



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 642 OF 2009**

**SAMUEL NJUNG'E KARIUKI.....PLAINTIFF**

**=VERSUS=**

**FRANCIS MUTURI MUNIU.....DEFENDANT**

**RULING**

1. This is the Notice of Motion application dated 30<sup>th</sup> August 2021.
2. It is brought under Section 3A of the Civil Procedure Act, Order 24 Rules 2, 4, 5, 7 of the Civil Procedure Rules, and the Constitution of Kenya.
3. It seeks orders:-
  - a) *Spent.*
  - b) *That the abatement of this suit made herein in June 2021 be reviewed, set aside and this suit be revived.*
  - c) *That the time for seeking leave to substitute the deceased Defendant, Francis Muturi Muniu with the personal representatives Victor Kibinu Muturi and Jedidah Njeri Kabuthia be extended.*
  - d) *That the name of the deceased Defendant herein, Francis Muturi Muniu be substituted with that of the estate's personal representatives Victor Kibinu Muturi and Jedidah Njeri Kabuthia.*
  - e) *That the consent order given on 11<sup>th</sup> day of April 2011 be reinstated.*
  - f) *That the cost of this Application be in the cause.*
4. The application is based on grounds set out in paragraph 1 to 15 on the face of the application.
5. It is supported by the Plaintiff's annexed supporting affidavit sworn on 30<sup>th</sup> August 2021. He deponed that he filed this suit in 2009 seeking to be declared as the owner of the suit land by way of adverse possession and he obtained interim orders of injunction which were subsequently extended by consent allowing him to continue in possession of the suit land pending hearing and determination of this suit.
6. He further deponed that the case was fully heard, closed, final submissions filed and it was pending judgement but the Defendant died on 10<sup>th</sup> October 2019. He added that when the case came up on 13<sup>th</sup> June 2019 for mention for purpose of giving a judgement date, the Honourable trial Judge was not sitting.
7. He deponed that on 15<sup>th</sup> October 2019, the advocates informed the Court that the Defendant had passed on and requested for time to get instructions on substitution and the Court set the case for mention on 26<sup>th</sup> March 2020 but the matter was caught up by the Covid 19 pandemic which caused delay.
8. He also deponed that his advocates kept on inquiring from the Defendant's advocates on the issue of appointment of the administrators by the Defendant's beneficiaries, but the Defendant's advocates indicated they had not received instructions on sensing deliberate delay or mischief, he filed Citation Proceedings vide Nairobi **Hc Succession Case No. P & AE681 OF 2020** dated 16<sup>th</sup> September 2020 and

served the process on the Victor Kibinu Muturi and his stepmother Mercy Wambui Mbai.

9. He deponed that the said Victor Kibinu and his step-mother in their response stated that they were not willing to be appointed as administrators and as such, the Citation is still pending before the Family Court and was scheduled for hearing on 25<sup>th</sup> October 2021.

10. He deponed that recently at a Police Station visit arising out of attempted encroachment by the proposed Respondents on the suit land, and upon investigation in the Kenya gazette, he learnt that the proposed Respondents had in fact applied for and obtained grant of letters of administration at Kiambu High Court but they were all along misleading the Family Court and abusing the process of this Court. They had clandestinely moved to Kiambu Court in **Kiambu Succession No. 72 of 2020** and obtained a Grant on 13<sup>th</sup> May 2021.

11. He added that the proposed Respondents have included the suit lands as part of the assets of the Deceased's estate for distribution to his beneficiaries without indicating there is a pending case.

12. He deponed that he has been frustrated by the beneficiaries of the deceased Defendant to ensure that he is unable to prosecute this case after the Defendant died and they have been encroaching on his suit land on the basis that the suit had abated.

13. He urged the court to urgently revive the suit so that he can obtain the relevant contempt proceedings against the Respondent and have the case concluded as well.

14. The application was opposed vide the affidavit of Victor Kibinu Muturi sworn on 19<sup>th</sup> October 2021. He deponed that after the Defendants' death on 11<sup>th</sup> October 2019, there being no substitution, the suit abated in October 2020 in accordance with the law as confirmed by the orders given on 7<sup>th</sup> June 2021. He added that it was the Plaintiff's obligation to pursue the substitution of the Defendant but he did not until the suit abated.

15. He also deponed that the Plaintiff has concealed material facts from the court in that he has filed another case against him being **Thika ELC No.E14 of 2021; Samuel Njung'e Kariuki v Victor Kibinu Muturi** and is therefore engaging in multiple litigation over the same subject.

16. I have considered the notice of motion and the supporting affidavit. I have also considered the replying affidavit. The issues for determination are:-

*(i) Whether the orders made on 7<sup>th</sup> June 2021 marking the suit as abated ought to be reviewed and or set aside.*

*(ii) Who should bear costs of this application?*

17. **Order 24 rule (4)** of the Civil Procedure Rules provides that:-

*“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. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

*3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant”*

It is clear from the above provision that a suit abates twelve (12) months after the death of a defendant if no application is filed for purposes of substituting such a party.

18. **Order 24 rule (7) (2)** of the Civil Procedure Rules 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.”*

19. In the case of **Kishor Kumar Dhanji Varsani vs Amolak Singh & 4 Others [2016] e KLR** the Court of Appeal relied on the case of **Honourable Attorney General vs Law Society of Kenya & Another Civil Application No 133 of 2011** where it was stated:-

*“Sufficient cause or good cause in law means; the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused (see Blacks Law Dictionary 9<sup>th</sup> Edition page 521), sufficient cause must be rational, plausible, logical, convincing reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind, the explanation should not leave unexplained gaps in the sequence of events”.*

20. This matter was concluded on 22<sup>nd</sup> October 2018 and parties were given time to put in final written submissions. The matter was then

slated for mention on 18<sup>th</sup> December 2018. On the 18<sup>th</sup> December 2018, counsel sought more time to put in written submissions. They were given thirty (30) days to do so. The matter was fixed for mention on 21<sup>st</sup> March 2019.

21. On the 21<sup>st</sup> March 2019, counsel intimated that parties were negotiating and sought time to reach a settlement. The matter was given a mention date on 14<sup>th</sup> May 2019.

22. It appears they were not able to reach any settlement. On the 15<sup>th</sup> October 2019, Mr. Kingara for the Defendant informed the court that his client had passed on and sought a mention date for further directions. This went on until 7<sup>th</sup> June 2021 when Mr. Kingara prayed that the suit be marked as abated.

23. From the foregoing it is clear that the suit automatically abated on 10<sup>th</sup> October 2020.

24. I have gone through the affidavit of Samuel Njung'e Kariuki, the Plaintiff herein sworn on the 30<sup>th</sup> August 2021. In paragraph 8 he depones:-

***“That the way advocates kept on inquiring from the Defendant’s advocates on the process of appointment of the administrator but the Defendant’s advocate indicated they had not received instructions”.***

*In paragraph 9 he depones:*

***“That sensing deliberate delay or mischief, I filed Citation proceedings vide Nairobi HC Succession Cause No P & A E681 of 2020 dated 16<sup>th</sup> September 2020 and served the process on the 1<sup>st</sup> Respondent and his step mother Mercy Wambui Mbai”***

In paragraph 12 he depones:-

***“That recently at a police station visit arising out of attempted encroachment by the Respondent on the suit land, and upon investigation in the Kenya Gazette I learnt that the Respondent had in fact applied for and obtained grant of letters of administration at Kiambu High Court”.***

25. From the foregoing, I find that the Plaintiff has demonstrated sufficient cause to warrant this suit to be revived. He has demonstrated that the Defendant’s legal representatives were not willing to be substituted.

26. I find merit in this application and the same is allowed I hereby grant the orders namely:-

***(a) That the orders issued by this court on 11<sup>th</sup> June 2021 marking the suit as abated are hereby reviewed and or set aside and the suit herein is revived.***

***(b) That the Deceased defendant Francis Muturi Muniu be substituted with his legal representatives Victor Kibinu Muturi and Jedidah Njeri Kabuthia.***

***(c) That the consent order granted on 11<sup>th</sup> April 2011 is hereby reinstated.***

***(d) That costs of this application be borne by the Plaintiff/Applicant.***

It is so ordered.

**DATED, SIGNED AND DELIVERED THROUGH VIRTUAL COURT AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Plaintiff

**Mr. Kingara for the Defendant**

Steve - Court Assistant