



Thande v Thande & 24 others; Nyangwara & 21 others (Co-defendant) (Environment and Land Case Civil Suit 629 of 2011) [2022] KEELC 12794 (KLR) (28 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12794 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 629 OF 2011
SO OKONG'O, J
SEPTEMBER 28, 2022**

BETWEEN

PAULINE NJERI THANDE PLAINTIFF

AND

SOLOMON KIRAGU THANDE 1ST DEFENDANT
ELIZABETH WAMBUI MUIGAI 2ND DEFENDANT
MATHEW NGUGI MURIGI 3RD DEFENDANT
JOTHAM KAHARA NDIANGUI 4TH DEFENDANT
IRENE WAIRIMU GICHUNGO 5TH DEFENDANT
WALTER NGUGI MWANIKI 6TH DEFENDANT
FAITH NKATHA MAKEBU KIUNGA 7TH DEFENDANT
ANTHONY WAWERU NDERU 8TH DEFENDANT
BENSON NGUGI NJERI 9TH DEFENDANT
EVAH NYAMBURA NGUGI 10TH DEFENDANT
SIMON NG'ANG'A 11TH DEFENDANT
PERIS WAHINYA 12TH DEFENDANT
MAINA ISAAC MURAGE 13TH DEFENDANT
SYLVIA ANYANGO OHAGA 14TH DEFENDANT
JAMES MWANGI KARIUKI 15TH DEFENDANT
SARAH WAIRIMU 16TH DEFENDANT
GEORGE KYALO MACHENZIE 17TH DEFENDANT



DOMINIC NJENGA KIRUTHI	18TH DEFENDANT
GERALD MBUGUA NGIGI	19TH DEFENDANT
ZAKAYO KURIA	20TH DEFENDANT
JANE MAINA	21ST DEFENDANT
GRACE WAHU IKINYA	22ND DEFENDANT
JOHN NDUNGU	23RD DEFENDANT
GATHIGIA GATHERU	24TH DEFENDANT
MUTHONI NYOIKE	25TH DEFENDANT

AND

JEREMIAH MATOKE NYANGWARA & 21 OTHERS CO-DEFENDANT

RULING

1. On May 18, 2019, the co-defendants herein brought an application by way of notice of motion dated May 16, 2019 seeking an order that this suit be dismissed for want of prosecution and in the alternative, on the ground that the same had abated. The application was brought on the grounds that the 1st defendant, Solomon Kiragu Thande died on October 19, 2013 and that the plaintiff and one, Kariuki Peter Thande were appointed as the administrators of his estate on May 30, 2017. The co-defendants contended that the plaintiff had refused to substitute the deceased 1st defendant so that she could proceed with the suit. The co-defendants averred that the plaintiff's suit as against the 1st defendant had abated and that it was only fair and just that the suit be dismissed.
2. In a ruling delivered on November 19, 2020, the court found that there was no basis for the dismissal of the suit for want of prosecution. The court found however that the suit had abated as against the deceased 1st defendant. The court found that the 1st defendant (hereinafter referred to only as "the deceased") died on October 19, 2013 and that no steps had been taken to substitute him in this suit by his legal representatives. The court held that the plaintiff's suit as against the 1st defendant abated by operation of law under Order 24 rule 4(3) of the *Civil Procedure Rules* after the expiry of one year from the date of his death. In view of that finding, the court ordered that the plaintiff's suit as against the 1st defendant had abated.
3. What is now before me is another notice of motion application by the co-defendants (hereinafter referred to only as "the applicants") dated February 1, 2021. In the application, the applicants are seeking the following orders;
 1. That the applicants be granted leave to amend their statement of defence and counter-claim to delete the name of the deceased and in place thereof add Pauline Njeri Thande and Kariuki Peter Thande as plaintiffs in their capacity as the administrators of the estate of the deceased.
 2. That the defendants be granted leave to amend their statement of defence and counter-claim to add additional parties as defendants.
4. The application which is supported by the affidavit of Arthur Nganga Gituku is brought on the grounds that the deceased who was the 1st defendant and against whom the applicants had made a claim



should be substituted with the administrators of his estate so that the applicants can pursue their claim against the deceased. The applicants have averred further that persons with claims against the deceased in respect of the suit property have increased and as such it is necessary for the defence and counter-claim to be amended to add more parties.

5. The application is opposed by Kariuki Peter Thande (hereinafter referred to only as “the respondent”) through notice of preliminary objection dated August 12, 2021 and a replying affidavit dated August 6, 2021. In his notice of preliminary objection, the respondent has contended that the plaintiff’s suit as against the deceased has abated and as such the same cannot be revived through the amendment sought by the applicants. The respondent has contended further that this suit is sub-judice as there is another suit raising similar issues in which similar reliefs have been sought pending before the ELC at Thika namely; ELC No 116 of 2019. The respondent has contended further that the amendments sought by the applicants amount to an abuse of the court process. In his affidavit, the respondent has reiterated the contents of his notice of preliminary objection. The respondent has stated that he objects to being joined in this suit as a plaintiff in his capacity as one of the administrators of the estate of the deceased. The respondent has contended that although the applicants all along knew of the death of the deceased, they never took steps to substitute the deceased with his legal representatives. The respondent has averred that on November 19, 2020, the court ordered that this suit had abated as against the deceased. The respondent has contended that the present application is intended to circumvent the said order by the court. The respondent has contended that a party against which a suit has abated cannot be substituted. The respondent has contended further that in any event, the deceased could only be substituted as a defendant and not as a plaintiff. The respondent has contended that some of the applicants have also not come to court with clean hands as they had objected to the issuance of grant of letters of administration in respect of the estate of the deceased and sought to be declared as beneficiaries of his estate.
6. When the applicants’ application came up for hearing, the applicants relied entirely on the grounds on the face of the application and the affidavit in support thereof and urged the court to allow the same. The respondent similarly relied on his notice of preliminary objection and replying affidavit and urged the court to dismiss the application. The applicants’ application has three limbs; the first limb is seeking the substitution of the deceased with his legal representatives, the second limb is seeking the joinder of additional parties as defendants and the last limb is seeking leave to amend the defence and counter-claim.
7. On the first limb of the application, I am in agreement with the respondent that since the suit against the deceased has abated the deceased cannot be substituted in the suit with his legal representatives unless the suit is revived. I am also in agreement with the respondent that the deceased can only be substituted in the capacity in which he was sued by the plaintiff. The substitution sought by the applicants which is intended to change the status of the deceased from a defendant to a plaintiff is bad in law. It follows therefore that the limb of the application seeking the substitution of the deceased is incompetent.
8. With regard to joinder of additional parties, I am of the opinion that no prejudice would be suffered by the respondent if more parties who have similar claims as defendants are added as defendants to the suit. In any event, the plaintiff in the suit has not opposed the application. On the last issue which concerns amendment of the defence and counter-claim, when a court allows joinder of additional parties to a suit, amendment of pleadings is ordered as a matter of course. In the circumstances, the applicants are entitled to amend their defence and counter-claim to add more parties to the suit as defendants. In conclusion, the applicants’ application succeeds in part. The application is allowed on the following terms;



1. The applicants are granted leave to amend their defence and counter-claim filed on May 25, 2012 to add 23rd to 41st applicants as defendants to the suit.
2. The prayer seeking substitution of the deceased 1st defendant is refused.
3. The costs of the application to be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Ndirangu for 2nd Respondent, Kariuki Thande

N/A for the Plaintiff

Mr. Mbaji for the 2nd to 25th Defendants

Mr. Ongangi h/b for Mr. Babu for the Co-defendants

Ms. C. Nyokabi - Court Assistant

