



**Kamau & 4 others v Karima (Environment & Land Case  
2952 of 1997) [2023] KEELC 18393 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18393 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 2952 OF 1997**

**AA OMOLLO, J  
JUNE 29, 2023**

**BETWEEN**

**TABITHA GATHONI KAMAU & 4 OTHERS ..... PLAINTIFF**

**AND**

**PETER NJOROGE KARIMA ..... DEFENDANT**

**RULING**

1. The Applicant filed a notice of motion dated October 24, 2022 seeking for the following orders;
  1. The honourable court be pleased to review and set aside the order made on 22/6/2022.
  2. The honourable court be pleased to revive the suit and substitute the defendant with his legal representatives -Hannah Njeri Njoroge and Esther Njeri Njoroge for purposes of this suit.
  3. That directions for hearing of the case be given accordingly.
  4. There be an order of temporary injunction against the administrators of the defendant herein being Hannah Njeri Njoroge and Esther Njeri Njoroge charging, selling, transferring and/or removing the suit plot LR Gatamaiyu/Kagwe/1227 from jurisdiction of this honourable court pending hearing and conclusion of this suit.
  5. That ELC No 1 of 2020 (Githunguri Law Courts) be transferred to this court and consolidated with this file for hearing and final determination thereof.
  6. Directions for hearing of the matter be given accordingly.
  7. Costs of this application be in the cause.
2. The motion was supported by an affidavit sworn by Tabitha Gathoni Kamau on October 24, 2022 stating that she testified and closed her case as the Plaintiff mid 2013 but since that time the defence case stalled due to willful neglect on part of his family to take out letters of administration until the



- case abated and then they commenced the succession proceedings and it took time before she found out. That after she found out that they had petitioned for the letters of administration and filed an application to have one of the administrators substituted in place of the deceased defendant, they still objected to the application and the same was dismissed.
3. The Applicants stated that the certificate of confirmation was issued on 4/8/2022 and the deceased's two widows are his legal representatives.
  4. A replying affidavit sworn by Esther Njeri Njoroge on 27<sup>th</sup> January 2023 was filed in opposition of the motion stating that neither her nor Hannah Njeri Njoroge are parties to the suit and that the application is an attempt to re-litigate the application of similar nature dated 24/4/2021 which sought to have this suit revived and have her substituted as Defendant in place of Peter Njoroge Karima -the deceased. The earlier application was dismissed in the ruling dated 22<sup>nd</sup> June 2022, which decision has not appealed.
  5. Esther Njeri Njoroge deposed that the Applicant had also filed an application dated 28/1/2020 in Githunguri ELC Case No 1 of 2020 seeking similar orders as those in prayer 4 of the application herein and the same was dismissed vide ruling dated 5/7/2021. She avers that this case cannot be consolidated with the Githunguri case because the causes of action are different and parties are different. She added that there has been no discovery of any new matter which could not be produced by the Applicant at the time of the earlier application and the fact that a grant was issued after the earlier application had been dealt with does not translate to new evidence. Submissions
  6. The Applicant and the Respondent filed their submissions dated 13<sup>th</sup> March 2023 and 16<sup>th</sup> March 2023 respectively. The Applicants laid the background of the matter stating that they had filed this suit on 24/11/1997 seeking to recover land fraudulently purchased by the 2<sup>nd</sup> Defendant from the 1<sup>st</sup> Defendant. That the Defendants' case was adjourned and eventually the Defendants passed away on 2017 before the case could be heard. That on 18/9/2018 when the matter came up for mention, the court directed that substitution of the 2<sup>nd</sup> Defendant be done within 90 days and fixed the matter for 13/3/2019 for further directions on which day the suit was marked as abated with liberty to the Plaintiff to move the court appropriately.
  7. The Applicants submitted that by a Notice of motion dated 29/4/2021, the Plaintiff sought to revive the suit by substituting the remaining Defendant, Peter Njoroge Karima with his widow, Esther Njeri Njoroge. The said application was dismissed because the grant on the succession cause had not been confirmed. It is submitted that a certificate of confirmation of the grant has eventually issued to the deceased's wives on 4<sup>th</sup> August 2022.
  8. The Applicants in submitting that they have shown sufficient cause to warrant the grant of the orders sought cited the case of *Attorney General vs Law Society of Kenya & ano* (2017)eKLR which defined sufficient cause as; the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or action excused.
  9. The Respondent submitted that the issue of substitution did not require a confirmed grant because under Order 24 Rule (5) of the *Civil Procedure Rules* it is provided that where a question arises as to whether or not any person is a legal representative of a deceased plaintiff, the question shall be determined by the court and the question having determined by the ruling dated 22/6//2022, it cannot be set aside. She further submitted that litigation must come to an end as the prayers for injunction sought had been previously dealt with. That an application for an injunction is premised on the fact of there being a pending suit, yet here there is no pending suit. She contended that on the prayer for transfer of ELC No 1 of 2020 Githunguri to this court, the parties are different from the parties herein.



## Analysis

10. I have considered the motion filed, the affidavits thereof together with its annexures and the submissions filed by the parties. The key question for determination is whether the present application is an abuse of the court process, res judicata the application dated 29<sup>th</sup> April 2021 and if not, whether the suit can be revived.
11. There is no dispute that the suit was marked as having abated on 13<sup>th</sup> March 2019 and that the applicant moved the Court to substitute the deceased defendant vide the application dated 24<sup>th</sup> April 2021. That application was heard on merits and Okongó J. made the following observations;

“On whether the Respondent can be substituted, it is common ground that only a legal representative of a deceased defendant can be made a party in place of the deceased defendant. It is common ground that the Respondent is not a legal representative of the deceased defendant as they have petitioned for letters which have not been issued to them”
12. Okongó J concluded that since there was no legal representative of the Defendant against whom the suit can proceed, it would serve no purpose to revive the suit. The judge proceeded to dismiss the application for reviving the suit on 22<sup>nd</sup> June 2022. Subsequently on 4<sup>th</sup> August 2022, the Respondent and one Hanna Njeri was issued with a certificate of confirmation of grant of the estate of the deceased defendant. The Applicants filed the current application in October 2022 which is two months after the grant had been issued to the Respondent. The Applicants’ previous motion was dismissed because the Respondent then was not a legal representative, they had petitioned but the grant was pending some objection proceedings.
13. In my view, this application cannot be said to be res judicata or abuse of the Court process because the reasons that resulted to the former application being dismissed are not substantially in issue here. When the former application was dismissed, the Respondent had not been appointed the legal representative of the deceased defendant. She had no capacity to be joined to these proceedings. Neither could the Applicants appeal the decision rendered on 22<sup>nd</sup> June 2022 for want of capacity of the Respondent to be joined in these proceedings. The only recourse left to the applicants after the appointment of the Respondent as the administrator of the estate of the deceased was to move the court afresh since the grant appointing her does not apply retrospectively.
14. Can the suit be revived? From the record, the Plaintiff had called the evidence of three witnesses and directions taken on 4<sup>th</sup> April 2017 that the matter was to proceed from where it had reached. The matter was then fixed for hearing on 22<sup>nd</sup> November 2017 and when the matter came up before the judge for hearing, counsel for the Defendant informed the court that the Defendant had died. Since the matter had progressed, I find no basis to deny the Applicants to prosecute their case to the end.
15. The Respondent having been duly appointed the legal representative of the estate of the deceased defendant in Kiambu High Court Succession Cause No 76 of 2020, she is capacitated to be substituted in place of the defendant-deceased. Consequently, I find merit in prayer 2 and 3 of the motion. In regard to prayer 4 seeking injunctive reliefs, neither the grounds set out in the face of the application nor the affidavit sworn in support of the Motion give descriptions on the nature of interference sought to be stopped. No prima facie case has been made for granting the relief of temporary injunction.
16. On the prayer for consolidation, the Applicants have not made out a case why they filed the latter suit and how their interests will not be taken care of in the current suit taking into consideration their



arguments that the parties and the subject matter are the same. I decline to grant prayer 5 seeking an order for consolidation.

17. In conclusion, I allow the application in terms of prayer 2, 3 and 7 of the application. Prayers 4 and 5 are dismissed for want of merit.

**RULING DATED, SIGNED AND DELIVERED THIS 29<sup>TH</sup> DAY OF JUNE 2023**

**A. OMOLLO**

**JUDGE**

