



REPUBLIC OF KENYA



**KENYA LAW**  
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**Awuonda v Muia & 6 others (Environment & Land Case  
200 of 2015) [2022] KEELC 3023 (KLR) (20 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3023 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 200 OF 2015  
CA OCHIENG, J  
JUNE 20, 2022**

**BETWEEN**

**ASTON OKETCH AWUONDA ..... PLAINTIFF**

**AND**

**NAOMI MITI MUIA ..... 1<sup>ST</sup> DEFENDANT**

**PHILLIP MUSEMBI MUIA ..... 2<sup>ND</sup> DEFENDANT**

**CHARITY MUTHONI MACHANGA ..... 3<sup>RD</sup> DEFENDANT**

**BENJAMIN IRUNGU MWANGI ..... 4<sup>TH</sup> DEFENDANT**

**JOSEPH MUCHIRI KANGANGI ..... 5<sup>TH</sup> DEFENDANT**

**MUUNGANO SELF HELP GROUP ..... 6<sup>TH</sup> DEFENDANT**

**LAZARUS N. MUIA ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Defendants' Notice of Motion Application dated the 9<sup>th</sup> August, 2021 brought pursuant to Order 17 Rule 2(3), Order 24 Rule 4(3) and Order 51 Rule1 of the *Civil Procedure Rules* as well as Section 51(i) of the *Civil Procedure Act*. The Defendants seek the following orders:
  1. That the Honourable Court be pleased to order that the suit herein be dismissed for want of prosecution for over one year.
  2. That the Honourable Court in any event issue orders that the suit against the 1<sup>st</sup> Defendant who died in April 2016 and the one against the 7<sup>th</sup> Defendant who died in April, 2020 abated for want of substitution within one year of death.



3. That the cautions or any other encumbrances placed by the Plaintiff/ Respondent or on their on LR Donyo Sabuk/komarock Block1/20114 be removed forthwith.
  4. That costs of this Application and of the entire suit be borne by the Plaintiff/Respondent.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Benjamin Irungu Mwangi who is a Trustee of the 6<sup>th</sup> Defendant. He contends that he has a mandate of the surviving Defendants to swear the affidavit. He claims there is no activity in this matter since the year 2000 and it is evident the Plaintiff has lost interest in it. He explains that the 1<sup>st</sup> Defendant died on 4<sup>th</sup> April, 2021 while the 7<sup>th</sup> Defendant died on 4<sup>th</sup> April, 2020 and these deaths are within the knowledge of the Plaintiff. He insists the suit against the two has long abated. He states that as a self help group (6<sup>th</sup> Defendant) they are suffering as their land LR Donyo Sabuk/komarock Block 1/20114 is cautioned by the Plaintiff on the basis of the proceedings herein and they are suffering extreme prejudice as they cannot do anything on the land which they had hoped to subdivide among themselves or sell to third parties for profit. He reiterates that they seek for the suit to be dismissed for want of prosecution and the caution placed on the title to be removed forthwith.
  3. The Plaintiff opposed the instant Application by filing a Replying Affidavit where he deposes that this suit has been fixed for hearing several times but as a result of the death of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, he has been unable to proceed due to difficulties in getting the relevant information to cite the other family members. He avers that the 7<sup>th</sup> Defendant had prepared himself to proceed with this matter but he passed away during Corona virus pandemic and they were unable to access the courts and also travel. He confirms that his Counsel has now managed to obtain the names of the remaining children of the 1<sup>st</sup> Defendant and she has prepared an application in the Chief Magistrate's Court to enable her enjoin them in the suit by citing them in the Succession Court. He claims to have paid money which was given to the 1<sup>st</sup> Defendant while in the care of the 7<sup>th</sup> Defendant who had accepted to testify in this matter and confirm the land in dispute was paid for. He reiterates that this case has merit and should be heard to its finality so that the Court may give a just and fair judgement. Further, there are triable issues that should not be dismissed on technicalities. He requests for this matter to be fixed for hearing after obtaining the outcome of the Citation to be filed in the Chief Magistrate's Court.
  4. The application was canvassed by way of written submissions.

### **Analysis and Determination**

5. Upon consideration of the Notice of Motion application dated the 9<sup>th</sup> August, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether this suit should be marked as abated as the 1<sup>st</sup> and 7<sup>th</sup> Defendants.
6. The Defendants in their submissions reiterated their averments as per the supporting affidavit and contended that this suit has abated against the 1<sup>st</sup> and 7<sup>th</sup> Defendants. They proceeded to interrogate the contents of the Plaintiff's pleadings and insisted the claim herein cannot subsist against the other Defendants. To support their averments, they relied on the following decisions: Civil Appeal No. 283 of 2015 Rebecca Muinde Mungole & Another V KPLC LTD & 2 Others and *Kenya Farmers Cooperative Union Ltd Vs Charles Murgor (deceased) t/a Kiptabei Coffee Estate* (2006) eKLR.
7. The Plaintiff in his submissions insist the Applicants only filed their witness statements in February, 2021 and it is hardly one year since the laid down procedures were completed. Further, he has filed a Citation in Machakos High Court Succession Cause No. E 014 of 2021 in the Matter of the Estate of Naomi Miti Muia Vs Titus Musila & Gregory Muasya Muia which is awaiting directions of the Court.



8. On abatement of suits as against one or more Defendants, 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.”

9. In the case of [Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others](#) [2018] eKLR, the Court observed that:

The application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In Kenya Farmers’ Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.”

See also the decisions in [Rebecca Muinde Mungole & Another Vs Kenya Power & Lighting Company Ltd & 2 Others](#) (2017) eKLR.

10. In this instance, the Defendants have sought for this suit to be dismissed for want of prosecution and for the suit as against 1<sup>st</sup> and 7<sup>th</sup> Defendants to be marked as abated as they were not substituted within one year of their death, as required by law. From the court records, I note the 1<sup>st</sup> and 7<sup>th</sup> Defendants were not substituted within one year of their demise. The Plaintiff claims there is a citation pending in the Machakos High Court. However, I note the provisions of Order 24 Rule 4(3) of the [Civil Procedure Rules](#) which I have cited above are couched in mandatory terms and there has been no instructions to substitute the deceased 1<sup>st</sup> and 7<sup>th</sup> Defendants with their legal representatives or at all.

11. Based on the facts as presented while replying on the legal provisions I have cited and associating myself with the quoted decisions, at this juncture, I find that the suit as against the 1<sup>st</sup> and 7<sup>th</sup> Defendants has indeed abated. I further find that the suit as against the rest of the Defendants still subsists. In the circumstance, I only find prayer No. 2 of the instant Notice of Motion Application merited and will allow it. I will decline to allow the rest of the prayers as sought.

12. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE, 2022**

**CHRISTINE OCHIENG**

**JUDGE**

