THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Neville Court Assistant.

No appearance for the Applicant

Proposed Respondents present

