



**Islam v Ali & 5 others (Environment & Land Case 320 of 2014)
[2023] KEELC 21931 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21931 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 320 OF 2014
NA MATHEKA, J
NOVEMBER 30, 2023**

BETWEEN

ISLAM K. ISLAM PLAINTIFF

AND

ZAMZAM M. HASSAN ALIAS ZAMZAM ALI 1ST DEFENDANT

ALI HASSAN ALI 2ND DEFENDANT

SHUWEIKA HASSAN ALI 3RD DEFENDANT

KHADIJA HASSAN ALI 4TH DEFENDANT

ABEID ABDULSWAMAD SAID 5TH DEFENDANT

**ATTORNEY GENERAL (SUED FOR AND ON BEHALF OF THE REGISTRAR
OF TITLES, MOMBASA) 6TH DEFENDANT**

RULING

1. The application is dated 17th January 2023 and is brought under Section IA, 1B and 3A of the [Civil Procedure Act](#), Cap 21 of the Laws of Kenya, Order 1, Order 24 Rule 3 (4) Order 51, Rule 1 of the [Civil Procedure Rules](#) 2010 Articles 150, 159 and (d) 2) (b) of the [Constitution](#) seeking the following orders;
 1. That this Honourable court be pleased to revive the suit against the 1st to 6th defendants for hearing on merit.
 2. That the Honourable court be pleased to extend time and order substitution of the original plaintiff (now deceased) with his legal representatives namely Thaniya Islam Khiyar and Khalilah Islam Khiyar
 3. That the costs of the application be in the cause.



2. It is premised on the following grounds that the Applicant's advocate herein filed an application dated 15th September, 2021 seeking to have the Applicants herein substituted in place of the deceased plaintiff instead of seeking prayers to have the abated suit be reinstated. That the mistake of the advocate should not be visited upon the Applicants. That the Applicants will be disinherited if this suit is not reinstated. That it is in the best interest of justice that the instant suit be revived and the same be heard on merit.
3. The 6th Respondent stated that the Applicants are guilty of laches noting that the application herein was filed more than two years after the suit herein abated given that the Plaintiff died on 24th October, 2019. That the suit herein having abated on 24th October, 2020 pursuant to Order, 24 Rule 3 (2) of the Civil Procedure Rules and having been marked as abated on 16th January, 2023 there is no suit before court and the orders sought are not capable of being granted.
4. I have considered the application, the affidavits and submissions therein. The Applicants seeks revival of this suit and that they be substituted with the plaintiff. There is no dispute that the plaintiff passed away on 24th October 2014 and that the Applicant obtained letters of administration *ad litem* in respect of his estate on 3rd September 2021 in CMCC Succession Cause No. 307 of 2021 (Mombasa).
5. The application is brought *inter alia* under Order 24 Rules of the Civil Procedure Rules provides that;
 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.”
6. There is equally no dispute that this suit abated on 24th October 2015. Order 24 Rule 7(2) of the Civil Procedure Rules provides:
 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.”
7. The plaintiff commenced this suit through plaint filed in the High Court at Mombasa on 30th April 2014 as HCCC No. 14 of 2014. The matter was later transferred to this court and became ELC Case No. 320 of 2014. The plaintiff averred that he was the co owner of the parcel of land known as plot No. Mombasa/Block XXV/106 and subdivision number 6293 (original number 6291/3) Section 1/



MN. That he has been left out of the enjoyment of the rental income. The suit was marked as abated on 16th January 2023.

8. The foregoing makes it clear that the cause of action survived the plaintiff and if an application for substitution was made prior to abatement, the legal representative would have been made a party to enable them proceed with the suit. Consequently, the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules comes into operation. Having made the present application, the Applicants must prove that they were prevented by any sufficient cause from continuing the suit.
9. The principles applicable while considering an application such as the present one were stated by the Court of Appeal in Said Sweilem Gbeithan Saanum vs Commissioner Of Lands (2015)eKLR 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 one year of the death of the plaintiff or 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. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See *M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others*, Meru HCC Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in *KFC Union v Charles Murgor (Deceased)* NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in *MacFoy v United Africa Co. Limited*(1961) 3 All ER 1169, that

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.”

10. The Applicants stated that the plaintiff did not involve them in this suit and they were unaware of the proceedings. After his death, Covid 19 came in and it was in 2021 when they decided to follow up on their father’s assets for purposes of succession when they realised their late father had instituted this



suit against the 1st Defendant their step mother and her children for the recovery of his assets. They then obtained letters of administration *ad litem* in respect of the plaintiff's estate on 3rd September 2021. I find that it is sufficient for purposes of Order 24 Rule 7(2) of the [Civil Procedure Rules](#) for the Applicant to demonstrate as she has done, that by the time this suit abated on 24th October 2019 they were unaware of this suit

11. The respondent argued that the plaintiff died on 24th October 2019 and this application was filed more than two years later. The record shows that on 20th September 2021, the Applicants filed a Chamber Summons dated 20th September 2021 seeking among others an order for substitution of the deceased. The application came up for hearing on 2nd November 2022 when directions were given that it be canvassed through written submissions. The Applicant later realised that the application could not address the issue of abatement. Upon their request, the application was marked withdrawn pursuant to this court's order of 16th January 2023 and file marked closed. It was replaced by Notice of Motion dated 17th January 2023. The delay from 20th September 2021 to 17th January 2023 when the Applicant took the first steps to obtain substitution is about three and a half months. In my view this is not inordinate delay. I am therefore satisfied that the Applicants have demonstrated that they were prevented by sufficient cause from continuing the suit. I further consider that in view of the nature of relief sought in the suit, it is in the interest of justice that the suit be determined on the merits. That however, this is not an excuse for the parties not to be proactive. The Applicants are warned to actively prosecute the suit.
12. For those reasons I find this application is merited and I grant the following orders;
 - a) This suit is hereby revived.
 - b) The deceased plaintiff is hereby substituted with Thaniya Islam Khayar and Khalilah Islam Khayar
 - c) The plaintiff to file and serve an amended plaint to reflect the substitution within 14 days of delivery of this ruling.
 - d) Costs in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

