



**Mudondo & another v Oloo & 2 others; Atsieno (As personal representative of defendants Furida Nekunda Oloo and Isaya Adedi Oloo now deceased) (Respondent) (Environment & Land Case 70 of 2015) [2023] KEELC 18736 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUSIA  
ENVIRONMENT & LAND CASE 70 OF 2015**

**BN OLAO, J**

**JULY 13, 2023**

**BETWEEN**

**FREDRICK OMWALA MUDONDO ..... 1<sup>ST</sup> PLAINTIFF**

**LIVINGSTONE WERE MUDONDO ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**FURIDA NEKUNDA OLOO ..... 1<sup>ST</sup> DEFENDANT**

**ISAYA ADEDI OLOO ..... 2<sup>ND</sup> DEFENDANT**

**LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**MILDRED ATSIENO (AS PERSONAL REPRESENTATIVE OF DEFENDANTS  
FURIDA NEKUNDA OLOO AND ISAYA ADEDI OLOO NOW  
DECEASED) ..... RESPONDENT**

**RULING**

1. Fredrick Omwala Mudondo and Livingstone Were Mudondo (the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs respectively) moved to this Court *vide* their amended plaint seeking several orders against Furida Nekunda Oloo, Isaya Adedi Oloo, and the Land Registrar Busia (the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively) with regard to the land parcel No Marachi/Elukhari/514.
2. Other than prosecuting an application dated July 23, 2015 seeking orders of temporary injunction and also other applications, the plaintiffs did not do much towards prosecuting the suit itself.
3. On February 14, 2022 (the coram erroneously states the date as February 14, 2020), the matter was listed before Hon. P. Y. Kulecho Deputy Registrar who directed that it be listed for dismissal before the



Judge on June 27, 2022. On that day, Omollo J dismissed the suit for want of prosecution. Meanwhile, as all this was happening, the 1<sup>st</sup> plaintiff passed away. Further, the 2<sup>nd</sup> defendant passed away on January 14, 2016 and the 1<sup>st</sup> defendant on September 23, 2017 as per copies of their death certificates filed herein (they did not die in 2018 as averred by Livingstone Were Mudondo the Applicant in the notice of motion dated July 1, 2022 and which is the subject of this ruling).

4. By the said notice of motion premised under the provisions of order 17 Rule 2(6) of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*, the Applicant seeks the following orders:
  1. The dismissal order dated June 2022 be set aside.
  2. This suit be reinstated for hearing and be heard on merit.
  3. Costs of this application be in the cause.
  4. Any order be made as the Court deems just.
5. The application is premised on the grounds set out therein and supported by the Applicant's affidavit also dated July 1, 2022.
6. The gravamen of the application is that the 1<sup>st</sup> and 2<sup>nd</sup> defendants died in 2018 (they actually died on September 23, 2017 and January 14, 2016 respectively as per the copies of the death certificates annexed to the supporting affidavit) and that there was a delay in getting their legal representatives. That the notice to show cause why this suit should not be dismissed did not reach the Applicant who only discovered this fact when he visited the registry to file an application for the revival of the suit. That one Mildred Atsieno (the Respondent) has now been appointed as the legal representative of the deceased defendants. That in 2018, she called upon the Respondent to be substituted in place of the deceased defendants but she was reluctant to do so. He therefore filed a citation cause which he however could not prosecute because it was during the COVID-19 pandemic period and a clerk in the registry informed him that all matters had been suspended and only advocates could access the registry. That the 1<sup>st</sup> plaintiff who was his brother died on June 5, 2021 and the Respondent through her advocates Okeyo & Company Advocates filed Busia CMCC No E003 of 2021 seeking orders to restrain him from burying the body in the land subject matter of this suit. It was then that he discovered that the Respondent had been issued with a certificate of Confirmed Grant and had distributed the suit land instead of defending this suit. That he took time defending Busia CMCC No E003 of 2021 together with the subsequent appeal. That prior to filing this application, he had earlier filed a similar application dated June 28, 2022 which is still in the file.
7. The Applicant annexed to his application the following documents:
  1. Copies of the death certificates for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
  2. An application dated August 13, 2018 by the 1<sup>st</sup> plaintiff seeking to substitute the 1<sup>st</sup> defendant with Mildred Atsieno Adedi.
  3. Citation filed in High Court Succession Cause No 8 of 2019.
  4. Order issued in Busia CMCC No E003 of 2021 on 25<sup>th</sup> January 2021.
  5. Copy of Confirmed Grant issued in Busia CMCC Succession Cause No 1211 of 2018.
  6. Certificate of Urgency filed in Busia High Court Civil Appeal No 3 of 2021.
8. The application is opposed and the Respondent has filed the following grounds of opposition:



1. The suit abated in June 2019 by operation of Order 24 Rule 3(2) of the Civil Procedure Rules as no application of substitution was made within one year of the death of the defendants.
  2. The suit has already been dismissed and cannot be revived.
  3. No substantive orders can be made in this suit as it has suffered the twin tragedy of abatement and dismissal.
  4. The Applicant has not made any application seeking extension of time within which to revive the suit and/or add the legal representative as held in *Rebecca Mijide Mungolwe v Kp&L Co. & others* 2017 eKLR.
  5. The Respondent is yet to be enjoined as a defendant to give him room to apply for revival of the suit.
  6. There is inordinate delay on the part of the applicant in filing this application in July 2022 some 37 months after the suit abated in June 2019.
  7. There is no basis for granting the orders sought as the Applicant has not established valid grounds.
  8. The application is scandalous, vexatious and otherwise an abuse of the Court process and should be dismissed with costs.
9. The Applicant's submissions were filed by Ms Achala who came on record on August 2, 2022. Mr Okeyo filed submissions on behalf of the respondent.
10. I have considered the application, the affidavit in support thereof, the grounds of opposition and the submission by counsel. The applicable law is order 24 rule 4(1) (2) and (3) of the *Civil Procedure Rules* and not order 24 rule 3(2) as submitted by counsel for the Respondent. And it reads:
- 4(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." Emphasis mine
11. It is common ground that the 1<sup>st</sup> defendant died on 23<sup>rd</sup> September 2017 and the 2<sup>nd</sup> defendant on 14<sup>th</sup> January 2016 as per the copies of their death certificates annexed to the Applicant's supporting affidavit. None of them died in 2018 as averred in the Applicant's affidavit or as submitted by the Respondent's counsel. No application had been made within one year from September 23, 2017 and January 14, 2016 to substitute the deceased 1<sup>st</sup> and 2<sup>nd</sup> defendants. That means that the suit against them abated on 23<sup>rd</sup> September 2018 and January 14, 2017 as provided under sub-rule (3) of order 24 rule 4 of the *Civil Procedure Rules*. In the circumstances, even the dismissal order of June 27, 2022 was really superfluous. There was no suit in existence which could be dismissed by June 27, 2022 because it had long abated by effluxion of time. And there is no application before me to extend time.



12. The Applicant has deponed in paragraph 12 of her supporting affidavit that prior to learning about the dismissal of this suit, he had filed an application dated 28<sup>th</sup> June 2022 and filed on 29<sup>th</sup> June 2022 seeking to revive this suit. However, that application was never prosecuted for reasons best known to the Applicant.
13. On the prayer to set aside the dismissal order dated 27<sup>th</sup> June 2022, the Applicant has averred in paragraph 3 of his supporting affidavit that the notice to show cause did not reach him. There is an affidavit of service by one Hillary Okanga Ongwete dated 24<sup>th</sup> June 2022 to the effect that on 3<sup>rd</sup> March 2022 he posted “by registered post” to the last known addresses of all the parties herein the copies of the notices for dismissal of the suit. While there is no presumption that a letter sent by ordinary post reached the addressee, such a presumption arises in the case of a letter or any document sent by registered post as provided under section 3(5) of the *Interpretation and General Provisions Act* (cap 2). It is also evident from the Applicant’s own affidavit particularly paragraph 11 that he paid more attention in prosecuting Busia CMCC Case No E003 of 2021 and the resultant appeal and forgot and/or ignored this suit. That cannot be a good or sufficient reason for this Court to exercise its discretion in setting aside the dismissal order issued on June 27, 2022.
14. Finally, the record also shows that by a notice of motion dated October 4, 2018, the Applicant sought to substitute the deceased 1<sup>st</sup> defendant with Mildred Atsieno Adedi the Respondent. I have however perused the proceedings and it is clear that the said application has not been prosecuted to-date. Strictly therefore, Mildred Atsieno Adedi, although referred to as a Respondent is not a party in these proceedings as she has not been enjoined as such.
15. Ultimately therefore and having considered the notice of motion dated July 1, 2022, I make the following disposal orders:
  1. The notice of motion is devoid of merits and is hereby dismissed.
  2. The parties to meet their own costs.

**BOAZ N. OLAO**

**JUDGE**

**13<sup>TH</sup> JULY 2023**

**RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 13<sup>TH</sup> DAY OF JULY 2023.**

**BOAZ N. OLAO**

**JUDGE**

**13<sup>TH</sup> JULY 2023**

