



REPUBLIC OF KENYA



KENYA LAW
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**Kwenja & 2 others v Kwenja (Environment & Land Case 7 of 2019)
[2023] KEELC 22543 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22543 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 7 OF 2019
A KANIARU, J
OCTOBER 23, 2023**

BETWEEN

ALBERT MWANIKI KWENJA 1ST PLAINTIFF

LEONARD IRERI KWENJA 2ND PLAINTIFF

BERNARD KIURA KWENJA 3RD PLAINTIFF

AND

JENARDO NJOKA KWENJA DEFENDANT

RULING

1. The focus of this ruling is a Notice of Motion application dated 06.12.2022 and filed on the same date. It is expressed to be brought under Articles 159(2)(d) and (e) and 259(9) of *the Constitution* of Kenya 2010, Sections 1A,1B and 3A of the *Civil Procedure Act*, Order 1 Rule 10(2), Order 24 Rules 2,3,4 and 7, and Order 51 of the Civil Procedure Rules 2010, and all other enabling provisions of the law. The Applicants who are the 1st, 2nd & 3rd plaintiff's in the suit are Albert Mwaniki Kwenja, Victor Muchangi Njeru (as the Executor of the Estate of the late Leonard Ireri Kwenja) & Benard Kiura Kwenja respectively. The Respondents are – Jane Nyaguthii Njoka and Hellen Wambui Maina (as the Administrators of the Estate of the late Jenardo Njoka Kwenja). The Proposed Interested Party is Fides Kairu Mvuria (as the Administrator of the Estate of the Late Ephantus Mvuria Kwenja). The prayers sought are as follows:
 - (1) That the instant suit as against the Defendant, having abated by operation of the Law on or about the 23.02.2021, be and is hereby revived and reinstated.
 - (2) That there be an extension of the one-year time limit within which an application for the substitution of the deceased Defendant by his legal representatives ought to have been made, and which lapsed on 23/02/2021, so as to accommodate the instant application for substitution and related proceedings.



- (3) That Jenardo Njoka Kwenja, deceased as of 23.02.2020 be and is hereby substituted by Jane Nyaguthii Njoka and Hellen Wambui Maina who are the administrators of his Estate as the defendant herein.
 - (4) That Leonard Ireri Kwenja, deceased as of 01.12.2020, be and is hereby substituted by Victor Muchangi Njeru who is the executor of the Will pertaining to his estate , as the 2nd plaintiff herein.
 - (5) That for the avoidance of doubt, all court proceedings herein including applications filed and orders issued after the abatement of the suit on 23.02.2021 without substitution of the deceased defendant be and is (sic) hereby regularized hence valid.
 - (6) That Fides Kwenja Mvuria be added to this suit as an interested party in her capacity as the Administrator of the Estate of the late Ephantus Mvuria Kwenja.
 - (7) That the plaintiffs be and are hereby granted leave to amend the plaint herein as necessary and to file and serve the amended Plaint within seven days of the date of this order.
 - (8) That the costs of this application be in the cause.
2. The application is premised on the grounds mainly that the 2nd Plaintiff and the Defendant are both deceased; that since the defendant died on 23.02.2020 the suit by law automatically abated against him after one year of his death; that the death of the 2nd Plaintiff on 01.12.2020 did not affect the cause of action herein which continued to subsist, hence it is necessary for the Executor of the 2nd Plaintiff's estate to be made a party; that on 19.03.2021 this court issued a Notice to Show Cause as to why this suit should not be dismissed for want of prosecution and the advocates for both the Plaintiff's and Defendant prosecuted the same; that the final orders of this court might possibly affect the Estate of the Late Ephantus Mvuria Kwenja who had proprietary interest in the suit property, which makes it necessary to add the administrator of his estate, Fides Kairu Mvuria, as an interested party.
 3. Further, the court is being asked to take judicial notice that it was during the period relevant herein, that is February 2020 – December 2021, that the corona virus pandemic literally brought the world to a standstill through lockdowns and related measures including closure of courts; that then the 2nd plaintiff also died a few months after the defendant, meaning the Kwenja family to which all parties herein belong had suffered two huge losses in succession within a short period of time and therefore needed time to gain stability; that upon the death of the defendant and upon realizing that the estate of the Defendant was not keen on pursuing the appointment of an Administrator, the plaintiffs filed two citations through Embu High Court Misc Succession Cause No. 8 OF 2021 and NAIROBI/HCFP & A/E 2017 OF 2021 which ultimately led to the gazettment of the Application for Grant of Letters of Administration for the deceased defendant.
 4. The application came with a supporting affidavit in which the Applicants reiterated the grounds set out in the Notice of Motion and annexed to the same a copy of the 2nd Plaintiff's & Defendant's death Certificates, Copies of the Citations, and Extracts from the Kenya Gazette.
 5. The application was responded to vide a replying affidavit dated 10.03.2023 and filed on 23rd March 2023. It was drawn by the intended defendant and personal representative of the Defendant – Hellen Wambui Maina. She deposed inter alia, that the plaintiff has not demonstrated any reasonable grounds warranting granting of the orders sought; that the 2nd Plaintiff's advocate failed to make an application for substitution of the deceased 2nd Plaintiff despite the matter having been mentioned severally before court to confirm the same; that the deceased 2nd plaintiff's advocates and personal representatives have been guilty of prolonged and inexcusable delay in proceeding with the suit within a year of his demise



which clearly shows loss of interest in prosecuting this matter; that continued pendency of the suit is oppressive to the defendant and reinstating the same will not only prejudice the fair trial of the suit, but also affect the peaceful and quiet enjoyment of the suit land by him as the registered proprietor. That it is also an abuse of the court process; that litigation ought to be conducted expeditiously; and that the same must come to an end. She prays that the application be dismissed with costs.

6. The Applicants filed a Supplementary affidavit dated 22.03.2023, where they deposed that the Respondent's Affidavit ought to be struck off the record having been filed outside the leave period granted by the court; that the said Replying Affidavit is incompetent and must be struck off the court record for the reason that it has been deposed by one of the Administrators of the deceased defendant without an express order allowing such substitution to take place; and that it is the Applicant's present application which had sought for such an order but which as of this moment is yet to be granted.
7. The Applicants depone further that the defence on 07/02/2023 communicated that it was not opposed to prayer no. 1 of the present application being allowed and that in the subject Replying Affidavit, the defence has clearly taken the contrary position without explaining to the court the reason for the change. I think it is important though to point out at this stage that I have perused the court record and the proceedings of 07.02.2023 and there appears to be no record of such admission. Therefore that statement may be misleading. Nevertheless, the Applicants go on to depone that this court opted to allow for additional time for a citation to be filed so that the issue of appointment of a personal representative of the Defendant's estate could be fast tracked; that the death of one out of several plaintiff's does not cause the suit to abate if the cause of action continues to subsist; and that the death of the 2nd plaintiff definitely did not cause the suit to risk abatement at any time; that the defence will suffer no prejudice if the present application is allowed; and that it will be in the interest of justice if the orders sought are granted.
8. The application was canvassed through written submissions. The Applicant's submissions are dated 27.03.2023. The Applicants in their submissions give a brief background to the case and mainly expound on the grounds raised in it and the Affidavits. They reiterate the position that they have given sufficient cause for the reinstatement of the suit as required by law. To support their position they have quoted the cases of Hon. Attorney General v the Law Society of Kenya & Anor Civil Application No. 133 of 2011 citing the case of Ebby Minayo Mungasia vs Shadrack Macharia Mwangi & Anor (2020) eKLR, Vue Taure Vue & Anor vs Felix Tsori Chivatsi & Anor (2020) eKLR as cited in Ebby Minayo Mungasia vs Shadrack Macharia Mwangi & Anor (2020) eKLR.
9. The Respondents on the other hand filed submissions on 05.06.2023. They submitted that the Applicants have not demonstrated sufficient cause to warrant the court to exercise its discretion in their favour. They also gave an analysis of what sufficient cause entails and sought to rely on the cases of Rukwaro Waweru v Kinyutho Ritho & Anor (2015)eKLR, Attorney General v LSK & Anor (2013) eKLR, Daphne Parry v Murray Alexander Carson (1963)EA 546 and Charles Mugunda Gacheru vs AG & Anor (2015) eKLR.
10. They further submit that an application for joinder as Interested parties is provided for only under Rule 7(1) of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which in turn does not apply to civil suits but Constitutional Petitions and Judicial Review suits. That the prayer seeking joinder of the proposed interested party is fatally defective and thus cannot be granted and that the Applicant's ought to have joined the proposed interested party as either a Plaintiff or a Defendant to the suit. They also submit that the Applicant's application has not expressed how the proposed interested party meets the criteria for joinder as an interested party. They cite the case of Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others (2014) eKLR to support their position.



11. The procedure on the death of a plaintiff or plaintiffs is provided for under order 24 Rule 3 of Civil Procedure Rules as follows:

3.

(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)

12. The procedure on the death of a defendant or defendants is provided for under Order 24 Rule 4 of the Civil Procedure as follows :-

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.

13. From the above provisions, the law is clear that a suit abates after one year of the death of, in this case, a sole defendant. The defendant herein is said to have died on 23.02.2020. The suit against him therefore abated on 23.02.2021. Nevertheless, under Order 24 Rule 7, a court has discretion to revive an abated suit. That provision of law is drawn as follows:-

(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. It will be noted that the power to revive a suit that has abated is usually a discretionary one and the court has to consider whether sufficient cause has been given for failure to continue the suit. In this case the suit abated on 23.02.2021 and this application to revive the suit was filed on 06.12.2022 after the abatement of the suit. This is approximately 19 months after the suit abated. The Applicants have explained that the Defendant died on 23.02.2020 at a time that marked the onset of the corona virus pandemic that forced lockdowns and other measures which included closure of courts. That during the said period on December 2020, the 2nd Plaintiff herein also died which meant that the entire family



(since all the parties to the suit are brothers) had suffered two huge losses within a space of nine months and that any family in such a scenario would need time to gain stability.

15. It is worth pointing out that a look at the court record reveals that the suit came up for Notice to Show Cause why the same should not be dismissed for want of prosecution on 17.05.2021. Both counsel on record then for all the parties prosecuted the said Notice to Show Cause and the court being satisfied with the explanations given directed that the suit would not be dismissed and that the same would proceed to trial. The parties though irregularly so, as the suit had abated by operation of law, continued to actively pursue the suit which means that they had not lost interest in the same.
16. I am satisfied with the explanation given by the Applicant's and find it to be sufficient cause for not continuing with the suit. I also find this to be a proper case for this court to exercise its judicial discretion under articles 50 and 159(2)(d) of the constitution to do substantive justice without due regard to procedural technicalities.
17. I am guided by the case of *Kinyua v Go Ombachi* [2019] eKLR as cited in the case of *Chesire & 4 others v Kwambai & 3 others; Rono & 3 others (Interested Party); Sawe & another (Applicant) (Environment & Land Case 520 of 2012)* [2022] KEELC 120 (KLR) where the court made the following observation:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial "Sword of the Dancle" which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”
18. To decline to grant an order for the revival of the suit herein will be prejudicial to the Applicants as the same will amount to denying them an opportunity to have their case heard and determined on its merits. On the other hand I see no prejudice that will be occasioned to the Respondents should I grant the said orders as they will have an opportunity to defend the suit. It is also on this basis that I find that the Applicant's prayer to regularize all court proceedings conducted after the abatement of the suit and any orders issued therein to be merited and allow the same. I further find no reason to decline the Applicant's application to substitute the 2nd Plaintiff and the Defendant with their respective appointed Executor/Administrators as proposed.
19. Further, the Applicant's have made an application to join an interested party to this suit. The court while defining who an interested party is stated as follows in the case of *Communications Commission of Kenya and 4 Others v Royal Media Services Limited & 7 Others* Petition No. 15 OF [2014] eKLR as cited in the case of *Parinet Ole Kiseet v Sylvia Moi & 3 others; Ndegwa Kabogo (Interested party)* [2021] eKLR:

“An interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when



it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- (i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions:

- a) what is the intended party's state and relevance in the proceedings and
- b) will the intended interested party suffer any prejudice if denied joinder.?"

20. The law on joinder of interested parties was set out in the case of *Francis K. Muruatetu and another v Republic & 5 others* (2016) eKLR as cited in the case *Parment Ole Kiseet* (supra), where the court set out identifiable key elements for consideration in an application for joinder as an Interested Party. The elements are as follows: -

- “(a) The Personal interest or stake that the party has in the matter must be set out in the application. The Interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- (b) The prejudice to be suffered by the intended Interested Party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- (c) Lastly, a party must, in its application, set out the case and/or submission it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”

21. Going by the above court findings, in order for a party to be joined as an interested party, they ought to first demonstrate that they have a personal stake in the suit, the prejudice they will suffer in case of non-joinder, which prejudice must be demonstrated to the satisfaction of the court. They must also set out the case/and or submission they intend to make before the court and its relevance. In the case before me, the application to join the interested party has been brought by the plaintiffs and not even the alleged interested party. They merely speculate that the courts final orders might affect the estate of the deceased party who is said to have had a proprietary interest in the suit land.

22. That to me and going by the above decided cases, is not sufficient ground to have the interested party joined in the suit. There is no proper demonstration of what interest the proposed interested party has in this suit, or what submission they intend to make in the suit or even how they will be prejudiced should they not be joined. I find that the Applicant's have not made a proper case for the proposed interested party to be joined in this suit.

23. The upshot of the foregoing is that I allow the plaintiff's application dated 06.12.2022 in part in terms of prayers 1, 2, 3, 4, 5, 7 and 8.



24. Prayer no. 6 to join Fides Kwenja Mvuria as an interested party in her capacity as the Administrator of the Estate of the late Ephantus Mvuria Kwenja is hereby declined.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS DAY OF 23RD DAY OF OCTOBER, 2023.

A.K. KANIARU

JUDGE

In the presence of Omulama for applicant and M/s Murigi for M/s Mburu for defendant.

Interpretation: English/Kiswahili

