Mungai & another v Allied Group for Business Investment Limited & 3 others (Environment & Land Case 981 of 2015) [2022] KEELC 3395 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3395 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 981 OF 2015

OA ANGOTE, J

MAY 26, 2022

BETWEEN

RICHARD WARUINGI MUNGAI ..... 1ST PLAINTIFF

STEPHEN MUNGAI ..... 2ND PLAINTIFF

AND

ALLIED GROUP FOR BUSINESS INVESTMENT LIMITED .... 1ST DEFENDANT

BEN NJAU KAYAI T/A NJAU KAYAI & CO ADVOCATES ..... 2ND DEFENDANT

ROGER OTIENO SAGANA & ABDIWAHID AHMED BIRIQ T/A SAGANA BIRIQ & CO ADVOCATES ..... 3RD DEFENDANT

CHIEF LANDS REGISTRAR ..... 4TH DEFENDANT

RULING

Background

1. Before this court for determination are two applications being the 1st defendants' notice of motion application dated August 3, 2021 and the plaintiff's notice of motion application dated November 16, 2021.

The 1st Defendant's Application of August 3, 2021

2. This application seeks the following reliefs;

   a) That the plaintiff's suit against the defendants be dismissed with costs having abated in law.

   b) That in the alternative to (a) above, the plaintiffs suit be dismissed with costs for want of prosecution.

c) That the Interim Injunctive orders made on the October 21, 2015 be set aside and discharged conditionally.

d) That the 1st defendant be allowed to deposit the balance of the purchase price in court and an order for vacant possession of the property be granted to the 1st defendant forthwith.

e) That without prejudice to the foregoing, in the alternative, this honourable court be pleased to set down the counterclaim for hearing on a priority basis.

f) That the costs of the application be in the cause.

3. The application is based on the grounds on the face of the motion and supported by the affidavit of the director of the 1st defendant company who deponed that the 1st defendant was served with a plaint on October 8, 2015 and that on October 27, 2015, the 1st defendant filed a replying affidavit to the plaintiffs application for injunction and filed its defence on the January 14, 2016.

4. It was deponed that the defence was received under protest prompting the 1st defendant to peruse the court file which revealed that a default judgment had been entered against it on December 1, 2015; that *vide* an order of June 27, 2016, the default judgment was set aside and the 1st defendant granted unconditional leave to defend the suit and that the matter was last set for hearing on December 3, 2019, but did not proceed as the court was informed that the 1st plaintiff had passed away.

5. The 1st defendant's director deponed that the plaintiffs were granted three months to effect substitution but to date no lawful substitution of the 1st and 2nd plaintiffs has ever been done; that the plaintiffs have never set the matter down for hearing since December 3, 2019 and that the plaintiffs continue enjoying interim injunctive orders granted on October 21, 2015.

6. It is the 1st defendant's case that not having filed any defence to the counterclaim and the plaint having abated, the counter-claim ought to be allowed as prayed; that the 1st defendant had paid the plaintiffs the sum of Kshs 20,000,000 and had the suit property conveyed to it and indenture of conveyance registered in its name and that the 1st defendant is willing to deposit the balance of Kshs 40,000,000 in court so that it may be transmitted to the Estate of the deceased plaintiffs.

7. In response to the application, George Macheho Mungai deponed that on January 26, 2016, the matter could not proceed as the 2nd plaintiff had passed away on January 7, 2016; that vide an application dated May 30, 2016, he sought to be substituted in place of the 2nd plaintiff which application was allowed on May 8, 2017 and that the matter first came up for hearing on February 4, 2019 when it was adjourned at the plaintiffs' instance and stood over to May 9, 2019.

8. It was deponed that on May 9, 2019, the matter could not proceed as the 1st plaintiff was unwell and the matter was adjourned to December 3, 2019; that on December 3, 2019, the matter could not proceed as the 1st plaintiff had passed away on October 24, 2019 and the same was fixed for mention on March 25, 2020 and that due to the scale down of court activities brought about by the corona pandemic, the matter was not mentioned until March 24, 2021 when a hearing date was fixed for September 30, 2021.

9. It was deponed on behalf of the plaintiffs that the matter could not proceed on September 30, 2021 due to the filing of the present application which the court directed would be determined first; that *vide* the application dated November 16, 2021, the plaintiffs have sought for leave to be substituted to pave way for a speedy determination of the matter and that the plaintiffs have an arguable case which the defendants are seeking to defeat through the aid of technicalities which ought not to be allowed by the court.

The Plaintiffs' Application dated November 16, 2021.

10. This application seeks the following reliefs;

    i. This honourable court be pleased to revive this suit in respect to the 1st plaintiff.

    ii. This honourable court be pleased to substitute the 1st plaintiff with George Macheho Mungai who is the personal representative of the estate of the 1st plaintiff pursuant to the grant of letters of administrators ad litem issued on November 9, 2021.

    iii. The costs of this application be provided for.

11. In support of the motion is the affidavit of George Macheho Mungai who deponed that the 1st plaintiff passed away on October 24, 2019; that he was issued with a grant of letters of administration ad litem for purposes of representing the 1st plaintiffs' interest in this suit on November 9, 2021 and that by the time he was issued with the letters of administration aforesaid, the suit by the 1st plaintiff had abated.

12. It is the deposition of the deponent that he now wishes to substitute the 1st plaintiff as the personal representative of his estate and that his substitution and the revival of the suit will enable the court effectively determine all issues in dispute.

13. In response, the 1st defendant filed grounds of opposition in which it averred that the application is incompetent as it seeks to revive a suit that has abated; that the applicant has not applied for extension of time to comply with the court orders of December 3, 2019 that directed the plaintiffs to effect substitution within 3 months; that the plaintiffs have not demonstrated sufficient cause for failure to effect substitution within the legally contemplated timelines and that the application is incurably defective and should be struck out.

14. The 3rd defendant through his counsel deponed that the suit has never taken off due to the plaintiffs constant adjournments; that on December 3, 2019 when the matter was coming up for hearing, the plaintiffs' counsel informed the court that the 1st plaintiff was deceased; that counsel subsequently sought and was granted leave to substitute and regularize representation of the 1st plaintiff and that on the aforesaid date, the plaintiffs' counsel sought for more time to comply.

15. It was deponed that an application for revival of a suit is unknown in law and the applicant ought to have sought for enlargement of time to be allowed to substitute and having failed to do so, the application is null ab initio; that no explanation has been given for the institution of this application after more than two years and that the same constitutes an abuse of court process

16. Vide an amended notice of motion application dated February 11, 2022, the plaintiff sought for two additional prayers being;

    i. This honourable court be pleased to extend the time period within which the legal representative of the 1st plaintiff may make the application for substitution of the 1st plaintiff with the legal representative.

    ii. The amended notice of motion herein be deemed to have been properly filed before this honourable court.

17. The 1st defendant through its counsel filed a replying affidavit and objected to the plaintiffs' amended application dated February 11, 2022 on the basis that the same was filed without leave of court and ought to be struck out. The parties filed submissions and authorities which I have considered.

Analysis & Determination

18. Having considered the applications, the affidavits and submissions herein, the issues that arise for determination are;

    i. Whether the amended notice of motion application dated February 11, 2022 is competent?

    ii. Whether the present suit should be dismissed or revived?

    iii. Whether the interim injunctive orders made on the October 21, 2015 should be set aside and discharged conditionally?

    iv. Whether the 1st defendant is entitled to vacant possession of the property?

19. The 1st defendant has raised an objection to the amended notice of motion filed on February 11, 2022 and seeks to have it struck out for having been filed without leave of court. Counsel for the plaintiffs/applicants assert that they inadvertently forgot to seek a prayer for enlargement of time in the original motion necessitating the amendment; that in light of the provisions of article 159 (2) (d) of the *Constitution*, such failure ought not be fatal to the application and that the defendants have in any event not demonstrated what prejudice they have suffered by the failure to seek leave.

20. The plaintiffs filed the motion dated November 16, 2021 and thereafter proceeded to file an amended notice of motion dated February 11, 2022 without leave. The question before this court is whether or not the failure to seek leave is fatal to the application.

21. Order 8 rule 5 of the *Civil Procedure Rules* is instructive and provides thus;

> "(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
>
> (2) This rule shall not have effect in relation to a judgment or order."

22. In the case of *Nathan Chesang Moson & 2 others v Community Uplift Ministries* [2013] eKLR, the Court of Appeal struck out and expunged from the record an amended notice of motion that was filed without the leave of the court pursuant to the Court of Appeal Rules. Similarly, the Court of Appeal in *Kiru Tea Factory Company Ltd v Stephen Maina Githiga & 13 others* [2019] eKLR cited by the 1st defendant, struck out an amended motion filed without leave of court and held;

> "...where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out."

23. In the instance case, the motion was amended after the parties had filed responses to the initial application. According to counsel, they thought it best to file the amended application rather than wait until when the matter was coming up for mention to seek formal leave in a bid to save time due to the "serious backlog of cases in the ELC" which means it is "simply not possible to get early dates".

24. It is clear from the explanation given by the plaintiff's counsel that the failure to seek leave to amend the initial motion was deliberate and tactical and was an attempt to get to the desired destination using the shortest route.

25. While the court is alive to the provisions of article 159 (2) (d) of the *Constitution* which stipulates that justice shall be administered without undue regard to procedural technicalities, it is of the opinion that

the said provision was not meant to override the laid down law and procedures nor indeed aid litigants who deliberately flout these procedures.

26. As aptly expressed by the Supreme Court in the case of *Raila Odinga v IEBC & others* [2013] eKLR:

> " Article 159(2)(d) of the *Constitution* simply means that a court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."

27. In view of the foregoing, the court finds that the amended notice of motion as filed is incompetent and the same is hereby struck out and expunged from the record. The court shall therefore proceed to consider the initial application dated November 16, 2021.

28. At the onset, it is undisputed that the suit by the 1st plaintiff has abated. The 1st defendant, *vide* the application of August 3, 2021 seeks to have the entire suit dismissed while the applicant, *vide* the application of November 16, 2021 is seeking to revive the 1st plaintiff's suit and substitute himself with the deceased 1st plaintiff.

29. The legal framework on substitution of a deceased plaintiff is captured in order 24 rules 1, 2, and 3 of the *Civil Procedure Rules* which provide as follows:

> " 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
>
> 2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
>
> 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.
>
> 3(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."

30. Order 24 rule 7 contains a framework on revival of an abated suit. It provides as follows:

> " 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."

31. Having regard to the above provisions, the Court of Appeal in *Said Sweilem Gheithan Saannum v Commissioner of Lands & 5 others* [2015] eKLR cited by the 3rd defendant summarized the process thus;

> " 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."

32. According to the 1st defendant, the applicant's failure to apply for extension of time is a fatal misstep and subsequently the orders of substitution and revival of the suit cannot lie. Is this the position? The court will in this respect be guided by the decision of the Court of Appeal in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* cited by the defendants where the learned justices in dealing with the question of whether in seeking to revive an abated suit, the applicant must, in the first place seek extension of time within which to do so expressed itself as follows:

> " Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted."

33. In view of the foregoing, the orders for substitution and revival sought by the applicant are unattainable. The above notwithstanding, it is trite that where an application is made for extension of

time under this head, the same is not a matter of right but subject to the courts discretion "for good reason on application".

34. It is noted that no reason has been proffered as to why the substitution was not sought not only within the court mandated timelines but within the statutory timelines. The plaintiffs' argument that the court has discretion to extend the time without making a formal application is not tenable. In the circumstances, even if the court wished to, there is no basis upon which it can exercise its discretion "to extent time" in favour of the applicant.

35. As to whether the suit has abated as against the 2nd plaintiff, the court thinks not. The 2nd plaintiff died on January 7, 2016 and an application for substitution was filed on May 31, 2016 which was duly allowed on the May 8, 2017. Having been duly substituted, the provisions of order 24 rule 2 are inapplicable in the circumstances. In conclusion, the suit by the 2nd plaintiff is still valid.

36. The 1st defendant has sought for an alternative prayer seeking dismissal of the suit for want of prosecution. This is clearly an exercise of the power conferred to this court by order 17 rule 2(3) of the *Civil Procedure Rules* which provides that any party to the suit may apply for its dismissal as provided in sub-rule 1.

37. Sub-rule 1 aforesaid provides for the dismissal of a suit when no application has been made or step taken by either party within a year. The court has perused the court file. Prior to the 1st defendants' application of August 3, 2021, the matter had been in court on September 30, 2021 when it was coming up for hearing, the date having been fixed on March 24, 2021. The matter has come up for hearing on three occasions when it was adjourned at the instance of the Plaintiffs due to the illness and subsequent deaths of the plaintiffs.

38. Such circumstances being factors beyond the control of the plaintiffs cannot be used to infer a delay by the plaintiffs. Ultimately, the court is not convinced that the application for dismissal of the suit for want of prosecution is warranted at this stage.

39. The prayer to discharge the said injunctive orders is premised on order 40 rule 6, and 7 of the *Civil Procedure Rules* which states as follows:

> "6 Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise."

40. Whereas order 40 rule 7 provides as follows:

> "7 Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order."

41. The interlocutory injunction sought to be discharged was issued on October 21, 2015 pending the determination of the application for injunction. On November 17, 2015, the court reiterated that the interim orders of injunction were to last until the determination of the application. The court has perused the record and it appears that the application for injunction has not been determined more than six years later.

42. In discussing the import of order 40 rule 6 of the *Civil Procedure Rules*, the Court of Appeal in the case of *Barclays Bank of Kenya Limited v Henry Ndungu Kinuthia & another* [2018] eKLR, stated;

> "(17). A plain reading of order 40 rule 6 shows that the rule is couched in mandatory terms, and that the only situation in which an interlocutory injunction will not automatically lapse after 12 months by operation of the law is where the court has given a sufficient reason why the interlocutory injunction should not so lapse. Therefore, the question we address is whether the words "pending the hearing and determination of this suit" created a sufficient reason within the Rule so that the interlocutory injunction does not automatically lapse after 12 months.
>
> Under the 2010 edition of the *Civil Procedure Rules*, order 39 rule 1 became order 40 rule 1 in exactly the same terms but there was the introduction of order 40 rule 6 limiting the order of interlocutory injunction for a period of 12 months. Thus, the order granted by the court issuing interlocutory injunction "pending the hearing and determination of the suit" can only be read within the context of order 40 rule 1. In other words, the court was not addressing itself to order 40 rule 6 and providing sufficient reason for the order of injunction to remain in force for more than 12 months, but was merely issuing an order of temporary injunction to preserve the suit property during the pendency of the suit.
>
> The order made by the court on February 22, 2011 remained subject to order 40 rule 6 that required that such an interlocutory order remain in force for a period of 12 months only, but subject to the court having the power to extend the interlocutory order beyond the 12 months, if there is sufficient reason for it to do so. In our view, such as extension must be addressed by the court and justified at the opportune time."

43. Whereas the interim orders of injunction was to remain in force "pending the hearing and determination of the application, the Court of Appeal in the above cited clearly expressed that the words "pending the hearing and determination of the suit" does not constitute sufficient reason to justify the extension of the interlocutory injunction beyond the period of 12 months.

44. It appears that no attempt was made to have the orders extended from 2016 nor have the application for injunction set down for hearing within one year from the date when the order was given. In the circumstances, the court finds that the orders of injunction made on October 21, 2015 have lapsed by operation of the law.

45. The 1st defendant is seeking for an order of vacant possession of the property and to be allowed to deposit the balance of the purchase price in court. The dispute herein involves ownership of the suit property. The alleged sale that the 1st defendant seeks to rely on has been disputed. Having found that the suit by the 2nd plaintiff still subsists, it follows that such an order cannot be made at this stage as the same would in essence be a determination of the parties' rights in respect of the suit property without a trial.

46. In view of the foregoing the court makes the following determinations;

i. The amended notice of motion application dated February 11, 2022 is incompetent and is hereby expunged from the record.

ii. The application dated August 3, 2021 partially succeeds as follows;

a) The suit by the 1st plaintiff be and is hereby marked as having abated.

b) The interim injunctive order issued on October 21, 2015 is deemed to have lapsed by operation of law.

c) The application dated November 16, 2021 is unmerited and is hereby dismissed.

d) Each party shall bear the costs of their respective applications.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF MAY, 2022.

OA Angote

Judge

In the presence of;

Mr Murungu for plaintiff.

Mr Issa for 1st defendant

Mr Biriq for 3rd defendant

Mr Allan Kamau for 4th defendant

Court Assistant – June Nafula