



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC ORIGINATING SUMMONS NO. 22 OF 2019**

**BONIFACE MUTWIRI KUNGANIA** (Suing as the legal representative of the estate of

**KUNGANIA M'BAGINE** Alias **SAMUEL KINGANI (Deceased)**.....**PLAINTIFF**

**VERSUS**

**JAPHET KIRIMI M'RINKANYA** (Sued as the legal representative of the estate of

**GLADYS KATHUNI M'RINKANYA**.....**DEFENDANT**

**RULING**

**A. APPLICATIONS**

1. Before the court are two applications dated 28.10.2021 and 17.11.2021.
2. The application dated 28.10.2021 seeks a declaration that the suit has abated. The application is supported by an affidavit sworn by Japhet Kiriimi Rinkanya on 28.10.2021.
3. The grounds of the application are that the deponent is a legal representative of the defendant who passed on 20.10.2019 and that by operation of law, the suit abated on 20.10.2020; and that there has been no application to revive the suit except the amended originating summons dated 5.10.2020 which joined the legal representative to the suit.
4. It is averred that the suit as at 20.10.2020 had abated. The applicant has attached a copy of limited grant issued on 9.3.2021 and a death certificate dated 26.11.2020.
5. As regards the application dated 17.11.2021, the plaintiff seeks for the revival of the suit under **Order 24 Rule 7 (2) Civil Procedure Rules**. The application is supported by an affidavit sworn on 18.11.2021.
6. The reasons given for the application are: the defendant died on 20.10.2019 but the plaintiff only became aware of it on 26.4.2021 when he was served with an application dated 15.3.2021 when one year had already lapsed; during the appearance in court on 11.12.2019, the defence counsel did not disclose the facts to the court but left the court to issue the ruling on 29.4.2020; Covid 19 struck and court operations were scaled down.
7. Further, the applicant states there was non-material disclosure and acquiescence on the part of the defendants counsel on record who took directions on the amendment of the originating summons and a pretrial conference on 13.7.2021 during which his application dated 15.3.2021 was allowed by consent of parties.
8. The plaintiff urges the court guided by **Article 159 2 (b) and (2)** to allow substantive justice to prevail, disregard procedural technicalities and find the ignorance of the facts of death excusable, reasonable and genuine which should not be visited upon him.
9. The defendant did not reply to the motion.

**B. SUBMISSIONS**

10. With leave, parties filed written submissions to both applications dated 25.1.2022 and 31.1.2022 respectively.

11. The defendant submits there is no dispute that Gladys Kathuni M'Rinkanya passed on 20.10.2019 and that the plaintiff did not seek to enjoin a legal representative or apply to revive the suit until he made the application on 17.11.2021 which delay is inordinate and unexplainable.

12. In his view, the suit abated by operation of law as per **Order 24 Rule (4) (3) of the Civil Procedure Rules** since there was no substitution before 20.10.2020 and anything else done thereafter without the revival of the suit was void **ab initio**. Reliance is placed on **Titus Kiragu –vs- Jackson Mugo Mathai [2015] eKLR, Sarah Gathoni Muiruri & Another –vs- Wanjiku Kiguru [2019] eKLR, Said Sweilem Gheithan Saanum –vs- Commissioner Of Lands & 5 Others [2015] eKLR** on the proposition that the courts need not issue a proclamation on abatement.

13. Regarding whether the application dated 17.11.2021 has merits, the applicant submits a revival of an abated suit under **Order 24 (7) (2)** has qualifications as held in **Said Sweilem Gheithan Saanum (Supra)** namely; good reasons, be done within one year, sufficient case and as per **Sarah Gathoni case (Supra)** rendering of an account as to the willful negligence.

14. In their submissions, the applicant while admitting acquiescing and continuing with the matter, it is submitted it was only for the purposes of dismissing the suit and getting costs of the suit that he continued with the matter.

15. In sum, the defendant submits the suit is a nullity and the court should not sanction a nullity as held in **Macfoy –vs- United Africa Ltd (1961) 3 All F.R. 1169**.

16. The plaintiff submits by consent of parties the current defendant was admitted to the proceedings on 13.7.2021 after making an application dated 15.3.2021 pursuant to the letters of administration ad litem.

17. It is submitted the application has merits since the lack of knowledge of the death and continued participation of the defendant's lawyers in the proceedings together with Covid 19 there was sufficient cause. The plaintiff relies on **Article 159 of the Constitution, Mbaya Nzulwa –vs- Kenya Power & Lighting Co. Ltd [2018] eKLR** and **Order 51 Rule 14 (1) & (2)** since the applicant is not opposed.

18. It is also submitted that the defendant's submissions are based on **Order 24 Rule (3) (2)** while the application for the revival of the suit is based on **Order 24 Rule (7) (2)** and given amendments have already been made, a replying affidavit filed, and compliance with **Order 11 of the Civil Procedure Rules**, the objection does not hold any water. Reliance is placed on **Hass –vs- Wainaina [1982] eKLR 17** on the proposition that the defendant is estopped from opposing the facts after consenting to the amendment and the subsequent participation in the proceedings.

### C. ISSUES FOR DETERMINATION

19. The issues presenting themselves for court's determination are:-

- 1) **If the suit has abated and or is a nullity.**
- 2) **What are the implications of the consent orders and proceedings preceding the two applications.**
- 3) **Whether the two applications have merits.**

### D. BACKGROUND OF THE SUIT

20. The plaintiff came to court through an originating summons dated 25.4.2019 seeking to be declared the adverse possessor of **L.R No. Abogeta/Upper – Chure/517** on behalf of the estate of M'Kungania M'Bagine alias Samuel Kungania measuring 1.98 Ha against Gladys Kathuni M'Rinkanya sued as the legal representative of the estate of Raiji son of Gataaru alias Raiji Gataaru alias M'Raiji Gataaru – deceased.

21. Subsequent, the plaintiff sought and obtained inhibition orders against the suit land.

22. The defendant came on record and filed a preliminary objection on the basis that the suit was res judicata due to **Meru High Court Succession Case No. 182 of 1984**. The defendant opposed the suit by a replying affidavit filed on 26.6.2019 admitting the plaintiff had been allowed to utilize a small portion of the suit land by her husband; that he had built on the suit land; an order was issued to that effect and that the plaintiff had also participated in the succession cause and his claim dismissed since he was a tenant at will who should be evicted from the land.

23. Through a ruling delivered on 30.4.2020, the court confirmed the inhibition orders, preserved the subject property, dismissed the preliminary objection and ordered the matter to be heard on priority basis.

24. After the ruling, it appears the file remained dormant until the defendant filed an application dated 15.3.2021 seeking that the current defendant be made a party under **Order 24 Rule 4 Civil Procedure Rules** on the basis that the defendant had passed on 20.10.2019 and a legal representative appointed by the court on 9.3.2021. The application was by consent allowed on 13.7.2021. The and parties were ordered to make the necessary amendments before the matter could come for pretrial directions on 7.10.2021.

25. When the matter was mentioned, the plaintiff confirmed he had served the amended originating summons filed on 5.10.2021. The defendant's counsel admitted having received the amended originating summons but stated from the bar that the suit had already abated yet

no application to revive it had been made before one year elapsed.

26. The court directed the defendant to file a reply to the amended originating summons within 14 days and the parties to comply with **Order 11** before 0.11.2021, the date given for pretrial directions.

27. The defendant made a reply to the amended originating summons sworn on 18.11.2021, put in a case summary, issues of determination one of which was if the suit had abated or was res judicata, if adverse possession arises and filed a paginated bundle of documents.

#### **E. DETERMINATION**

28. At the same time, the plaintiff complied by filing a paginated record, case summary and issues for determination.

29. Looking at the record above, it is quite obvious by the time the court rendered its ruling on the preservation of the suit property on 29.4.2020, the deceased defendant was long dead and the plaintiff's lawyers did not disclose those facts on 11.12.2019 when they appeared before the court and fixed a ruling date for 29.4.2020.

30. Similarly, soon after the ruling was rendered, the defendant's lawyers on record did not disclose the status of their client until a year later on 30.3.2021 when the application to join the current defendant was filed.

31. In the said application, the limited grant ad litem was specific that the defendant was to take over the current suit as a defendant. The defendant did not raise any issue as to the abatement of the suit yet the application was made under **Order 24 Rule 4**.

32. The issues raised in the current application are more or less similar to the previous application. My finding is that this application is res judicata and the applicant is also estopped from claiming the suit had abated yet he willingly joined the same. Further orders of inhibition and preservation of the suit and the suit to be heard on priority were made on the basis that parties were willing to have the matter heard and determined on merits.

33. Given the actions and the participation of the defendant and his lawyers on record from 11.12.2019, up to the filing of the notice of motion dated 28.10.2021, they are estopped by silence and acquiescence from raising the issues of abatement.

34. **Section 1A, 1B and Section 3 of the Environment and Land Court Act** expects lawyers as appearing for parties to assist the court on the overriding objectives to dispense substantive justice in an expeditious manner.

35. One of the ways to do so is by acting honestly and responsibly by bringing to the attention of court material facts including the capacity of parties. The defendant's lawyers on record knew its client was no more but withheld that vital information until after perhaps the suit had abated.

36. It is a principle of law that a party should not be allowed to benefit from an illegality particularly if the same has been perpetuated by such a party. The defendant made a reply to the affidavit of service and turns to say he only participated and or applied to come into the suit for purposes of costs and to seek to have the suit dismissed.

37. If the defendant had a belief then that the suit had abated, why flog a dead horse? Why ride on a dead horse when he knew well it could not move? To allow such a scenario would be tantamount to allowing a party to abuse the court process.

38. Consequently, my findings are that once the defendant consented to the replace the deceased defendant, automatically the suit was continued. The amended originating summons was made and the defendant responded to it to carry on with the case since the cause of action was against the estate of the late M'Kungania M'Bagine alias Samuel Kungania who had sought for letters of administration in order to take over the succession case as the administrator to the suit land.

39. The current defendant is the one who brought to the attention of the court that the defendant died and opted to have the matter proceed to hearing by being joined as a defendant. The current defendant did not opt then to seek the court to find the suit abated by operation of law. By allowing the joinder of parties, the court outrightly extended and revived the suit and directed amendments to be done to reflect the changes.

40. The order was by the consent of parties. The defendant willingly entered into the consent. There is no claim of fraud, illegality and or mistake. In any event to revive a suit and order for joinder of a party is discretionary to the court. The court then for good reason and sufficient cause allowed the joinder of the defendant.

41. Once the defendant was joined as a party and the amendment was allowed, my finding is that the plaintiff did not require to formally seek for the revival of the suit.

42. By allowing the amendment, the court is deemed to have revived the suit with effect from the time the consent was made since sufficient cause and reason had been shown for continuing the suit under **Order 24 Rule 7 (2)**, to advance substantive justice. Once the revival was made there has been no prejudice to the defendant since he responded to the petition, complied with **Order 11**. Further the property has not changed hands given it was preserved vide the ruling of 28.4.2020. See **Rebecca Mijide Mungole & another –vs- Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR**.

43. In **Dhanesvar V. Mehta –vs- Manila M Shah [1965] EA 321**, the court held the object of any limitation enactment is to prevent a

plaintiff from prosecuting stale claims on one hand and on the other hand, to protect a defendant after he has lost the evidence from being disturbed after a long lapse of time.

44. The moment the current defendant disclosed about the death and made the application, the plaintiff consented to the application and amended the originating summons immediately since the suit was revived.

45. The claim upon the amendment could not in my view be described as stale, or abated. The order for the joinder has not been set aside or appealed against.

46. The above notwithstanding and for avoidance of doubt, I find the application dated 28.11.2021 unopposed and proceed to allow it guided by the reasoning in *Kishor Kumar Dhanji Varsani –vs- Amolak Singh & 4 others [2016] eKLR*.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU**

**THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2022**

**In presence of:**

Karanja for respondent - present

Mwarania for plaintiff/applicant

Court Assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**