



**Republic v Special District Commissioner Makueni; Nzungi (Exparte);
Mutie (Interested Party) (Environment & Land Miscellaneous Case
42B of 2020) [2022] KEELC 2789 (KLR) (29 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND MISCELLANEOUS CASE 42B OF 2020**

TW MURIGI, J

JUNE 29, 2022

BETWEEN

REPUBLIC APPLICANT

AND

SPECIAL DISTRICT COMMISSIONER MAKUENI RESPONDENT

AND

KANYIYA NZUNGI EXPARTE

AND

MASIKA MUTIE INTERESTED PARTY

RULING

1. Before me is a Notice of Motion dated 30th of October 2012 brought pursuant to the provision of Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 24 Rule 3 of the Civil Procedure Rules, wherein the Applicant is seeking for the following orders: -
 - 1) That the judicial review application be declared as having abated against the interested party.
 - 2) That the Honourable Court be pleased to grant orders that the Interested Party's costs for this application and the suit be paid out of the deceased estate.

INTERESTED PARTY/APPLICANT'S CASE

2. The application is premised on the grounds on the face of the application. These grounds are: -
 - 1) That the Ex parte Applicant died on 30th of November 2009.



- 2) That Order 24 Rule 3(1) of the Civil Procedure Rules provides that an application to substitute a deceased sole Plaintiff with his/her legal representative must be made within one year from the date of the Plaintiff's demise.
 - 3) That no such application has been filed by the Applicant's Advocate.
 - 4) That Order 24 Rule 3(2) further provides that if no application is made for substitution within one year, the suit shall abate as far as the deceased Plaintiff is concerned.
 - 5) That as there was only one Applicant, the suit has automatically abated.
 - 6) That it is in the interest of justice that the Court makes a formal order to that effect and gives directions as to the payment of the Interested Party's costs incurred this far.
3. The application is supported by the affidavit of the Applicant sworn on the even date. The Interested Party/Applicant, in his supporting affidavit, reiterated the grounds on the face of the application and annexed a copy of the death certificate.

EX PARTE APPLICANT'S/RESPONDENT'S CASE

4. Opposing the application, the Respondent relied on the grounds of objection filed on 22nd of July 2013. These grounds are: -
- 1) That the delay in the substitution or the delay in the cause has emanated from the Court as they had filed an application for ad litem on 15/05/2012 which has not been heard to date.
 - 2) That in the absence of the said ad litem, substitution cannot be effected.
 - 3) That on 16/05/2012 Justice Ndulu ordered the parties to file their consent which they did on 13/08/2012.
 - 4) That the application for ad litem was placed before the Court on 12/10/2012 and 30/11/2012 but the Court was not sitting while on the 16/07/2013, it was taken out of the cause list.
 - 5) That the delay in prosecuting the application for ad litem does not emanate from the Applicant.
 - 6) That the application be dismissed with costs.
5. In response to the grounds of objection, the Applicant vide his further affidavit sworn on 4th of October 2013 averred that the grounds had been filed without locus as the deceased ex parte Applicant was yet to be substituted. He argued that it was incorrect to state that the delay emanated from the Court since the Respondent petitioned for the Limited Grant on 15/05/2012 though the Ex parte Applicant died on 09/11/2009. He contends that the grounds are devoid of merit and that they should be disregarded by the Court.

Submissions

6. The application was canvassed by way of written submissions.

The Interested Party/Applicant's Submissions

7. The applicant's written submissions were filed on 13th of January 2022.
8. Counsel for the applicant raised the following issues for the Court's determination;



- i) Whether there is sufficient cause in delaying to substitute the deceased within one year after his demise.
 - ii) Whether the grounds of opposition have been filed without the required locus standi.
 - iii) Whether the Interested Party is entitled to costs sought herein.
9. On the issue as to whether there is sufficient cause in delaying to substitute the deceased within one year after his demise, Counsel submitted that after the Ex parte Applicant passed away on 09/11/2009, no application was made to substitute him within one year from his demise as stipulated under order 24 rule 3(2) of the *Civil Procedure Rules*. Counsel submitted that the Ex parte dependants petitioned for letters of administration ad litem on 15/05/2012, 2 years after the demise of the Ex parte applicant and the orders were issued on 05/11/2013. Counsel went on to submit that the dependants had not demonstrated any sufficient cause as to why they failed to file an application for substitution 3 years after the demise of the Ex parte applicant. Counsel relied on the following authorities to buttress his submissions: -
1. *Mwikya Mangui(deceased) vs Marshall Kvesi* [2017] eKLR.
 2. [*Timothy Limo & 2 others vs Joel Kinyanjui Muchiri \(suing as the legal representative of the estate of the late Jacob Muchiri Kinyanjui \(deceased\)\)*](#) [2020] eKLR.
 3. [*Joshua Chege Njoroge vs Ann Wanjiru Mwaura & another*](#) [2021] eKLR.
10. As regards the issue as to whether the grounds of objection have been filed without the required locus, Counsel submitted that the grounds as filed are devoid of merit as there is an application pending before the Court to extend time to substitute the Ex parte Applicant.
11. As regards the issue as to whether the Interested Party is entitled to costs, Counsel argued that the Applicant was entitled to costs.

The Ex Parte Applicant/respondent's Submissions

12. The Ex parte applicant/respondent's submissions were filed on 26th of November 2014.
13. Counsel submitted that the Court has inherent powers under Sections 1A, 1B and 95 of the *Civil Procedure Act* to grant the intended Ex parte Applicant time for substitution. Counsel further submitted that article 159 of [*the Constitution*](#) provides that justice is to be administered without undue regard to procedural technicalities hence the Court should grant the same.
14. Counsel went on to submit that the applicant had good reasons in his application to extend time as the delay emanated from the Court.
15. Counsel further submitted that the Ex parte applicant would be prejudiced if the application is declined as he was claiming ownership over the disputed parcel of land. Counsel placed reliance on the following authorities: -
 1. [*Billy Olouch Okun Orinda Vs Ayub Muthee M'gweta & 2 Others*](#) (2014) eKLR.
 2. [*Evanson Ngiti Kaminda Vs Peter Gicharu Ngige*](#) (2008) eKLR.
 3. [*Muiruri Njoroge Vs Wanjiku Kiguru*](#) (2014) eKLR.



Analysis and Determination

16. Having considered the application, the grounds of opposition and the rival submissions, I find that the only issue for determination is whether the Applicant is entitled to the orders sought.
17. Order 24 of the *Civil Procedure Rules* governs the law on death and bankruptcy of the parties. Order 24 rule 3 provides as follows: -
 - (1) Where one or two 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 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 costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.
18. It is clear from the foregoing that a suit abates by operation of the law. Once a suit abates, no order is required to declare that the suit has abated.
19. In the case of Titus Kiragiu Vs Jackson Mugo Mathai (2015) eKLR the court held that;

“It is not the Act of the court declaring the suit as having abated abates the suit but by operation of the law.”
20. The Ex parte Applicant instituted this proceedings vide a Judicial Review Application on 7th of April 2004 and sought for the reliefs therein.
21. It is not in dispute that the Ex parte Applicant died on 9th of November 2009. The Applicant annexed a copy of the death certificate in his supporting affidavit. More than one year lapsed without any application for substitution being made. The suit automatically abated.
22. Order 24 rule 3(2) of the *Civil Procedure Rules* provides that the suit automatically abates by operation of the law and it is not necessary to make an application to have the suit marked as abated. Order 24 rule 3(2) also makes provisions for an application by the defendant for costs of an abated suit. The application for the grant ad litem was made on 15th of May 2012 while the application to extend time to substitute the deceased application was filed on 5th of September, 2014. Both applications were made long after the suit had abated. I find that the Judicial Review Application automatically abated a year after the failure to file an application to substitute the deceased Ex parte Applicant.
23. The upshot of the foregoing is that the application is merited and the same is allowed in the following terms: -
 - a) That this suit be marked as abated.
 - b) That each party to bear its own costs.

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HON. T. MURIGI

JUDGE



RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 29TH DAY OF JUNE, 2022.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

Kithuka for the Interested Party/Applicant and holding brief for Mutua Makau for the Respondent.

