



REPUBLIC OF KENYA



Njathi t/a Premier School v Katingi & another (Environment & Land Case 1109 of 2013) [2023] KEELC 21187 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21187 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1109 OF 2013**

**MD MWANGI, J
OCTOBER 26, 2023**

BETWEEN

PETER GACHEHA NJATHI T/A PREMIER SCHOOL PLAINTIFF

AND

SILA WAMBUA KATINGI 1ST DEFENDANT

**DAMARIS MUMO MALINDI (SUED AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF GABRIEL MUTISYA KILONZO
(DECEASED) 2ND DEFENDANT**

RULING

1. By the Notice of Motion dated 10th June, 2022, the Plaintiff moved this court for orders that:
 - a. The suit against the 2nd Defendant be and is hereby reinstated
 - b. The 2nd Defendant be substituted with Damaris Mumo Malindi who is one of the legal representatives of the Estate of the late Gabriel Mutisya Kilonzo.
 - c. Leave be granted to the plaintiff to amend the Plaintiff in terms of the Draft Amended Plaintiff and annexed herewith.
 - d. That the draft Amended Plaintiff be deemed as duly filed.
 - e. That the cost of this application be in the cause.
2. The application is expressed to be brought under Article 159 (2) of *the Constitution*, Section 3A & 95 of the *Civil Procedure Act*, Order 8 rule 7, Order 51 rule 1 of the *Civil Procedure Rules* 2010.
3. The Application is premised on the grounds on the face of it and further supported by the affidavit of Cynthia Musembi deponed on the 10th June, 2022. The deponent avers that the Plaintiff filed the



present suit in 2013. That shortly after serving the 2nd Defendant with the suit documents, the 2nd Defendant passed away on 22nd September 2013.

4. The Advocate for the 2nd Defendant had notified this court of their intention to substitute the 2nd Defendant with his legal representative. Despite the time being enlarged severally to enable substitution, the Advocate failed to do so. The suit against the 2nd Defendant therefore abated by operation of the Law.
5. She states that the Plaintiff is still desirous of prosecuting the suit against the 2nd Defendant. The Plaintiff made efforts to identify the personal representatives of the 2nd Defendant. It is then that the Plaintiff came to know of Succession Cause No. 44 of 2014 where letters of Administration in the Estate of the 2nd Defendant had been issued to the deceased's wife, one Damaris Mumo Malindi and Salvador Kilonzo Mutisya.
6. The Plaintiff, therefore, seeks to reinstate the suit against the 2nd Defendant as there are personal representatives that can be sued on behalf of the 2nd Defendant. The Plaintiff avers that the application has been filed without undue delay hence it is in the interest of justice that the suit against the 2nd Defendant be reinstated and determined conclusively, on its merits.
7. Regarding the amendment of the Plaintiff, the deponent avers that the Plaintiff wishes to amend the Plaintiff to include alternative prayers. The additional prayers will aid this court to determine the real issues in dispute and protect the Plaintiff's interest in the suit property.
8. No prejudice will be suffered by any party to this suit if leave is granted to effect the amendment.

Replying Affidavit

9. The application is also opposed by the Respondent through the replying affidavit of Damaris Mumo Malindi deponed on 3rd July, 2023 in which she inter alia deposed that; the 2nd Defendant Gabriel Mutisya Kilonzo died on 22nd September, 2013 hence, the suit against him abated one year thereafter. It is now about 10 years since the 2nd Defendant passed on. The delay in bringing the current application is inordinate and no sufficient cause/reason has been advanced by the Applicant.
10. She avers that the 2nd Defendant had purchased the Suit Property from the 1st Defendant before the 1st Defendant fraudulently sold it to the Plaintiff for a second time. The deceased is a victim of the fraud perpetuated by the 1st Defendant and was not refunded his money. The deceased never owned the suit land and therefore, he was wrongly sued in these proceedings.
11. She depones that the draft Amended Plaintiff introduces allegations of fraud and collusion by the Defendants. Fraud and collusion to dispossess the Plaintiff's land are crimes and personal in nature and the same do not survive a deceased person.
12. The deponent states that both the Plaintiff's suit and the application are incompetent, abuse of the court process, frivolous and vexatious, as such, the application ought to be declined and the deceased be allowed to continue resting in peace.
13. The 1st Defendant despite being served with the application, never filed any response.

Court's Directions

14. By mutual consent of the parties, the court directed that the application be dispensed with by way of written submissions. Both parties complied. The court has had the opportunity to read and consider the said submissions by the parties herein.



Issues for determination

15. I have considered the application and the rival affidavits as well as the submissions filed. The court is of the opinion that the issues for determination in this matter are: -
- a. Whether the suit as against the 2nd Defendant should be revived and the 2nd Defendant substituted with his personal representatives.
 - b. Whether the Plaintiff should be granted leave to amend the Plaintiff.

Analysis and determination

A. Whether the suit against the 2nd Defendant should be revived and the 2nd Defendant substituted with his personal representatives.

16. Order 24 rule 4 of the *Civil Procedure Rules* provides for the effect of death of one or several Defendants or of the sole Defendant. It states that:

- i. 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.
- ii. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- iii. Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant”.

17. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 rule 7 (2) provides a window to reinstate a suit that has abated as follows:

“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.”

18. The Applicant argues that the Advocate for the 2nd Defendant notified this court of their intention to substitute the 2nd Defendant with his legal representative. Despite the time of substitution being enlarged severally, he failed to do so. Therefore, the suit as against the 2nd Defendant abated on the 8th November 2021 when the court noted so. The submission by the Plaintiff/Applicant as to the time when the suit abated is not correct. The suit abated on one year after the death of the 2nd Defendant. The suit abates by operation of the Law whether the Court pronounces it or not.
19. 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. In the case of *Said Sweilem Gheithan 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.”

20. 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.”

21. It is a common ground that the 2nd Defendant passed away on 22nd September 2013. The suit against him automatically abated in September 2014 by operation of law and not on 8th November, 2021 as averred by the Plaintiff. The court only confirmed the abatement on the 8th November, 2021.

22. Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient cause shown.

23. The Court of Appeal in the case of the Honourable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011 stated that:

“Sufficient cause or good cause in law means: the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused. (See Blacks Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”

24. 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. In the case of Rukwaro Waweru vs. Kinyutho Ritho & 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.

25. Be that as it may, when one of the defendants dies and the cause of action survives or continues and upon an application made, the Court shall cause the legal representative of the deceased to be made a



party or to be substituted in place of the deceased party to proceed with the case. Section 2 of the [Civil Procedure Act](#) defines a legal representative as follows:

“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued”.

26. In the instant application, the grant of representation in respect of the 2nd Defendant was issued on 1st April, 2014 to Damaris Mumo Malindi and Salvador Kilonzo Mutisya. The deceased Defendant was however not substituted within one year, causing the suit to automatically abate.
27. From the Court record, it is evident that the Advocate for the 2nd Defendant had indeed informed the Court of his intention to substitute 2nd Defendant severally. When it did not happen, the Plaintiff moved the Court through the application now under consideration.
28. The Court’s discretion is meant to avoid injustice or hardship. The Court should, unless substantial prejudice may be caused to the other party, endeavor to do substantive justice. The Respondent has not demonstrated the prejudice that she stands to suffer if the suit against the estate of the deceased is revived.
29. On the issue of delay as was enumerated in the case of [Jackson Ngungu Kaguae vs. Attorney General & 595 Others](#) [2016] eKLR the court held that the test for what amounts to delay is that which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. The court will determine the issue of delay on a case by case basis whereby a day or two may be considered as inordinate delay while 5 or so years may be considered otherwise. It depends on the circumstances of the case and whether sufficient explanation is given to convince the court.
30. Accordingly, the court allows the revival and reinstatement of the abated suit as against the 2nd Defendant. Further, the deceased 2nd Defendant shall be substituted with his legal representatives.

Whether the Plaintiff should be granted leave to amend the Plaint

31. The instant application has been brought under the provisions of Section 100 of the [Civil Procedure Act](#), and Order 8 Rule 5 (1) of the Civil Procedure Rules.
32. Section 100 of the [Civil Procedure Act](#) provides that: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.
33. Order 8 Rule 5 (1) of the [Civil Procedure Rules](#) provides that: -

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
34. It is evident from the above provisions of the law, that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other side can be compensated by costs.



35. A wider footage on the issue was given in the case of *Ochieng and 2 others v First National Bank of Chicago* (1995) eKLR, where the Court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings as follows:
- a. “the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings;
 - d. that as a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side; and
 - e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation”.
36. The above mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend as held in the case of *St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR.
37. The proposed amendments as indicated in the Draft Amended Plaint shows that the Plaintiff intends to state the particulars of the alleged fraud and seek an alternative prayer of adverse possession. Evidently, the proposed amendments emanate from the same transaction and the Plaintiff is not introducing any new cause of action.
38. Having held that the suit as against the 2nd Defendant be revived, the court would have no basis to deny the Plaintiff leave to amend. None of the Defendants will be prejudiced in any way by the proposed amendments as they can also amend their own pleadings, if necessary. For the purpose of determining the real questions in controversy between the parties herein, this court will grant the Plaintiff’s prayer to amend the Plaint.
39. Accordingly, this court makes the following orders: -
- a. The Plaintiff’s suit as against the 2nd Defendant is hereby revived and/or reinstated.
 - b. The 2nd Defendant be substituted with Damaris Mumo Malindi and Salvador Kilonzo Mutisya who are the legal representatives of the Estate of the late Gabriel Mutisya Kilonzo.
 - c. The Plaintiff is granted leave to amend his plaint.
 - d. The amended plaint to be filed and served within 14 days from the date of this ruling.
 - e. The Defendants are granted corresponding leave to amend file and serve their amended defences within 14 days from the date of service of the amended plaint, if need be.
 - f. The Costs of this application shall be in the course.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF OCTOBER, 2023.



M. D. MWANGI
JUDGE

