



**Mutika & another v Wambua (Environment and Land Appeal
2 of 2023) [2023] KEELC 21639 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21639 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 2 OF 2023
LG KIMANI, J
NOVEMBER 14, 2023
(FORMERLY MACHAKOS E.L.C APPEAL NO.75 OF 2018)**

BETWEEN

CHARLES NDULULU MUTIKA APPELLANT

AND

JEREMIAH MUTIKA NDULULU INTENDED APPELLANT

AND

MULEI WAMBUA RESPONDENT

RULING

1. The Intended Appellant/Applicant Jeremiah Mutika Ndululu filed an Application by dated 2nd May 2023 seeking for orders:
 1. Spent.
 2. That this Honourable Court be pleased to extend the time within which to substitute the Appellant and consequently revive the appeal which abated on 21st May 2020.
 3. That this Honourable Court be pleased to substitute the deceased Appellant, Charles Ndululu Mutika with the Intended Appellant, Jeremiah Mutika Ndululu.
 4. That this Honourable Court be pleased to further reinstate the Appeal which was dismissed for want of prosecution on 19th February 2021.
2. The Application is based on the grounds that Charles Ndululu Mutika, the previous Appellant died on 31st May 2019, before the appeal could be heard and determined. The Applicant wishes to take over the prosecution of the appeal as the legal representative of the deceased appellant. The appeal abated on 31st May 2020. He claims that he was not aware of the existence of this appeal. The suit



was dismissed for want of prosecution on 19th February 2021 and this information only reached the Applicant recently through another suit between the parties.

3. The application is supported by the affidavit of the intended appellant Jeremiah Mutika Ndululu sworn on 22nd May 2023 in which the applicant confirmed the grounds in support of the application. He stated that the suit was dismissed without his knowledge and the information only reached him through another suit between the parties that is ELC 3 of 2022 where an order for dismissal was attached to a list of documents served upon his lawyers in the matter. He is now the personal representative of the deceased Plaintiff through a grant of letters of administration ad litem issued on 28th February 2023 in Kitui MC Succession Cause E010 of 2023 attached to the affidavit.
4. The intended appellant deposed that the delay and the failure to take action was not out of negligence or deliberate, it was inadvertent and as such it was excusable and is a good and sufficient cause.
5. He also states that unless the appeal is reinstated and the orders of substitution are issued, the estate of the deceased appellant will suffer substantial loss and damage and that the orders sought will not change the substantive issues in the appeal. He also states that the respondent will not suffer any prejudice if the prayers sought are granted.

The Respondent's replying affidavit.

6. Grounds of Opposition dated 9th May 2023 were filed by counsel for the Respondent opposing the application on the following grounds:
 1. The application is bad in law, for having been lodged against a deceased person (Mulei Wambua).
 2. The application is incurably defective for having been filed by lawyers who are not properly on record.
 3. The Appellant's appeal having abated then there is no basis to seek substitution.
 4. The Applicant was always aware of his late father's appeal.
 5. There is inordinate delay in bringing the instant application.
 6. The application should fail in its entirety and be dismissed with costs.
7. Anthony Mulei Wambua, the son of the Respondent filed a replying affidavit in response, deposing that his father Mulei Wambua is deceased. He provided a burial permit supplied to the court during the hearing of the application which shows that he died on 26th June 2021. He deposed that contrary to the allegations that the applicant was not aware of the appeal herein, the applicant had on 24th March 2017 moved the court to have his deceased father, Charles Ndululu Mutika, joined in his (Anthony Mulei Wambua's) case, Machakos ELC Case No.131 of 2016 which later became Kitui ELC 3 of 2022 and which was heard and determined by the court in his favour.
8. That the applicant was aware of the instant appeal all through the proceedings and even mentioned the same in his defence, and therefore cannot feign ignorance of the same.
9. He also deposed that the appeal was dismissed and has also abated and as such the instant application should be dismissed for lack of merit.



Hearing of the Application

10. Hearing of the application proceeded orally in court on the 17th October 2023 where Counsel for the intended appellant/applicant Mr. Makau submitted that the appellant passed away on 31st May 2019 and since then the matter remained unprosecuted, noting that the Court dismissed the appeal on 17th February 2021 for want of prosecution.
11. He insisted that the intended appellant was not aware of this appeal and is therefore seeking reinstatement of the appeal because the dismissal was not caused by the applicant's indolence. He further submitted that the appeal subsists the death of the deceased.
12. Counsel for the applicant submitted that the intended appellant had a right to be heard under *the Constitution* to protect his rights as a beneficiary of the estate of the deceased. He also noted that the respondent is also deceased, and that counsel for the respondent can only address the Court if instructed by a living person.
13. In response counsel for the intended respondent Mr. Mwalimu relied on his Grounds of Opposition dated 9th May 2023 where he submitted that the application is bad in law for having been filed against a deceased person. It was also submitted that the appeal having long abated, the orders sought are untenable.
14. Counsel for the Respondent's position was that the applicant was all along aware of the appeal. He annexed an application filed on 10th November 2016 where the Applicant herein sought to have his own father and the father of the respondent joined as parties in Kitui ELC 3 of 2022.
15. Further, he submitted that no sufficient ground has been given to justify reinstatement of the appeal by substitution and highlighted that the other suit was decided in favour of the deponent of the replying affidavit. He further stated that even if the appeal is reinstated, it will not serve any useful purpose and sought dismissal of the application.
16. In rebuttal, Counsel for the applicant submitted that the Court dismissed the appeal suo motto and not by the actions of the respondent. He noted that reinstatement is the sole discretion of the Court and urged that since the applicant is an administrator of his father's estate, the Court would fail him in his duty to look into the best interests of his father's estate, urging the court to facilitate his duty as an administrator.

Analysis and Determination

17. Having gone through the application at hand as well as all the documents pertaining thereto, I opine that the following issues are for determination:
 - I. Whether the application for extension of time to substitute the deceased appellant and revival and reinstatement of the appeal has merit.
 - II. Whether the application dated 5th May 2023 have merit and what orders should be granted?
18. The Applicant filed this application pursuant to Sections 1A (1) and (2) and Section 3A of the *Civil Procedure Act*, Order 24 Rule 1 and (2), Rule 7(1) and (2) and Rule 9, Order 45 Rule (1), (2), and (3) of the Civil Procedure (Amendment) Rules (2020).
19. The deceased appellant having died on the 31st of May 2019, the suit therefore abated a year later on 31st May 2020 pursuant to Order 24 (2) of the Civil Procedure Rules. Notice to show cause was issued



by the court and the suit was subsequently dismissed for want of prosecution on 19th February 2021, in the presence of Mr. Mwalimu Advocate for the Respondent.

20. The Applicant herein now seeks to have the appeal revived and time extended for him to be substituted as a personal representative of the Appellant's estate. He attached Letters of Administration ad litem dated 2nd March 2023 as proof of his authority to act on behalf of his father's estate.

21. Order 24 Rule 3(1) and (2) of the Civil Procedure Rules provides as follows:

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."

22. Once a suit has abated under Order 24 Rule 3(2) the said suit is no longer in existence as was held in Kenya Farmers Co-Operative Union Limited V Charles Murgor (Deceased) T/A Kaptabei Coffee Estate [2005] eKLR that;

"In the instant case there was no application for substitution made within one year since the death of the Defendant. Therefore, as a matter of law the suit as against him abated. When substitution was subsequently purportedly made on 5th March, 1998 there was no suit subsisting in which substitution could be made. It had abated on or about 23rd April, 1996, that is, one year since the death of the Defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered... The suit having abated on or about 23rd April, 1996, as seen above, the order of substitution of 5th March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity."

23. However, Order 24 rule 7 further provides that:

"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."

24. In the case of Said Sweilem Gheithan Saanum –v- Commissioner of Lands & 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.”

25. From the foregoing it is necessary for the applicant to satisfy the court that he was prevented by “sufficient cause” from continuing with this appeal. The applicant states that the reason he did not seek substitution of the deceased appellant was because he was not aware of the existence of the appeal and that he only became aware of the appeal when he was served with List of Documents dated 17th June 2022 in Kitui ELC No. 3 of 2022 where among the documents listed was a dismissal order of Machakos ELCA No. 75 of 2018 dated 19th February 2021.
26. It is noted that the applicant took out a grant of letters of administration to the estate of Charles Mutika Ndululu on 2nd March 2023 and filed the current application on 4th May 2023. The applicant has not explained the period between the time when says he received the list of documents dated 17th June 2022 and the time he obtained the limited grant of letters of administration. He also has not explained the period between the time when he obtained the grant to the time of filing the current application.
27. The Respondent deponed that the averment by the applicant that he was not aware of the existence of the appeal herein is not true. The court has perused the documents filed by the applicant and the deceased respondent’s son Anthony Mulei Wambua and seen the court documents filed in the previous suits as stated by both parties.
28. The court notes that indeed it is true that the applicant filed the defence dated 10th November 2016 in Machakos ELC No. 131 of 2016. The said suit was transferred to this court and was given the number Kitui ELC No. 3 of 2022. In the said defence at paragraphs 6, 7, 11, 15 and 18 the applicant clearly shows knowledge of the existence of the suit Kitui SPMCC No. 379 of 2010. The said suit 379/201 gave rise to this appeal. This appeal was previously Machakos High Court Civil Appeal No. 158 of 2013 which when transferred to Machakos ELC became Machakos ELCA No. 75 of 2018. The record also shows that the applicant filed an application by way of a Chamber Summons dated 24th March 2017 the same suit in which he confirmed knowledge of this appeal.
29. All the above mentioned documents clearly show that the applicant was aware of this appeal as early as November 2016 long before the death of his father. The list of documents that the applicant claims brought to his attention the existence of the appeal was thus only a reminder of what he already knew.
30. In the courts view the applicant has not been honest with the court about the reason he did not file an application for substitution of the deceased appellant within the one year provided under Order 24 Rule 3 (2) of the Civil Procedure Rules.



II) Does the application dated 5th May 2023 have merit and what orders should be granted?

31. In the court's view the applicant has not proved that he was prevented by any sufficient cause from continuing the appeal as required under Order 24 Rule 7 (2) of the Civil Procedure Rules which provides that;

“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.”

32. Further it was conceded by Counsel for the applicant that the respondent is also deceased. This was confirmed by the burial permit supplied by Counsel for the respondent that the said respondent died on 26th June 2021. This shows that even had the applicant been substituted within time the appeal would still stand abated since one year has passed since the Respondent's death.

33. It is trite law that an appeal cannot exist without a respondent. Mbogholi Msagha J confirmed this position noting as follows: *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR

“In the Indian case of *C. Muttu vs. Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

34. It is the court's view that the present appeal cannot be revived in absence of a substitute for the deceased respondent whose death dates beyond the required period of one year. In the same breadth costs cannot be awarded to the respondent since he has not been substituted.

35. The upshot of the above is that the application dated 2nd May 2023 lacks merit and the same is hereby dismissed with no order as to costs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 14TH DAY OF NOVEMBER, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Ruling read virtually and in open court in the presence of-

Musyoki C/A

Mwalimu for Respondent

N/A for Applicant

