



REPUBLIC OF KENYA



**Nyang'au v Moreka & another (Environment & Land Case
361 of 2016) [2023] KEELC 22202 (KLR) (5 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 361 OF 2016**

M SILA, J

DECEMBER 5, 2023

BETWEEN

ESTHER SARANGE NYANG'AU PLAINTIFF

AND

MOSES NYABUTO MOREKA 1ST DEFENDANT

NYANG'AU OKACHI 2ND DEFENDANT

RULING

1. The application before me is that dated 5 June 2023 which is said to be brought pursuant to Order 1 Rule 10 of the *Civil Procedure Rules*, and Sections 1A, 1B, and 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The application seeks the following two prayers, being :-
 - a. The Hon. Court be pleased to allow the name of Esther Sarange Nyang'au now deceased be substituted by Tom Orange Nyang'au as the plaintiff.
 - b. That costs of this application be in the cause.
2. The application is opposed by the defendants.
3. To put matters into context, this suit was commenced through a plaint which was filed on 3 November 2016. The plaintiff was wife of the 2nd defendant. She averred that the property South Mugirango/Nyataaro/1187 (parcel No. 1187) was the joint property of herself and her husband though registered in his name and that he was to hold it in trust. She pleaded that her husband irregularly subdivided the said land into the parcels South Mugirango/Nyataaro/2552 and 2553 (parcels No. 2552 and 2553) without her knowledge or consent and transferred the same to the 1st defendant. In the suit, she sought orders to restrain the defendants from accessing the two parcels of land. The defendants filed a joint statement of defence. It was pleaded that the land parcel No. 1187 was acquired by the 2nd defendant before he even married the plaintiff and it was denied that he ever held it in trust. It was



pleaded that the 2nd defendant has given the plaintiff and her children land contained in the land parcel South Mugirango/Nyataaro/2856. It was averred that the 1st defendant legally owns the land parcels South Mugirango/Nyataaro/2553 and 2857 and the plaintiff has no valid claim in them. An amended defence was subsequently filed on 22 September 2017 to add a counterclaim where the 1st defendant complained that the plaintiff had interfered with his land and caused damage to crops valued at Kshs. 112, 837/=, which he claimed, together with a prayer for the plaintiff to be permanently restrained from his parcels of land. Various attempts were made to have the parties settle the dispute at home but they all came to nought.

4. In this application, the applicant avers that the plaintiff is his mother and that she died on 4 April 2022 before the case could be heard. He adds that he filed an ad litem application being Miscellaneous Succession Cause No. 35 of 2023 at the Chief Magistrates' Court at Kisii and obtained a grant of letters of administration ad litem on 16 March 2023.
5. The defendants have opposed the motion through grounds of opposition. They contend that the suit has abated by dint of Order 24 Rule 3 (2) and no application for enlargement of time has been made.
6. Mr. Sagwe, learned counsel for the applicant, filed written submissions in support of the application, whereas Mr. Nyasimi, learned counsel for the defendants, relied on the grounds of opposition. I have considered all these before arriving at my disposition.
7. This is an application for substitution of the deceased plaintiff. Although the applicant has cited Order 1 Rule 10 of the Civil Procedure Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act as the basis of the application, applications for substitution of a deceased party are actually covered under Order 24 of the Civil Procedure Rules and not the law cited by the applicant. In relation to substitution of a deceased plaintiff, Order 24 Rule 3 applies and it provides as follows :-

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 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.

8. From the foregoing, it will be seen, particularly under subrule (2), that an application for substitution needs to be made within one year of the death of the deceased plaintiff, and where no such application is made, the suit shall abate. The court may however revive an abated suit pursuant to Rule 7 (2) which provides 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.



9. From the proviso in Order 24 Rule 3, the court may extend time for filing the application for substitution for good reason, and under Rule 7 (2), a court may revive an abated suit if it is proved that the applicant was prevented by any sufficient cause from continuing the suit.
10. In our case, the plaintiff died on 4 April 2022. The suit abated on 4 April 2023. This application was filed on 6 June 2023. It is thus correct that at the time the application was being filed, the suit had abated. It is also correct that the applicant has not sought any order for extension of time or for revival of the abated suit for he has not brought his application under Order 24 Rule 3(2) or Order 24 Rule 7 (2). Even if we ignore the fact that these provisions of the law have not been cited, there is nowhere in the application where the applicant has asked for any order for extension of time to file the application for substitution, or asked for an order to revive the abated suit. He has only come asking for substitution when the case has already abated. I could turn a blind eye to the failure to explicitly seek the orders for extension of time and revival of the abated suit. However, this court is only obliged to extend time if good reason is shown why the application was not filed in time and where it is sufficiently shown that such applicant was unable to continue the suit within the specified time.
11. I have gone through the application and supporting affidavit and nowhere has the applicant explained the delay. I see that the applicant obtained a letter from the Chief on 7 February 2023 to file the ad litem grant. The applicant has not explained why he had to wait for close to 10 months before seeking such letter. The applicant has kept silent and has not disclosed when he filed the application for the grant. We can never know if he filed it within one year of death or outside the one year. What he annexed was the grant itself which I see was issued on 23 May 2023 outside the one year of death.
12. There is a reason why the law provides for one year for substitution and a defendant is fully entitled to assume that the matter is no longer being pursued if no application for substitution is filed within one year of death. If an application is filed outside one year of death, the applicant must give sufficient reason why the application was not filed within the one year provided in law. In our case, absolutely no explanation has been offered. There must be sufficient cause shown before this court can exercise its discretion to revive an abated suit, and without reason being given, I am not persuaded that the court is bound to exercise its discretion in favour of the applicant.
13. For the above reasons, I am not persuaded to allow the application for substitution of the deceased plaintiff. I will make the order that this suit has abated and no further proceedings on it can be undertaken. In my discretion, there will be no orders as to costs.
14. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 5TH DAY OF DECEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

At Kisii

In the presence of: -

Mr. Sagwe for the applicant

Mr. Momanyi Aunga holding brief for Mr. Nyasimi for the defendants/respondents

COURT ASSISTANT – LAWRENCE CHOMBA

