



Mohdar & another v Kombe & 4 others (Environmental and Land Originating Summons 252 of 2018) [2022] KEELC 13347 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 252 OF 2018
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

MOHAMED ABUBAKAR MOHDAR 1ST PLAINTIFF

FAROOK ABUBAKAR MOHDAR 2ND PLAINTIFF

AND

KAINGU KOMBE 1ST DEFENDANT

SAIDI OKUMU 2ND DEFENDANT

MORRIS WANJE (OF MAISHA MAPYA SELF HELP GROUP) 3RD DEFENDANT

ABUBAKAR MOHAMMED HABIB 4TH DEFENDANT

HALIM BINTI MOHAMMED ALAMIN 5TH DEFENDANT

RULING

1. The application is dated June 29, 2022 and is brought under sections 1A, IB, 3A of *Civil Procedure Act*, Order 24 rule 3 & 7(2), Order 51 of the *Civil Procedure Rules* seeking the following orders;
 1. The honourable court be pleased to join Ahmed Abubakar Mohdhar and Fatma Abubakar Mohdhar, as the legal representatives of the two (2) deceased plaintiffs who died on December 2, 2015 and September 20, 2020 respectively, during the pendency of this case, and to continue with the case, with leave to file pleadings suitable to this new status.
 2. The court be pleased to reinstate and/or revive the abated suit;
 3. The court be pleased to extend time within which to substitute the deceased plaintiffs;
 4. There be no order as to costs.



2. It is based on the grounds that the two (2) deceased plaintiffs passed on December 2, 2015 and September 20, 2020 respectively before the suit was concluded. The applicants herein instructed the plaintiffs' counsel to apply for letters of administration of grant *ad litem* for purposes of substituting the deceased plaintiffs. On June 9, 2022, two (2) letters of administration of grant *ad litem* were issued in Mombasa CMCC Misc Succession Cause No E069 of 2022 - In the matter of the estate of Farook Abubakar Mohdhar Mohamed (deceased) appointing Ahmed Abubakar Mohdhar and Waily Abubakar Mohdhar and Mombasa CMCC Misc. Succession Cause No E070 of 2022 - In the matter of the estate of Mohamed Abubakar Mohdhar (deceased) appointing Fatma Abubakar Mohdhar as the legal representatives of the deceased plaintiffs' estate for purposes of instituting and/or defending the estates in court proceedings. The plaintiffs' counsel wrote a letter to court on November 17, 2021 requesting the registry to retrieve the court file for perusal purposes so as to know the position of the file. However, the file could not be traced neither in the registry nor the court's archives. On June 21, 2022, the plaintiffs' counsel wrote another letter requesting the court to retrieve the court file to enable prepare and file an application for substitution of the deceased plaintiffs and for reinstatement of the abated suit only to be told that the suit had been listed for dismissal for want of prosecution (NTSC) before court 2 on June 30, 2022. It is in the interest of justice that this application be allowed to give the deceased plaintiffs legal representatives a chance to prosecute the suit to its conclusion. It is necessary to join the legal representative to take care of the deceased plaintiffs' interests.
3. This court has considered the application and the supporting affidavit. The defendants were served but failed to file any opposition. The deceased plaintiffs died in 2015 and 2020 respectively and this application has been filed in 2022. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. In the case of *Said Sweilem Gbeithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 Others* (2015) eKLR, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

There are three 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 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.

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.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye 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."
4. In the case of *Titus Kiragu v Jackson Mugo Mathai* (2015)eKLR it was held that:

It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law."



5. *Charles Mugunda Gacheru v Attorney General & Another* (2015) eKLR, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of *Rukwaro Waweru v Kinyutho Ritbo & Another* (2015) eKLR, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. From the limited grants of letters of administration, it shows that the same were issued in 2022. The administrators of the estate of the plaintiffs have been indolent and no sufficient cause has been given for the delay. This matter was first filed in court in 1995. There is absolutely no justification for this delay. Indeed, that when the matter was listed for dismissal is when the plaintiffs suddenly woke up and filed the current application. I find that the application is not merited and I dismiss it. There will be no orders as to costs as the application was undefended.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

