



REPUBLIC OF KENYA



**Musembi v Kyengo; Musembi (Applicant) (Environment & Land
Case 32 of 2003) [2022] KEELC 3024 (KLR) (14 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3024 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 32 OF 2003**

CA OCHIENG, J

JUNE 14, 2022

BETWEEN

JOHN MUSYOKA MUSEMBI PLAINTIFF

AND

JOSEPH KYANYA KYENGO DEFENDANT

AND

PRISCILLA MUSYOKA MUSEMBI APPLICANT

RULING

1. What is before Court for determination is the Applicant's Notice of Motion Application dated the November 30, 2021 brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B & 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders:
 1. Spent
 2. That this Court's order dated November 23, 2021 closing the file herein be set aside.
 3. That the Plaintiff's suit herein be set down for mention for purposes of taking directions on priority basis.
 4. That costs of this application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Priscilla Musyoka Musembi who confirms that the Plaintiff died on March 8, 2019. She explains that the last time this matter was in court was on February 12, 2021 when the court delivered its Ruling. Further, the Court directed her to file an application for substitution. She contends that through her advocates on record she filed an application for substitution dated the February 17, 2021 on February 25, 2021. She explains that she had challenges in having the Application dated February 25, 2021 placed before



court's records as the Court file was said to be missing. Further, the said application was never set down for hearing. She claims that through her advocates, they have made several attempts to trace the file but to no avail. Further, on November 24, 2021, her advocates on record received a copy of the notice for directions from the Court dated the November 15, 2021 which indicated this matter was fixed for directions on November 23, 2021. She insists the notice was received a day late by her Advocates and hence they failed to attend court when the case file was marked as closed. She states that she is desirous of prosecuting the impugned application/suit herein and should be granted an opportunity to do so. She reiterates that she stands to suffer irreparably unless the orders sought are granted.

3. The Defendant Joseph Kyanya Kyengo opposed the Application by filing a Replying Affidavit where he deposes that the said Application is incompetent, fatally defective and inadmissible. He insists the Application is bad in law as it offends the provisions of Order 24 Rule 3 of the Civil Procedure Rules. He contends that this suit abated on March 8, 2020 as no substitution by the personal representative of the estate of the deceased Plaintiff was made within one year of the Plaintiff's death on March 8, 2019. He avers that having failed to provide a good reason for her delay in substituting the Plaintiff in good time, the Applicant is not entitled to have the Court exercise its discretion to reinstate the suit. He insists that the court having made an order that the suit has abated, it became *functus officio*. Further, the court cannot therefore issue further orders until and unless the suit is revived. She reiterates that the Applicant is not competent to bring this application, as she is not a party to the suit. Further, the allegations that the Court file was missing is baseless as there is no record of the Deputy Registrar communicating the same to the Applicant. He explains that the letter dated the October 25, 2021 was written 2 years, 7 months and 17 days after the Plaintiff died. Further, no explanation has been given for the delay in obtaining the said Limited Grant. He reaffirms that the notice referred to by the Applicant was served on November 16, 2021 from elcmachakos@gmail.com to various Counsels, amongst the advocates copied in that email is agrosskenya@yahoo.com which is the email address for the Applicant's Counsel provided for in its pleadings.
4. The Applicant filed a Further Affidavit reiterating her averments and insisting that the court should have communicated with her Advocates using the last correspondence being their letter dated the November 25, 2021.
5. The application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the Notice of Motion Application dated the November 30, 2021 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Court's order dated the November 23, 2021 closing the file herein be set aside and matter fixed for mention for directions.
7. The Applicant in her submissions reiterated her averments as per the two affidavits and insists the notice issued to her advocates was improper as the said notice from court should have been served by a Court Bailiff. Further, that the suit as presented being a land matter, ought to be heard to its logical conclusion. To support her arguments, she relied on the following decisions: [Wachira Karani v Bildad Wachira](#) [2016] eKLR and [PMM V JNW](#) [2020] eKLR; [Petals & Décor Ltd v Tamcom Consulting Engineers & another](#) [2007] eKLR.
8. The Defendant in his submissions relied on the averments as per the replying affidavit and insists the instant application does not comply with Order 24 Rule 3(2) of the Civil Procedure Rules as the Plaintiff died on March 8, 2019 and the suit abated by operation of law on 8th March, 2020 since no substitution had been made within one year. To buttress his averments, he relied on the following



decisions: *Vue Taure Vue & another v Felix Tsori Chivatsi & another* [2018] eKLR; *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR and *Independent Electoral and Boundaries Commission & another v Stephen Mule & 3 others* [2014] eKLR where it cited in approval a decision from Supreme of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91 /2002*.

9. The Applicant has sought to set aside the orders issued by this Court on November 23, 2021 marking the suit as abated and proceeding to close the file. It is not in dispute that the Plaintiff died on March 8, 2019 and by the time the court issued its orders on November 23, 2021, the deceased was yet to be substituted by his personal representatives.
10. Order 24 Rule 3(2) of the *Civil Procedure Rules* stipulates the procedure to be undertaken by the parties in case of death of one of several Plaintiffs or of sole Plaintiff and states thus:

(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.

(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.”

11. 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 v 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 Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR.

12. In this instance, the Applicant has sought to set aside orders that marked this suit as abated as the Plaintiff was not substituted within one year as required by law. From a reading of the legal provisions I have cited, it would have been proper for the Applicant to first seek leave to reinstate the abated suit, before seeking to set aside the impugned orders. It is trite that once a suit is abated, there is no suit where an application to set aside an order can be anchored. It is my considered view that the Applicant has recourse by bringing an application under Order 24 Rule 7(2) of the *Civil Procedure Rules*, seeking leave of court to revive the suit first, before proceeding with any application.
13. 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 the instant application premature and will proceed to strike it out with costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14TH DAY OF JUNE, 2022.

CHRISTINE OCHIENG

JUDGE

