



**Guracha v Guracha & others (Environment & Land Case 81 of 2013)  
[2023] KEELC 21848 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21848 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 81 OF 2013  
FM NJOROGE, J  
NOVEMBER 30, 2023**

**BETWEEN**

**KAHASO SULUBU GURACHA ..... PLAINTIFF**

**AND**

**THE GURACHA & OTHERS ..... DEFENDANT**

**RULING**

1. The application by the Plaintiff dated 27.09.2023 brought under Order 51 Rule 1, Order 12 rule 6 and 7 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeks the following orders: -
  - a. Spent
  - b. That the Order made by this Honourable Court on 20<sup>th</sup> September, 2023 declaring the Plaintiff's suit to have abated be vacated and or set aside and this suit be reinstated for hearing on merit.
  - c. That the court do cause Eric Mwaduna & Shadrack Mwayele of P.O. BOX 949- Mombasa to be made parties to the suit as legal representatives of Thethe Guracha (deceased) in accordance with Order 24 Rule 4 of the Civil Procedure Rules.
  - d. That costs be provided for.
2. The application is supported by the grounds on the face of the application as well as the sworn supporting affidavit of Kahaso Sulubu Guracha. She deponed that the suit was declared to have abated without full proof of the death of the Defendant as no death certificate was availed and in the absence of the Plaintiff; that on the material day of that declaration, the matter was coming up for directions as to whether the defendant had substituted the "deceased" person and since the court seized of the matter was not sitting, it was not proper for the court which handled the matter to make such declarations without satisfying itself that the Defendant was indeed dead.



3. She also deponed that the Defendant herein has filed an appeal in the Court of Appeal, being Appeal No. E024 of 2023 and is pursuing the same. Further, that Eric Mwaduna & Shadrack Mwayeye are also participating in that appeal and they are co-petitioners in Succession Cause No. 30 Of 2017 which is the subject of Civil Appeal No. E024 of 2023 in the Court of Appeal; that the appeal was filed on 11<sup>th</sup> August, 2023 which is just one month prior to the filing of the present application and it cannot be explained how the defendant gave directions while deceased.
4. In response, the respondent filed a Replying Affidavit sworn by Eric Mwaduna on the 9<sup>th</sup> October, 2023 who asserted that when the matter came up for a mention his advocate informed the court that the suit had abated by virtue of the Defendant having met his demise on 22<sup>nd</sup> January, 2019 after which the Honourable Court directed him to file the deceased's Certificate of Death. That on 11<sup>th</sup> August, 2023 his advocate filed an affidavit attaching the Defendant's certificate of death and when the matter came up before court, the court acted upon the affidavit on record and proceeded to declare the matter abated. According to him, the plaintiff having been aware of the defendant's death and failing to file the current application outside the ambit of Order 24 Rule 4(3) of the Civil Procedure Rules, the same ought to be struck out with costs.

### **Determination**

5. This court has considered the application dated 27<sup>th</sup> September, 2023 and, in my view, what is for determination is whether this court ought to set aside the orders granted by this court on the 20<sup>th</sup> day of September, 2023.
6. The background to the application is that while parties were evidently awaiting the determination of succession proceedings pending in another court, this court at the instance of counsel for the defendant declared the present suit as abated on 20/9/2022 with which order the plaintiff was dissatisfied. The plaintiff's dissatisfaction peaked when he noted that on a date after the alleged date of demise, an appeal had been filed in the name of the person alleged to be deceased. One of the grounds relied on in impugning the declaration of the court is that it was issued without any evidence having been provided as to the demise of the defendant. However, I summarily dismiss this ground for the reason that there is an affidavit of Alfred Kizambo Mwadilo filed on 11/8/2023 exhibiting a death certificate showing the defendant was deceased. In the affidavit the copy of the Certificate of Death attached thereto shows that the said Thethe Guracha Birurumo died on the 22<sup>nd</sup> day of January, 2019. Though the plaintiff avers that he was not served with that affidavit, it is my belief that since all that was required was evidence of demise, the court properly relied on that affidavit in declaring the suit as abated. In addition, I do not perceive there to be any contestation that the said certificate of death is a false document. However, it remains to be seen whether on the basis of other grounds the application at hand ought to be granted.
7. The provisions of Order 24 rule 4 (4) of the Civil Procedure Rules are as follows:
  - (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) .....
  - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased Defendant.”



8. Further, Eric Mwaduna & Shadrack Mwayeye are participating in Civil Appeal No. E024 of 2023. They are co-petitioners in Succession Cause No. 30 Of 2017 which is the subject of Civil Appeal No. E024 of 2023. The applicant states that the appeal was filed on 11<sup>th</sup> August, 2023 which is just one month and it cannot be explained how the defendant was alive then to give directions. The intimation is that there is a chance that the defendant may not be deceased. However, I have stated before that the deaths certificate produced by way of an affidavit on oath in the matter has not been impugned.
9. Neither the fact that the surviving defendants have filed an appeal in the Court of Appeal nor as the fact that Eric Mwaduna & Shadrack Mwayele, the persons now sought to be substituted as the defendants, are participating in the said appeal can be ignored.
10. In the case of *Titus Kiragu – v- 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.”
11. In *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. Kinjutho Ritbo & Another* (2015) eKLR, the court held that it has the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown.
12. The Application was brought under, among others Order 51 Rule 15 of the *Civil Procedure Rules*. This is the provision which caters for situations where a court proceeds ex parte. It provides that “The court may set aside an order made ex parte.” The powers of the Court to set aside ex parte proceedings and orders is wide, but it must be exercised judicially. In the case of *Patel v E.A. Cargo Handling Services Limited* (1974) E.A. 75 the Court was of the view that the discretion of the Court in setting aside ex parte orders is very wide. It was stated as follows in that case:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties and the court will not impose condition on itself or fetter wide discretion given to it by the rules the principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
13. That the defendant has an appeal in the Court of Appeal and the other defendants Eric Mwaduna & Shadrack Mwayele are co-petitioners in Succession Cause No. 30 Of 2017 which is the subject of Civil Appeal No. E024 of 2023 in the Court of Appeal cannot be denied. However, it has not been demonstrated that the Succession Cause No. 30 Of 2017 relates to the estate of the defendant herein. without any grant of letters of administration, it would be futile to revive a suit or order substitution of the proposed parties. It can not be stated for certain that the said Eric Mwaduna & Shadrack Mwayele have capacity to be substituted for the defendant and consequently I hereby dismiss the application dated 27/9/2023. The costs of the application shall be in the cause.

**DATED, SIGNED AND ISSUED AT MALINDI ON THIS 30<sup>TH</sup> DAY OF NOVEMBER 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI.**

