



**Muthike & 2 others v Francis Kinyanjui Lusieba Omenya T/A Company Advocate & 10 others
(Environment & Land Case E12 of 2020) [2022] KEELC 3026 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3026 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E12 OF 2020
EC CHERONO, J
JUNE 10, 2022**

BETWEEN

**DANIEL MURIITHI MUTHIKE 1ST APPLICANT
DANIEL GACOKI MUTHIKE 2ND APPLICANT
ANTONY MURIMI MUTHIKE 3RD APPLICANT**

AND

**FRANCIS KINYANJUI LUSIEBA OMENYA T/ACOMPANY
ADVOCATE 1ST RESPONDENT
STEPHEN MUTHAURA 2ND RESPONDENT
PETER MUNENE KABIBU 3RD RESPONDENT
FREDRICK BUNDI NJOGU 4TH RESPONDENT
ALEX NGURE MUNENE 5TH RESPONDENT
KENNEDY MURIMI WAWERU 6TH RESPONDENT
SENIOR RESIDENT MAGISTRATES COURT KERUGOYA . 7TH RESPONDENT
CHIEF LAND REGISTRAR 8TH RESPONDENT
KIRINYAGA COUNTY 9TH RESPONDENT
THE HON. ATTORNEY GENERAL 10TH RESPONDENT
LAW SOCIETY OF KENYA 11TH RESPONDENT**



RULING

1. The Applicants filed a Notice of Motion dated 30th November, 2021 on 6th December, 2021 seeking the following orders: -
 - a. Spent
 - b. The applicants herein; Daniel Muriithi Muthike, Daniel Gacoki Muthike and Anthony Murimi Muthike be joined as a legal representatives of the Plaintiff in the suit.
 - c. Costs of this application be in the suit.
2. The Application is opposed by the 1st Defendant/ Respondent vide grounds of opposition dated 3rd February, 2022.
3. When the application came up for hearing on 8th March, 2022 the parties agreed to have the same canvassed by way of written submissions. The Applicants filed theirs on 30th March, 2022, However, the Respondents did not file submissions

Applicant's Case and Submissions: -

4. The applicants' case is that this suit was instituted by Fausto Muthike Mbuko (Deceased) who died on 7th December, 2020.
5. They stated that they are the joint administrators of the Estate of the said Fausto Muthike Mbuko (deceased) pursuant to the grant of Letters of Administration issued on 4th October, 2021.
6. They stated that this suit was instituted in order to recover his properties that had been fraudulently transferred by individuals who were attempting to dispose of the same.
7. They stated that they have been advised by their advocates on record that the suit would abate on 7th December, 2021 unless the application is allowed.
8. They stated that they are ready to prosecute the suit once they are substituted and that they will suffer substantial loss and hardship unless the application is allowed.
9. They stated that at the time of filing the instant application, the suit had not abated and that the application was filed in real time pursuant to Order 50 Rule 4 of the Civil Procedure Rules, 2010.
10. They stated that their advocate is properly on record having duly filed his Notice of Appointment.
11. They further stated that the process of obtaining the letters of administration was finalized on 26th October, 2021 and that the instant application was presented to the registry on 30th November, 2021 but the court file had been misplaced until, 6th December, 2021.
12. In their submissions, the applicants submitted that their application has merit and it is neither an abuse of the court process nor an afterthought. They relied in the case of *Mary Wangari Kiarie Vs Safaricom (K) Limited* (2021) e KLR.
13. They further submitted that they have explained the reasons for the delay exhaustively which they contend are excusable and that the respondent has neither challenged nor controverted the same.
14. They submitted that their application for joinder is deserving as they have demonstrated that the original plaintiff has died and that his estate is pending succession.



15. They urged the court to be guided by Article 159(2)(d) of *the Constitution* of Kenya, 2010 as read with Section 1A, 1B & 3A of the *Civil Procedure Act* in ensuring that substantive justice is not sacrificed at alter of procedural technicalities.
16. They submitted that the present application is competent, proper, and deserving having been made within one year from the dead of the plaintiff as was held by the Court of Appeal in the case of *Said Sweilem Ghetban Saanun Vs Commissioner for Lands & 5 others* (2015) e KLR.

Respondent's Case: -

17. The 1st Defendant/ Respondent raised the following grounds of opposition: -
 - a. The application is an abuse of the court process, an afterthought and brought too late in the day as the suit has already abated by operation of law.
 - b. The application has been brought by an advocate who is improperly on record; filing fees to the Notice of Appointment of Advocate was not paid for. (Ref to a receipt dated 6.12.2021)
 - c. No sufficient cause preventing the Applicants from continuing this suit on time have been advance.
 - d. The application is bad in law and should be dismissed with costs.

Analysis: -

18. I have considered the application, grounds of opposition, applicants' submissions as well as the applicable law.
19. Order 24 Rule 3 (1) and (2) of the Civil Procedure Rules, 2010 provides that: -
 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.
 - (2) Where within one year no application is made under Sub-rule (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.
20. It is clear from the above that an application for substitution ought to be made within one upon death of the plaintiff failing which the suit abates.
21. I have looked at the Grant of Letters of Administration Intestate annexed and marked as DNM2 in the Applicants Supporting Affidavit. It is clear that the applicants are indeed the personal representatives of the estate of Fausto Muthike Mbuko (deceased).



22. I have also looked at the death certificate of the said Fausto Muthike Mbuko (deceased) annexed to the affidavit in support of the application marked DGM1 which indicates that the said Fausto Muthike Mbuko (deceased) died on 7.12.2020.
23. From these materials, I am persuaded that one year had not lapsed from the time of death and the time this application was filed. It can therefore be said that the application was brought in real time. I am satisfied that the application was filed timeously in accordance with Order 50 Rule 4 of the Civil Procedure Rules, 2010 which provides that: -
- Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:
- Provided that this rule shall not apply to any application in respect of a temporary injunction.
24. On the issue of the Notice of Appointment, I have perused the court record and confirm that the same was paid for and a payment receipt was issued at the court registry. These are empirical evidence that the Applicants advocate is properly on the record.

Conclusion: -

25. For the reasons given hereinabove, I find the application dated 30th November, 2021 merited and the same is hereby allowed as prayed. Costs shall be in the cause.

RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10TH JUNE, 2022.

HON. E.C. CHERONO

ELC JUDGE

In the presence of-

Hey for the Applicant-----present

1st Defendant-----absent

2nd, 3rd, 4th, 5th, & 6th Defendants/Advocate-----absent

Kabuta C/A-----present.

