



REPUBLIC OF KENYA



KENYA LAW
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**M'Mbijiwe (Being the Legal representative of the Estate of Gilbert Kabeere M'Mbijiwe) & another
v Muthee & 7 others (Petition 25 of 2012) [2022] KEELC 3632 (KLR) (11 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3632 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
PETITION 25 OF 2012**

CK NZILI, J

MAY 11, 2022

**IN THE MATTER OF ALLEGED CONTRAVENTION OF CONSTITUTIONAL
RIGHTS AND GUARANTEES AS ENSHRINED UNDER ARTICLES
2, 10, 40, 47, 159, 258 AND 259 OF THE CONSTITUTION OF KENYA**

BETWEEN

**KINYUA M'MBIJIWE (BEING THE LEGAL REPRESENTATIVE OF THE
ESTATE OF GILBERT KABEERE M'MBIJIWE) 1ST PETITIONER**

**NASIR MUNENE (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE
OF GILBERT ZAKAYO M'MIGWI) 2ND PETITIONER**

AND

FRANCIS MUTHEE 1ST RESPONDENT

JUMA M'IGWETA 2ND RESPONDENT

M'KAUMBUTUO KAUMBUTHO 3RD RESPONDENT

MWANJALU MAORE 4TH RESPONDENT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER
IGEMBE 5TH RESPONDENT**

COMMISSIONER FOR LANDS 6TH RESPONDENT

MINISTER FOR LANDS 7TH RESPONDENT

ATTORNEY GENERAL 8TH RESPONDENT



RULING

1. By an application dated March 4, 2022, the petitioner seeks for leave to amend the petition dated December 29, 2012. The reasons given are contained on the face of the application and the supporting affidavit of Kinyua Mbijiwe sworn on the even date. It is stated that the amendments are necessary for the court to determine the real issues in controversy and would make the petition to conform with and be in tandem with the evidence in support.
2. Looking at the annex draft amended petition, it appears the 1st and 2nd petitioners are being replaced with their legal representatives namely; Kinyua M'Mbijiwe and Nasir Munene respectively while the 10th to 63rd interested parties are being added and lastly a prayer no. (1) (a) is being added for the cancellation of the respective titles and for an order for fresh adjudication.
3. When the application came before the court on March 7, 2022, Mr Murango Mwenda advocate for the 1-5 respondents opposed the application. Counsel took the view that there was no petition capable of being amended in view of the court's orders made on December 14, 2021 to the effect that the petitioners shall comply within with the orders made on October 13, 2021 within 60 days from that date failure of which the petition shall stand dismissed for non-compliance.
4. Counsel submitted the said order had not been varied or vacated and that given the instant application was filed on March 4, 2022 which was way outside the timelines, there was nothing to amend after the order took effect. Therefore Mr Murango Mwenda advocate urged the court to find the application was filed based on a non-existent petition, hence should be dismissed with costs.
5. Mr Kieti senior litigation counsel for the 6th- 9th respondents associated his submissions with those of the 1-5th respondents given the previous orders were clear that non-compliance would automatically lead to a dismissal since the order was self-executing. Further Mr Kieti submitted that since the petition stood dismissed and in the absence of a prayer for reinstatement, there was nothing to amend. Counsel however stated they were not pursuing any costs from the petitioners.
6. In response, Mr Mwanzia advocate for the petitioners submitted the role of the court was to meet the ends of justice to members of public and since it had become necessary to amend the petition the court should vary the earlier orders given it was a land matter touching almost an entire location whose importance could not be gainsaid.
7. Counsel submitted that the rules were not cast on stone and in the interest of justice and for it to be seen to be done, there was need to review the earlier orders so that the matter could be heard on merits. Further counsel submitted any prejudice occasioned to the respondents could be mitigated by way of costs. Counsel submitted that by writing and filing written submissions without the amendment would have been superfluous to the parties and the court.
8. Mr Murango Mwenda advocate also reiterated that the orders of October 13, 2021 were given by consent and leave to amend was issued to be done within 21 days hence the filing of the instant application to amend was unnecessary.
9. Counsel submitted the advocate for the petitioners was present when the order was made and the court was alive to the importance and the nature of the matter. Therefore counsel submitted it was not something new to say that the petition was an important matter given there had been no explanation why there was non-compliance within the stipulated time lines.



10. Counsel submitted the nature and importance of the matter could not be used to disregard court orders and if the court was to do so and allow such disregard of its orders, it would be acting in a discriminatory manner between small and big cases.
11. Counsel submitted the order was self-executing and the only thing the petitioners should have do but failed to do, was to seek for reinstatement of the petition.
12. Counsel urged the court to find that the order had taken effect and grant them costs. Mr Kieti reiterated the court had become functus officio and unless there was an application for reinstatement of the suit there would be no basis of the application before the court including the oral request for reinstatement.
13. Having looked at the application and heard oral submissions from both sides this court has to determine if;
 - i. There was in existence a petition capable of being amended as at March 4, 2022.
 - ii. The petitioners are entitled to the prayer to amend the petition and or the oral request to reinstate the petition.
 - iii. What is the order as to costs.
14. The court record indicates the petition herein was filed on December 31, 2012 by the petitioners describing themselves members of Antuamune Mugaa clan as owners of approximately 33000 acres of land situated in Kinanduba location Igembe North district. Otherwise known as Kinanduba Downs Ranch.
15. They alleged that the 1-5th respondents had waged a campaign to harass and or evict them from their ancestral land but the 6-9th respondents though under a duty to issue them with certificates of title to land had allegedly declined to do so.
16. The petitioners prayed for declaratory orders that the respondents actions of adjudication, excising or alienating their land was unconstitutional and illegal and for an order against the 6th – 9th respondents to issue them with certificates of title to land and in the alternative compensation at the value of kshs 9,900,000,000.
17. Contemporaneously with the petition, the petitioners filed a certificate of urgency dated December 31, 2021 seeking for temporary orders of injunction against the 1-5th respondents from interfering with their use and occupation of the suit land pending the hearing and determination of the petition, which orders were issued on January 2, 2013. The petition was opposed by the 1st and 3rd respondents replying affidavits inter alia that the area had been declared as Ndoleli/Antubetwe Kiongo adjudication section in 1986, manned by an inter clan committee comprised of Antubangai, Uringu and Antuamune clans.
18. Further the 1st and 3rd respondents averred the adjudication register of the section had been closed and any alleged claimant ought to have filed committees' arbitration board AR objection and or a minister's appeal.
19. Further by an application dated March 14, 2013 some parties sought to be co-joined as petitioners and or interested parties as members of Kinanduba community sporting group, Mwangaza Ntukai farmer's self-help group, Kinanduba irrigation project, Itamene fish farmers group and Kiambogo self-help group.
20. By yet another application dated February 16, 2019 the petitioner sought under order 24 rule 4 *Civil Procedure Rules* to cause the legal representative of the deceased Gilbert Kabeere M'Mbijiwe one Kinyua M'Mbijiwe to be substituted as a co-petitioner after he passed on November, 2017.



21. Thereafter the firm of Murango Mwenda also filed an application dated an application dated July 13, 2018 to cause acting for the 1-5th respondents.
22. Eventually the said application by the 1st – 5th respondents was withdrawn on December 5, 2018 leaving the only application pending as the one dated March 14, 2013 to enjoin 702 parties which the court had earlier on ordered their names to be verified by the deputy registrar. The same could not however take place since the deputy registrar was informed that some died while others lost interest in the matter.
23. The application dated March 14, 2013 was later dismissed on November 4, 2020 and the matter listed for pre-trial directions on January 25, 2021. On January 25, 2021 the court was told the 2nd petitioner was also dead hence leave was required to substitute. This was on top earlier on regarding the 1st petition made on April 18, 2018 to substitute him. The matter came up for mention again on February 22, 2021 whereby counsel for the petitioners told the court the 2nd petitioner had died on July 3, 2020. He sought time to seek for a grant to substitute the deceased 2nd petitioner. The court gave the petitioners 30 days to do so with a mention for May 3, 2021 to confirm the filing of the application to substitute the deceased 2nd petitioner. Once more the petitioners were not ready hence more time was given up to July 22, 2021 on which date the petitioners had not complied and hence were given another date for October 13, 2021 during which Mr Mwanzia also sought for 21 more days to substitute the 2nd deceased petitioner. By the time the 1st petitioner had not been replaced at all despite orders to that effect.
24. The court went out of its way to grant by consent of parties another order that the 2nd petitioner be substituted by one Nassir Munene and thereafter an amended petition to be filed within 21 days from the date thereof.
25. Further the court granted leave to the respondents to file further replies within 21 days upon service and the petition to be canvassed by way of written submissions. The court gave a mention date for December 14, 2021 to confirm compliance with the above directions.
26. When the matter came up on December 14, 2021 the petitioners had not once again complied with the orders and counsel alleged his client was out of the country and though he had prepared the amended petition and the written submissions he needed more time to cause his client to sign the papers and comply appropriately. He request for 45 more days.
27. Miss Mbogo advocate for the 1-5th respondents took the view the amended petition and written submissions had not been filed hence sought for the dismissal of the petition whereas Mr Kieti senior litigation counsel for 6th – 9th respondents asked that the petitioners to be allowed more time to comply.
28. Once more the court granted the petitioners leave to comply with the orders granted on October 13, 2021 within 60 days failure of which the petition shall stand dismissed for non-compliance. A mention date for March 7, 2022 was fixed for further orders.
29. Looking at the record herein, it is quite obvious the petitioners have flagrantly disregarded court orders and directives and made a mockery of such court orders.
30. In the first instance the 1st petitioner passed on November 1, 2017 and the court allowed for his substitution on April 18, 2018. The petitioners took no action at all to comply with the said orders. The petition therefore abated due to effluxion of time under order 24 rule 1 Civil Procedure Rules. The same case applies to the 2nd petitioner who was said to have died on July 3, 2020. The petitioners counsel on record was allowed to substitute the deceased petitioner within 30 days with effect from February 22, 2021. Later on this was pushed to July 22, 2021 and eventually on October 13, 2021 the petitioners were given 21 more days to do so.



31. In absence of any compliance, it is quite apparent the petition abated one year after the death of the 2nd petitioner. Consequently my finding is that there were no petitioners capable of sustaining the petition in the first instance after the court orders were disregarded as alluded above for the timelines specified. The failure to amend within 60 days as ordered by the court automatically therefore resulted to the dismissal of the petition.
32. Under the law time does not run between December 21 in any year and the sixth day of January in the year next following both days included.
33. So in essence the petitioners had up to end of February 2022 to comply with the orders of the court before the sixty days could expire. The petitioners had not only to file the amendment but also needed to comply with order 29 rule 3 Civil Procedure Rules and seek leave to revive the petition since the claim had abated by virtue of the one year rule substitution for a deceased party.
34. The *Constitution of Kenya (Fundamental Rights and Freedoms) and Practice and Procedure Rule* 2013 are silent and do not expressly provide for the substitution of a deceased petitioner by his legal representative or for the abatement of the petition.
35. Article 137 of the Ugandan Constitution as read together with Rule 15 (iv) of the Constitution Court Practice For Declaration Directions 1996 provides that a petition shall abate by the death of a sole petitioner or of the survivor of two or more petitioners.
36. In *Elizabeth Kwini & another vs Mananging director and another* (2014) eKLR the court held substitution may be allowed depending on the choices in action which survived the death of the deceased petitioner.
37. In *Karl Webner Claasen vs Commissioner of Land and 4 others* (2019) eKLR the court held a right to institute any proceedings under article 22 (1), 40 and 258 of the *Constitution* was a chose in action which could be continued by a legal representative by virtue of section 2 (1) of the *Law Reform Act* and 82 of the *Law of Succession Act* as read together with rules 10 (1) and 27 (3) of Mutunga Rules.
38. In this petition the petitioners failed to seek for extension of time to substitute the deceased petitioners. Without such an extension the petition could not be revived though an application for amendment and or an oral request as Mr Muia Mwanzia attempted to do.
39. There must also be sufficient cause why the court should revive an abated petition. The application before me was not one for revival of the petition supported by sufficient reasons. Even if the court was to consider the oral request by counsel, I find no sufficient cause to revive the petition.
40. In *Kamau Tichu & 16 others vs Ikere Gitau, Attorney General and Commissioners of Land* (2017) eKLR, Munyao Sila J faced with a similar situation held that what was envisaged in law was to have a legal representative then after that, apply for the revival of the abated suit giving sufficient reasons for not having applied for the substitution within the given one year of death.
41. In this petition and as observed from the court record the court has bend backwards to accommodate the petitioners but all in vain.
42. Unfortunately there can be no sufficient reasons when the petitioners have always disregarded court directions and timelines until the petition abated and or stood dismissed for non-compliance.
43. The petitioners had all the options under article 22 and 258 of the *Constitution* to bring on board other parties to the petition to rescue the situation if at all it relates to a group as counsel alleged.



44. Other than the two petitioners the proposed amended petition seeks to bring on board other parties who unfortunately were affected by a previous application which had been filed and was not prosecuted at all.
45. It is also note worth that the court had to dismiss the application dated March 13, 2013 for non-prosecution on the part of the petitioners.
46. In essence I entirely agree with submissions by Murango Mwenda advocate and Mr Kieti senior litigation counsel for respondents that there was nothing to seek leave to amend under the circumstances as at March 4, 2022.
47. I find the application lacking merits. The petition dated December 22, 2012 stood abated and dismissed for effluxion of time under order 24 Civil Procedure Rules and non- compliance with costs to the respondent. The file is therefore marked as closed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 11TH DAY OF MAY, 2022

In presence of:

Muia for petitioner

Miss Mbogo for 1st – 5th respondents

HON C K NZILI

ELC JUDGE

