



Nyambura (Suing as Legal Representative of the Estate Nyambura Mbogo) v Mbogo(Deceased & another (Environment and Land Appeal E015 of 2021) [2022] KEELC 3834 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3834 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E015 OF 2021
LN GACHERU, J
JULY 28, 2022

BETWEEN

JOHN MBOGO NYAMBURA APPELLANT
SUING AS LEGAL REPRESENTATIVE OF THE ESTATE NYAMBURA MBOGO

AND

EUNICE WAMBUI MBOGO(DECEASED 1ST RESPONDENT
GIDRAF MBOGO 2ND RESPONDENT

(Being an appeal from the Ruling delivered on 14th July, 2021, by Hon. P.M. Kiama(S.P.M) in Kangema Chief Magistrates Court SPMC Misc Case No. E005 of 2021)

JUDGMENT

1. The Appellant John Mbogo Nyambura, is a Legal Representative of the Estate of Esther Nyambura Mbogo (deceased), the Plaintiff in SPMC Misc Case No 15 of 2021, while the Respondents herein are the Defendants. In respect to the Notice of Motion Application dated April 6, 2021, Esther Nyambura Mbogo, was the Applicant, while the Respondents herein were also the Respondents in the said application.
2. By the said Notice of Motion Application dated April 6, 2021, the Applicant therein, sought for orders;
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 - a. That the Court file for this suit be reconstructed from photocopies of documents furnished by the Plaintiff in terms of the copies of pleadings and documents annexed to the Supporting Affidavit of John Mbogo Nyambura hereto
 - b. That upon reconstruction, this file be kept in the strong room.



- c. That the Costs of the Application be provided for.
3. The Application was premised on five (5) grounds set out on the face of it and on the Supporting Affidavit of John Mbogo Nyambura, sworn on April 6, 2021.
4. John Mbogo Nyambura, deponed that he had visited the Court registries in Kangema Chief Magistrate's Court and Nyeri High Court on various occasions to try and locate the file, but his efforts were futile. That on September 15, 2020, he wrote to the Deputy Registrar, Nyeri High Court requesting that the said registry send back the original Lower Court file, to Kangema SPM Court in the impugned matter, as the same could not be traced at Kangema Law Courts.
5. That the Hon Deputy Registrar responded via a letter dated October 5, 2020, advising that the same could not be found as it had been sent back after the Appeal was concluded. That via a letter dated December 7, 2020, he wrote to the Executive Officer, Kangema Law Courts, requesting her assistance in tracing the file. That via a letter dated February 8, 2021, the Senior Principal Magistrate, Kangema Law Courts advised him to reconstruct the Court file.
6. That the absence of the Court file had hindered him from filing and prosecuting an urgent application. That it was in the interest of justice to allow the said application and that the Respondents would not suffer any prejudice if the same was allowed.
7. The Application was opposed by the 2nd Defendant/Respondent through Grounds of Opposition dated June 7, 2021. The 2nd Defendant/Respondent opposed the Application inter alia on the grounds;
 - a. That the Application is fatally and incurably defective as it is filed against Order 24 Rule 3.
 - b. That the drafting of the Application is wanting as the Plaintiff/Applicant is deceased and John Mbogo Nyambura has no locus before Court.
 - c. That the Plaintiff in the suit died on February 5, 2013, and the said John Mbogo Nyambura, never made an application for substitution within one year of her demise as required by the *Civil Procedure Rules* and therefore the suit has abated.
 - d. That the Application ought to be dismissed for want of proper parties capable of proceeding with the Application as the 1st Defendant is deceased and the cause of action does not survive against the 2nd Defendant as he has no familial lineage with the Applicant.
 - e. That despite the said John Mbogo Nyambura, being issued with grant of letters ad litem, on October 28, 2016, he has never exhibited interest to be made a party to the suit.
 - f. That the said John Mbogo Nyambura, has not demonstrated by evidence or otherwise that he has been tracing the file for the last 3 years, and his application is an admission of indolent and unwillingness by the Applicant to prosecute the suit.
 - g. That the Applicant has not complied with the necessary procedure for reconstruction as he has not involved the Defendants in the reconstruction
 - h. That the documents intended to be used for reconstruction have not been certified and as such are unreliable and cannot be said to reflect a true record of the original file.



8. The Application was canvassed orally in Open Court and on July 14, 2021, the trial Court delivered a Ruling in favour of the Defendants/Respondents and stated as follows;

“The Upshot is that I find the Application lacks merit and the same is hereby dismissed with costs to the 2nd Defendant”

9. The Appellant was aggrieved by the above determination of the Court in favour of the 2nd Respondent herein and has sought to challenge the said Ruling through the Memorandum of Appeal dated August 12, 2021, and sought for orders that;

1. The Appeal be allowed.
2. The Orders made on July 14, 2021, be vacated and the Notice of Motion Application dated April 6, 2021, be allowed as prayed.
3. The costs of the Appeal and the proceedings in the Senior Principle Magistrate at Kangema be awarded to the Appellant.

10. The grounds of Appeal are;-

1. The Learned trial Magistrate erred in Law and fact by making a lopsided ruling in favour of the 2nd Respondent contrary to the facts and evidence presented before him.
2. The Learned trial Magistrate erred in Law and fact in giving undue weight to the grounds of opposition of the 2nd Respondent thereby arising at a biased finding.
3. The Learned trial Magistrate erred in Law and fact by failing to exercise his discretion, in a judicial manner contrary to the provisions of Article 159 (2) (d) of the [Constitution of Kenya, 2010](#).
4. That in all the circumstances of the case and in as far as the Appellant is concerned, the learned Magistrate failed to do complete justice before him.
5. That the Learned Magistrate erred in law and fact in disallowing the Applicant’s Application.
6. The Learned trial Magistrate erred in Law and fact by making orders that were not only unconscionable, but also an affront to the provisions of Article 159 (2)(d) of the [Constitution of Kenya 2010](#), which underlines substantive justice as opposed to procedural technicalities.

11. The 2nd Respondent opposed the Appeal via Reply to the Memorandum of Appeal dated September 17, 2021.

12. It is the 2nd Respondent’s averment that the trial Magistrate was correct in fact and in law by making a Ruling in favour of the 2nd Respondent. That the trial Magistrate was right in giving weight to the Grounds of Opposition of the 2nd Respondent and that this suit has abated by operation of law after the demise of the Plaintiff on February 5, 2013, and the 1st Defendant on June 25, 2002. That the said John Mbogo Nyambura, continues to ignore the critical orders to be sought first in an abated suit, by embarking on substituting himself in place of the Deceased’s Plaintiff in the Memorandum of Appeal.

13. On April 21, 2022, the Court directed that the instant Appeal be canvassed by way of written submissions.

14. The Appellant acting in person filed his written submissions dated June 17, 2022, and submitted that the lower Court fell into error when through the letter appearing on Page 64 of the Record of Appeal,



- advised him to move Court for reconstruction of the Court file because the same was missing and then dismissed the Applicant's Application for reconstruction via the Ruling delivered on July 14, 2010.
15. The Applicant relied on the case of *Abdul Karim Omar v Stephen Ngumbau Kitbuka* (2017) eKLR, where the Court set out the procedure that ought to be followed before a missing file is reconstructed and held that the issue of reconstruction of a missing Court File is an internal matter to be addressed by the office of the Registrar, the official and legal custodian of all Court files. Further it was the Appellant's submissions that the lower Court failed to exercise its discretion in tandem with the principles espoused in Articles 48,50, and 159 of the *Constitution of Kenya, 2010*.
 16. The 2nd Respondent on the other hand filed his written submissions through Babu Law Firm dated May 25, 2022. It is the 2nd Respondent's submissions that the Appellant led no evidence at all on why he had never been substituted in the suit, despite being issued grant ad litem on October 28, 2016. That the suit has abated by virtue of Order 24 Rule 3 of the *Civil Procedure Rules*. That the Plaintiff died on February 5, 2013, while the 1st Respondent died June 25, 2002, and therefore there was no valid suit before the trial Court by the time the Appellant filed the impugned application.
 17. The 2nd Respondent relied on a litany of cases *inter alia* *Said Sweilem Gheithan Saanum v Commissioner of Lands & 5 others* (2015) eKLR, where the Court of Appeal explained the provisions of Order 24 of the *Civil Procedure Rules, 2010*, and stated that where no application for substitution of a deceased person was made within one year, or within the time extended by leave of the Court, the suit shall abate.
 18. Further, the 2nd Respondent submitted that the Appellant waited for over 4 years to begin his attempt to trace the file, and he had not given sufficient cause to explain his delay. That this Court has a duty to avoid any form of prejudice or hardship that may be caused on a party, as a result of unexplained and/or inexcusable delay. The 2nd Respondent therefore urged this Court to dismiss the instant appeal and uphold the ruling of the trial Court as the same was made after careful consideration of the requisite legal principles and law.
 19. The Court has considered the evidence adduced in Court as well as the submissions thereafter by parties. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows; -
 20. This is a first Appeal and the Court has a duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the *Civil Procedure Act*.
See the case of *Abok James Odera t/a A.J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, where it was held in part that:-

“This being a first appeal, we are reminded of our primary role as a first appellate Court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
 21. This Court has a duty to delve into some factual details and revisit the facts as presented before the trial Court, analyse the same, evaluate it and arrive at an independent conclusion.
 22. This Court notes that the instant appeal turns on whether the trial Magistrate exercised his discretion properly in dismissing the Application dated February 6, 2021, filed by the Appellant herein.
 23. Before this Court can interfere with such discretion, it must be satisfied that the learned Magistrate misdirected himself in some matter and as a result arrived at a wrong decision or that he



misapprehended the law or failed to take into account some relevant matter. Madan, JA (as he then was) captured the principle more succinctly in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* (1985) EA 898 as follows:

"The Court of appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. The Court of appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

24. Having now carefully read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions, and the Ruling by the trial Court, this Court and finds the issue for determination is whether the Appeal is merited.

i. Whether the instant Appeal is merited

25. What flows from the evidence, pleadings and the rival written submissions of parties, and the record before this Court is that Esther Nyambura Mbogo, now deceased instituted a suit in the Chief Magistrates Court at Kangema being SMRCC 33 of 1994. That while the suit was still pending in Court, the Plaintiff and the 1st Defendant therein died on February 5, 2013 and June 25, 2002 respectively.
26. The Appellant herein obtained a limited grant Ad-Litem over the estate of the Plaintiff on October 28, 2016. The Appellant herein after being issued with the Limited Grant Ad litem, sat on it until April 6, 2021, when he approached the trial Court with the impugned application seeking to reconstruct the trial Court's file to enable him proceed with the case.
27. The Court notes that while the said Esther Nyambura Mbogo, had long died by the time the Application was filed, she was still named as the Plaintiff in the said Application. The Supporting Affidavit was however sworn on by the Appellant herein.
28. As a general rule, upon the death of any of the party to a suit, the suit abates after 12 months from the death of the party. Order 24 Rules 3(1) and 3(2), 4 and 7 provides that:
- (1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiff s 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.

Order 24 Rule4(1) provides that:

- 4(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.

Order 24 rule 7 states:

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
- (2) The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt Plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

29. There are two stages according to these provisions. As a general rule, the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the Court may in its discretion for “*good reason*” determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “*good reason*” therefore relates to application for extension of time to join the Plaintiff’s legal representative to the suit.
30. Secondly, if no such application is made within one year or within the time extended by leave of the Court, the suit shall abate. Where a suit abates, no fresh suit can be brought on the same cause of action. The effect of an abated suit is that it ceases to exist in the eyes of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff.
31. In its decision, which is binding to this Court, the Court of Appeal in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, held:

“The sequence of the application under this procedure of what should happen in case of the death of a Plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs, which he may have incurred in defending the suit, to be recovered from the estate of the deceased Plaintiff. But as was observed by this Court in *Said Sweilam* (supra) the fact of abatement has to be brought to the notice of the Court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the Court is necessary for a final and effectual disposal of the suit.

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased Plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one



year, that an application be made for extension of time to apply for joinder of the deceased Plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted."

31. Further in the case of *William Muinde Kilundo v Peter K. Wambua & 3 others* [2018] eKLR, the Court approved the decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others*, *supra*, and held that the provisions of Order 24 are not mere technicalities as follows:

25. Having found that the cause of action in the two suits were similar, we cannot help but note that the High Court suit which was filed first in time abated following the deceased's death on August 13, 1994. This much is admitted by the appellant. As a result, the provisions of Order 24 (7) of the *Civil Procedure Rules* which we have set out in the opening paragraph of this judgment come into play. This Court while expressing itself on the said provision in *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR held:

"Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented." [Emphasis added]

26. We decline to accede to the appellant's invitation to find that the provision in question is a mere technicality and should not defeat substantive determination of the suit. In doing so, we take guidance from the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR wherein this Court succinctly stated:

"The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure."

32. In the instant suit, the Plaintiff, Esther Nyambura Mbogo, died on February 5, 2013, and the 1st Defendant died on June 25, 2002. Based on the above, it follows that the case against the 1st Defendant by law abated on June 26, 2003, unless it is proved before this Court that an application for extension of time and substitution with their legal administrators was made. This Court further notes that in the instant Appeal, the 1st Respondent's name appears as it did in the initial suit. Therefore, it is in order to assume that no such substitution has been made and therefore the suit against the 1st Defendant has already abated.



33. With regards to the Appellant's case, this Court has not seen any application for substitution and or application for extension of time filed by the Appellant. Therefore, the Court will agree with the 2nd Respondent that indeed the Plaintiff's suit abated on February 6, 2014, exactly 12 months after the demise of Esther Nyambura Mbogo, by operation of law.
34. Consequently, it follows that by the time the Appellant filed the Application dated April 6, 2021, the suit he sought to reconstruct had already abated and therefore the Orders sought in the said application were a nullity and could not be sustained in law.
35. Having analysed the available evidence at the Lower Court, the Record of Appeal and the rival written submissions, together with the relevant provisions of Law, the Court finds and holds that the Appeal herein is not merit and the same cannot stand.
36. Consequently, the Court proceeds to dismiss the instant Appeal entirely with costs to the 2nd respondent herein.
37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 28TH DAY OF JULY, 2022.

L. GACHERU

JUDGE

In the presence of;

Joel Njonjo - Court Assistant

Appellant – Absent

1st Respondent – Absent

Mr Mwangi for the 2nd Respondent

L. GACHERU

JUDGE

July 28, 2022

