



Mwavula v Bayusuf & 3 others; Nyange & another (Applicant) (Environment & Land Case 176 of 2004) [2023] KEELC 18871 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 176 OF 2004**

**SM KIBUNJA, J
JULY 19, 2023**

BETWEEN

CHRISTOPHER ATHUMANI MWAVULA PLAINTIFF

AND

FADHIL MOHAMED BAYUSUF 1ST DEFENDANT

THE HON ATTORNEY GENERAL 2ND DEFENDANT

THE NATIONAL LAND COMMISSION 3RD DEFENDANT

REGISTRAR OF TITLES 4TH DEFENDANT

AND

MARILISI WAMBUA NYANGE APPLICANT

ONESMUS MWASI MGHENDI APPLICANT

RULING

1. The plaintiff moved the court through the application dated the June 14, 2022 that is brought under Order 24 Rule 4 and Order 51 Rule 1 of the [Civil Procedure Rules](#), seeking for orders:
 - a. “That this honourable court be pleased to resuscitate this suit and allow the same to proceed in the name of the legal representatives of the deceased plaintiff.
 - b. That this honourable court be pleased to substitute the deceased plaintiff Christopher Athumani Mwavula with his legal representatives Marilisi Wambua Nyange and Onesmus Mwasi Mghendi as the plaintiffs.



- c. That the costs of this application be provided for.”

The application is premised on five (5) grounds marked (a) to (e) on its face and supported by the affidavit on Marilisi Wambua Nyange, sworn on the June 14, 2022, in which she deposed inter alia that she is the widow of the plaintiff who died on April 21, 2021, and therefore one of the legal representatives to the deceased estate.; that she and her son, Onesmus Mwasi Mgehndi were granted Limited letters of administration (Ad Litem) on February 21, 2022 in CM Succ Misc No E020 of 2022; that the court should reinstate the suit and substitute the deceased plaintiff with their names in order to conclude the suit, which in her view had made much progress before the demise of her husband.

2. The application was served but none of the defendants filed any replies in opposition despite the directions of the December 7, 2022 and February 13, 2023. On the February 13, 2023, the court directed parties to file and exchange submissions but only counsel for the plaintiff filed theirs dated the February 24, 2023, which the court has considered.
3. The following are the issues for the court’s determinations;
- a. Whether the applicants have met the threshold for substitution and reinstatement of the abated suit.
- b. Who pays the costs.
4. The court has carefully considered the grounds on the application, the affidavit evidence, the submissions by counsel, the record and come to the following determinations;
- a. The effect of death of a plaintiff with a pending suit is as provided for under Order 24 Rule 3 of the *Civil Procedure Rules* states that;
1. “Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.
2. Where within one year no application is made under sub rule (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:
- Provided the court may, for good reason on application, extend the time.”
- That from the certificate of death number xxxx dated May 27, 2021 attached to the supporting affidavit, the plaintiff died on the April 24, 2021. On February 21, 2022, his widow, Marilisi Wambua Nyange and her son, Onsemus Mwasi Mghendi, were granted Limited letters of administration (Ad Litem) in Mombasa CM Succ. Misc. No. E020 of 2020 In the matter of the Estate of Christopher Athumani Mwavula (deceased).
- b. Under Order 24 Rule 3 of *Civil Procedure Rules*, the legal representatives of the deceased ought to have made the application for substitution within a year of his death, that is by April 21, 2022. The substitution is made once the legal representatives are granted letters of



administration. In this suit, no such application was filed within one year of the plaintiff's death. It is not disputed that in this case, the plaintiff's legal representatives were issued with the letters Ad Litem on February 21, 2022, which was nine (9) months and twenty-one (21) days after his demise. There is no reason tendered why the application for substitution was not made before the expiry of one year from the date of the death of the plaintiff. The suit abated on or about the April 21, 2022, a year after the death of the plaintiff with no substitution having been made. Therefore, when the matter came up for mention on June 13, 2022, the court found that there was no substitution of either the plaintiff or the 1st defendant, a year after their demise, and proceeded to make an order that the suit had abated with no order as to costs.

- c. Where a suit has abated, a legal representative, as an applicant, has three steps to take; first to seek to extend the time for making an application for substitution; secondly to be substituted and be joined in the suit in place of the deceased party, and lastly seek to reinstate the suit. The Court of Appeal pronounced itself on this in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, where it held that;

“It is only after the time has been extended that the legal representative can have the capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short-circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action... (emphasis mine)

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit.”

- d. The applicants before the court have not sought for an order of extension of time under Order 24 Rule 3 (2), which empowers the court to extend the time within which an application for substitution can be brought to court. The rule provides that;

“Where within one year no application is made under sub rule (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.

Provided the court may, for good reason on application, extend the time.”

The court cannot deal with the prayer for the suit to be reinstated before, the substitution of the deceased plaintiff is dealt with. Moreover, the substitution of the deceased plaintiff cannot be done where the application is filed outside the timeframe of one year, unless the time set out for making that substitution is extended by the court. This application has not sought for leave of court to extend



the one-year period set out for an application of substitution to be done. The prayers for extension of time, substitution and reinstatement of an abated suit may be sought for in one application so long as an applicant sets them in the proper sequence.

- e. That it is important to remember that the suit against the 1st defendant is abated as per the order of 13th June 2022.
 - f. The application by the Applicants therefore has no merit and they will bear their own costs the provisions of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.
5. In view of the foregoing, the court finds and orders as follows;
- a. That the Applicants application has no merit and is hereby struck out.
 - b. The Applicants will bear their own costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 19th DAY OF JULY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF;

PLAINTIFF: Deceased.

DEFENDANTS : Absent.

APPLICANTS : Mr. Mutugi Advocate.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

