



**Arodi & another (Suing through their Attorney Nicodemus Atito Arodi) v Midiwo;
Housing Finance Company of Kenya & another (Third party) (Environment &
Land Case 43 of 2020) [2023] KEELC 20939 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 43 OF 2020
BN OLAO, J
OCTOBER 25, 2023
(FORMERLY KISUMU ELC CASE NO. 1 OF 2019)**

BETWEEN

JEREMIAH ARNOLD OPANDE ARODI 1ST PLAINTIFF

IDA NEREAH ADHIAMBO ARODI 2ND PLAINTIFF

SUING THROUGH THEIR ATTORNEY NICODEMUS ATITO ARODI

AND

WASHINGTON JAKOYO MIDIWO DEFENDANT

AND

HOUSING FINANCE COMPANY OF KENYA THIRD PARTY

LEGEND VALUERS LIMITED THIRD PARTY

RULING

1. Order 24 Rule 3(1) and (2) of the *Civil Procedure Rules* provides that:

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- (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.” Emphasis mine.

2. Washington Jakoyo Midiwo (now deceased), and as the defendant, obtained leave to commence Third Party proceedings against the Housing Company of Kenya (the 1st Third Party) on February 7, 2019. The said 1st Third Party filed its statement of defence dated July 16, 2019 and subsequently filed its documents and witness statements as required. Meanwhile, there have been on-going proceedings between the other parties herein with respect to various applications.
3. The deceased passed away on June 14, 2021 and is yet to be substituted.
4. The 1st Third Party has now approached this Court vide its Notice of Motion dated August 5, 2023 in which it seeks the following substantive orders:
 1. That this Honourable Court be pleased to formerly declare the defendant’s claim by way of Third Party Notices against the 1st Third Party thus Housing Finance Company Ltd has abated and costs at the abated suit by the defendant against the 1st Third Party be ordered to be recovered from the Estate of the deceased defendant.
 2. That in the alternative, the deceased defendant’s Third Party Notice against the 1st Third Party be formerly declared to have stood dismissed for want of prosecution in circumstances where the defendant has not taken any steps to take directions on the Third Party proceedings herein or otherwise taken any steps to prosecute the said Third Party proceedings in any manner at all, where more than two years have lapsed, or otherwise the Court be pleased to dismiss the Third Party proceedings against the 1st Third party for want of prosecution, for not having taken any step on the Third Party proceedings against the 1st Third Party for more than one year since February 7, 2019.
 3. That costs of this application be provided for.
5. That application which is the subject of this ruling is predicated on Sections 1A, 1B and 3A of the *Civil Procedure Act*, as well as Order 17 Rule 2(5) and Order 24 Rule 3(1) and (2) of the *Civil Procedure Rules* and all other enabling provisions of the law. It is based on the grounds set out therein and supported by the affidavit of Mr Jude Ragot counsel for the said 1st Third Party.
6. The crux of the application, part of which I have already alluded to above, is that having been enjoined in these proceedings by the deceased defendant, the 1st Third Party filed its documents and witness statement on July 16, 2019. However, the deceased defendant died sometime on June 14, 2021 over 2 years ago and is yet to be substituted by his personal representative, if any. The Third Party proceedings instituted by the deceased defendant against the 1st Third Party have therefore abated within the meaning of the provisions of Order 24 Rule 3(1) and (2) of the *Civil Procedure Rules* and the 1st Third Party is properly entitled to an award of costs to be recovered from the deceased’s estate.
7. Further, in terms of the provisions of Order 17 Rule 2(1) and (3) of the *Civil Procedure Rules*, the deceased defendant’s Third Party Proceedings should be declared as dismissed for want of prosecution within the meaning of sub-rule (5) thereof as more than 2 years have lapsed without any activity. The continued pendency of these Third Party proceedings against the 1st Third Party without prosecution or any activity after the death of the deceased defendant, is prejudicial to the 1st Third Party and to the fair administration of justice. It is only proper and in the interest of justice that the Third Party



proceedings between the deceased defendant and the 1st Third Party should be declared as having abated and/or in the alternative, be dismissed for want of prosecution.

8. Annexed to the application is a copy of the obituary confirming that the deceased defendant passed away on June 14, 2021.
9. When the application came up for hearing on October 5, 2023, Mr Tiego was present for the deceased defendant with Mr Ragot for the 1st Third Party and also holding brief for Mr Otieno for the plaintiff.
10. Mr Tiego informed the Court that he was aware that succession proceedings had been filed at the High Court in Kisumu vide Cause No E2030 of 2021 in respect to the Estate of the deceased defendant although he was not acting for any of the parties in that matter. However, he made a request, as a friend of the Court, that this matter be mentioned in 30 days to await the outcome of the succession proceedings.
11. Mr Ragot was of the view that the under the law, there is no suit pending between the deceased defendant and the 1st Third Party the same having lapsed.
12. As the application was not opposed, I directed that I would deliver my ruling on the same.
13. As no response was filed against the application, it remains un-opposed. It is not in doubt that the deceased passed away on June 14, 2021. That is some 26 months ago. No legal representative has been appointed and made a party in place of the deceased defendant. From the time the Third Party Notice was filed and served upon the 1st Third Party by the deceased defendant, the two became clothed with the same rights and obligations as would be expected of a plaintiff and a defendant with respect to their respective claims against each other as provided for in law. The deceased defendant who issued and served the Third party Notice became the Plaintiff while the 1st Third party became the defendant. Their relationship was therefore governed by the provisions of Order 24 Rule 3(1) and (2) which I have already cited above. And since the deceased defendant died on June 14, 2021 and no legal representative has been appointed to represent his Estate more than 2 years later, his claim as against the 1st Third party has abated by operation of the law.
14. Mr Tiego, who readily admitted that he has no instructions to act for the deceased defendant's Estate, decided to wear the big gown and wig of a friend of the Court and made a valiant attempt to salvage what is clearly a lost cause. While I applaud counsel's verve and vigour in bringing to the Court's attention the fact that the deceased's Estate is now the subject of Kisumu High Court Succession Cause No E2030 of 2021 and in seeking 30 days to appraise this Court of the status of those proceedings, the hard fact is that there are no Third Party proceedings which the deceased defendant's Estate can pursue against the 1st Third Party unless extension of time is sought and granted once a legal representative is appointed for that Estate. In the case of *Said Sweilem Gbeithan Saanum -v- Commissioner of Lands & 5 Others* 2015 eKLR, the Court of Appeal explained the provisions of Order 24 of the *Civil Procedure Rules* thus:

“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.”



In the case of *Titus Kiragu -v- Jackson Mugo Mathai*, 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 the law.”

See also the case of *Rebecca Mijide Mungole & Another -v- Kenya Power & Lighting Company Ltd & 2 Others* 2017 eKLR where the Court of Appeal stated thus in relation to Order 24 Rule 3 of the *Civil Procedure Rules*:

“It is the effluxion of time that causes the suit to abate.”

15. Once a legal representative of the deceased defendant’s estate is appointed, then he may, for good reasons, seek the extension of time to revive those Third Party proceedings against the 1st Third Party herein. Before that is done, I must up-hold the oral submissions by Mr Ragot that a year after June 14, 2021, the Third Party proceedings lapsed by effluxion of the law.
16. The up-shot of all the above is that having considered the Notice of Motion dated August 5, 2023, I allow it and make the following disposal orders:
 1. The deceased defendant’s claim by way of Third Party Notice against the 1st Third Party is hereby declared to have abated.
 2. Costs of the abated Notice shall be recovered from the Estate of the deceased defendant.
 3. This file was transferred to this court after Justice A Ombwayo then sitting at Kisumu ELC recused himself. The Judge is no longer at that Court having been transferred to Nakuru ELC. This file shall therefore be returned to the Kisumu ELC Registry for safe custody.

RULING DATED, SIGNED AND DELIVERED ON THIS 25TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

