



**Muchai v Makeri & another (Environment & Land Case 702 of 2017)  
[2023] KEELC 19969 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19969 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 702 OF 2017  
JG KEMEI, J  
SEPTEMBER 21, 2023**

**BETWEEN**

**MWANGI MUCHAI ..... PLAINTIFF**

**AND**

**DANIEL WAINAINA MAKERI ..... 1<sup>ST</sup> DEFENDANT**

**SIMON CHEGE MURAYA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me is dated the November 1, 2022 in which the Applicant seeks the following orders;
  - a. That the Court do substitute John Maina Mwangi in place of the Plaintiff herein Mwangi Muchai, deceased.
  - b. That upon granting prayer (a) above the Court be pleased to discharge the prohibition orders issued on the February 26, 2018 and adopt the notice of withdrawal of the suit dated the August 24, 2020 and filed on the September 7, 2020 as an order of the Court.
  - c. Costs to be borne by the Respondent.
2. The application is based on the grounds therein and the Supporting Affidavit of the John Maina Mwangi, the administrator of the estate of the late Mwangi Muchai who died on the March 10, 2022. The deponent avers that he has the authority of the co-administrator, one Harun Kimani Mwangi dated the October 28, 2022 to depose of the matter pursuant to the Grant of Letters of Administration issued on the May 11, 2021.
3. He averred that the dispute was resolved on the March 5, 2020 vide the Judgment and decree issued in ELC 94 of 2018 - Muranga in which the Plaintiff was adjudged as the owner of the suit land. That this



- suit had to be stayed to allow another suit filed in Nairobi being HCCC No 258 of 2012 (OS) to be heard and concluded. That this case was dismissed on the October 29, 2018 for non-attendance.
4. Further that prior to the dismissal of HCCC No 258 of 2012, the Court had issued the following orders on the February 16, 2018;
    - a. That a temporary order of injunction be and is hereby issued restraining the 2<sup>nd</sup> Defendant by himself and / or by his employees servants and / or agents from interfering with the Plaintiff's occupation and quiet user and enjoyment of the suit land LOC 1/CHOMO/20 until the hearing and determination of this suit.
    - b. That a prohibitory order be and is hereby issued against the 2<sup>nd</sup> Defendant prohibiting him from carrying on any dealings with the title to the suit land LOC1/CHOMO/20 until the hearing and determination of the suit.
  5. That subsequent to para 4 above the said orders of prohibition were registered on the title on the March 5, 2018 barring any dealings on the land pending the hearing and determination of the suit (ELC 702 OF 2017).
  6. The Applicant states that he has been unable to register the decree in ELC 94 OF 2018 on account of prohibitory orders issued in this suit and registered against the suit land. That the Land Registrar wants the prohibitory order dated the February 16, 2017 registered against the title to be discharged to pave way for the execution of the decree in the ELC 94 OF 2018.
  7. The 1<sup>st</sup> Respondent has not opposed the application despite service.
  8. The application is opposed by the 2<sup>nd</sup> Respondent vide the Replying Affidavit sworn on the April 4, 2023 in which he deposed that the application is defective in form and substance in that the Applicant is seeking to execute a Judgement of another Court through the application, an act that is contrary to the law. That the Applicant has filed a multiplicity of suits in various Courts and that he is the author of the current scenario and urged the Court to dismiss the application.
  9. The application was heard orally on the May 2, 2023. The Applicant's Counsel reiterated the contents of the Applicant's Affidavit and added that the original Plaintiff passed on and his son, the Applicant seeks substitution in the suit as well as the discharge of the prohibition issued by the Court and registered on the title to enable them execute the decree of the Court in ELC 94 of 2018 in favour of his fathers' deceased estate. Further that a notice of withdrawal of the current suit had been filed on the August 24, 2020 but the same has not been adopted by the Court.
  10. The 2<sup>nd</sup> Respondent argued that the Applicant never led any evidence to proof his case. He expressed no objection to the issue of substitution. He relied on his Affidavit on record and urged the Court to dismiss the application for being unmeritorious.
  11. The issue for determination is whether the Applicant is deserving of the orders of substitution. The second issue is whether the orders of prohibition issued on the February 26, 2018 should be discharged and thirdly, whether the notice of withdrawal of the suit filed on the August 24, 2020 should be adopted.
  12. Order 24 rule 1 and 2 of the *Civil Procedure Rules* provides:-
    - (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 subrule (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.

13. [Order 24, rule 7.] Effect of abatement or dismissal 7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action. (2) The Plaintiff or the person claiming to be the legal representative 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.
14. In the case of *Said Sweilem Gbeithan Saanum Vs Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR*, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

' There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the Court may in its discretion for 'good reason' determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The 'good reason' therefore relates to application for extension of time to join the Plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the Court he was prevented by 'sufficient cause' from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.'

15. In the case of *Titus Kiragu Vs Jackson Mugo Mathai (2015)eKLR* it was held that:

' It is not the act of the Court declaring the suit as having abated that abates the suit but by operation of law.'

16. In the case of *Charles Mugunda Gacheru Vs Attorney General & Another (2015) eKLR*, it was held that for a Court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the Applicant was prevented by a sufficient cause from continuing the suit.
17. Equally in the case of *Rukwaro Waweru Vs Kinyutho Ritbo & Another (2015) eKLR*, the Court held that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.



18. Going by the above provisions of the law, it is not in doubt that the suit has abated. I say so because my perusal of the death certificate read together with the Grant of Letters of Administration on record clearly discloses that Mwangi Muchai died on the March 10, 2021 and not March 10, 2022 as stated by the Applicant. It therefore follows that the suit abated on the March 10, 2022. The application herein was filed on the November 2, 2022, a period of about 8 months later. It is notable that the Applicant has not sought to revive the suit. The application for substitution was not made within one year. An abated suit needs revival under Rule 7(2) of the Civil Procedure Rules. The proper way to proceed is to seek revival of the suit in the same application for substitution. This has not been done.
19. An abated suit is non-existent in the eyes of the law and it is resurrected through a process of revival. For a suit to be revived an appropriate application must be presented to Court and the Court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.
20. I am in agreement with the decision of the Court in *Titus Kiragu Vs Jackson Mugo Mathai (2015)eKLR* in saying that this suit is abated by operation of the law. The Applicant failed to move the Court to revive the same.
21. In the end the application is unmerited. It is dismissed with costs to the 2nd Respondent.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 21<sup>ST</sup> DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mrs. Magwa for Plaintiff

Defendant 1 – Absent but served

Defendant 2 – present in person

Court Assistant – Phyllis & Lilian

