



REPUBLIC OF KENYA



KENYA LAW
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Nguyo v Nzioki; Mulwa (Intended Defendant) (Environment & Land Case 223 of 2018) [2023] KEELC 20211 (KLR) (27 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20211 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 223 OF 2018
A NYUKURI, J
SEPTEMBER 27, 2023

BETWEEN

KINGI NZIOKI NGUYO PLAINTIFF

AND

JOHN MULWA NZIOKI DEFENDANT

AND

BERNARD MUTINDA MULWA INTENDED DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion dated March 4, 2022 filed by the Plaintiff seeking the following orders;
 - a. That the Honourable Court do revive the suit as against the Defendant which suit has abated.
 - b. That the Honourable Court do enlarge the time for filing an application by Kingi Nzioki Nguyo the Plaintiff herein for the legal representative of the Defendant herein Bernard Mutinda Mulwa to be substituted as Defendant in place of his deceased father John Mulwa Nzioki.
 - c. That costs of this application be in the cause.
2. The application is supported by the affidavit sworn by the Plaintiff on March 4, 2022. The Applicant deponed that the Defendant died on April 4, 2020 during the pendency of this suit and that it was only on June 8, 2021 when a limited grant of letters of administration Ad Litem were given to Bernard Mutinda Mulwa in Succession Cause No. E108 of 2021. He stated that in view of the fact that court operations were affected by the onset of Covid-19 pandemic and the estate of the Defendants was not



keen in obtaining grant of letters of administration, the delay herein is not inordinate. He also stated that although the suit against the Defendant had abated, the cause of action against the deceased's estate survives.

3. The application was opposed. Bernard Mutinda Mulwa filed a replying affidavit sworn on March 17, 2022. He stated that the Applicant had all along been aware that the deceased died on April 4, 2020 yet did not move the court for appropriate orders. That he obtained a limited grant on June 29, 2021 limited for purposes of representing Civil Application No. 90 of 2018 and Appeal No. 299 of 2018 in the Court of Appeal. He stated that the two suits were finalized hence the purpose of the grant was spent. That the suit property is not registered in the deceased's name and that he has no interest in it. He maintained that no sufficient cause had been given to explain the delay by the Applicant .
4. In a rejoinder Alphonse Muema Mbindyo, counsel for the Applicant filed a supplementary affidavit sworn on 31st October 2022. He stated that it had come to his knowledge that Bernard Mutinda Mulwa the Intended Defendant together with his brother Jackson Muisyo Mulwa had petitioned the High Court in Machakos HC P&A No. 20 of 2020 and that a full grant had been granted to them on July 6, 2021, that is one year and three months after the demise of the Defendant, when the suit had abated. He attached the grant issued on July 6, 2021 to Bernard Mutinda Mulwa and Jackson Muisyo Mulwa.
5. The application was canvassed by written submissions. On record are the Applicant's submissions filed on June 13, 2022 and the Intended Defendant's submissions filed on August 17, 2022; both of which the court has considered.

Analysis and Determination

6. I have carefully considered the application, the affidavits in support thereto, the response as well and the parties' rival submissions. In my considered view, the issue for determination is whether the Applicant deserves the orders sought.
7. Order 24 Rules 1, 4, and 7 of the [*Civil Procedure Rules*](#) provides as follows;

Rule 1 - No abatement by party's death if right survives

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Rule 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.

Rule 7 - Effect of abatement or dismissal

1. Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause fo action.



2. The Plaintiff or the person claiming to be the legal representatives of a deceased plaintiff or the 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 or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.
8. Therefore, where a Defendant dies and the cause of action survives or continues, on an application by any party to the suit, the court may join a legal representative of the deceased Defendant to the suit, for the case to proceed. Even where the suit has abated and the cause of action survives, on application, the suit may be revived and the legal representative joined to the suit; where sufficient cause is shown and the reason of delay is explained.
9. In this case, it is not disputed that the Defendant died on April 4, 2020. Although the Intended Defendant Bernard Mutinda Mulwa, has argued that there is delay, he has not challenged or denied the fact that he not only obtained grant of letters of administration for the deceased Defendant on July 6, 2021, which is after the suit had abated, but that he also concealed this fact from this court and the Plaintiff. In my view therefore, the conduct of the legal representative of the deceased Defendant's estate in failing to apply for the grant of letters of administration in time and concealing the fact that he had obtained the said grant is the real reason for delay on the part of the Plaintiff, as the Plaintiff could only move the court for substitution of the deceased Defendant after a legal representative of the deceased Defendant's estate had been appointed by the probate court.
10. In the premises, I am satisfied that the Applicant has demonstrated sufficient cause for delay in seeking revival of this suit. Since it is clear and undisputed from the grant obtained in Machakos HC P&A Cause No. 20 of 2020 that Bernard Mutinda Mulwa and Jackson Muisyo Mulwa are the administrators of the estate of the late John Mulwa Nzioki, it is only fair and in line with Sections 1A and 1B of the *Civil Procedure Rules*, that provide for the duty of the court to uphold overriding objective of ensuring a timely efficient, affordable and just resolution of disputes, that the two persons are joined to this suit as Defendants. Under Order 1 rule 10, this court has power to suo motto join parties to a suit that ought to be joined to such suit, for the effectual determination of the real issues in controversy. Therefore, suo motto, this court joins Bernard Mutinda Mulwa and Jackson Muisyo Mulwa as Defendants to this suit.
11. The upshot is that the application dated 4th March 2020 be and is hereby allowed as prayed. In addition, Bernard Mutinda Mulwa and Jackson Muisyo Mulwa are hereby joined to this suit as the legal representatives of the estate of John Mulwa Nzioki, the Defendant herein. The costs of the application are awarded to the Applicant.
12. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 27TH DAY OF SEPTEMBER, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Mutuku holding brief for Mr. Munyao for Intended Defendant

Mr. Mbindyo for Plaintiff



Ms Josephine – Court Assistant

