



Nyambati (Suing as the legal representative of the Estate of Samson Nyambati Nyamweya) v Ocharo & 7 others (Environment & Land Case 10 of 2021) [2023] KEELC 18388 (KLR) (21 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18388 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 10 OF 2021**

**M SILA, J
JUNE 21, 2023**

BETWEEN

CHARLES RATEMO NYAMBATI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SAMSON NYAMBATI NYAMWEYA) PLAINTIFF

AND

**JACKTON OCHARO 1ST DEFENDANT
CHARLES RATEMO NYAMWEYA 2ND DEFENDANT
ALICE KERUBO NYAMBATI 3RD DEFENDANT
KEFA NAMI NYANGITO 4TH DEFENDANT
LAND REGISTRAR, KISII COUNTY 5TH DEFENDANT
ATTORNEY GENERAL 6TH DEFENDANT
ALICE KWAMBOKA NAMI 7TH DEFENDANT
VINCENT OGEMBO NAMI 8TH DEFENDANT**

RULING

1. I need to give a ruling and/or directions in this matter given that the 1st defendant is deceased. It is said that he died on 4 January 2022. So far, no substitution has been done, though Dr Kamau Kuria, learned counsel for the plaintiff, did state from the bar that there is a pending succession matter before the High Court at Kisii, being Kisii High Court Succession Cause No E002 of 2022 where his client has tried to have a legal representative appointed on behalf of the estate of the 1st defendant so that he/she can continue this suit. There was also mention of succession case No 31 of 2016, but I am not quite sure how it can relate to the cause of a person who died on 4 January 2022. Whatever the case,



the position is that so far, as given by counsel, is that there has been no grant yet in respect of the estate of the 1st defendant and no application for substitution has been made.

Order 24 Rule 4 provides as follows :-

"4. Procedure in case of death of one of several defendants or of sole defendant.

- (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."

2. It will be seen from the above, especially sub-rule (3), that an application for substitution of a deceased party needs to be made within one year of death or else the suit abates as against the deceased defendant. Abatement is by operation of law. In this instance, no application for substitution has been made within one year and it follows that the suit against the 1st defendant has abated. This court's hands are tied and has no choice but to make the order that the suit against the 1st defendant has abated. The only issue left upon the abatement is costs and in this court's discretion, I make no orders as to costs for or against the now deceased 1st defendant.

3. The other important issue, subsequent to the order above, is to determine whether or not there is any substance left in this suit now that it has abated against the 1st defendant. I think that before I make a decision on that, it is only prudent that I first give counsel leeway to address me on it. For the moment, as I have mentioned before, the case against the 1st defendant is marked abated and nothing can be pursued as against the 1st defendant within this suit.

4. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 21 DAY OF JUNE 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

