



**Ndei v Muriuki & 5 others (Environment and Land Case Civil Suit  
496 of 2011) [2022] KEELC 13292 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13292 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 496 OF 2011  
SO OKONG'O, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**SILAS MURIUKI NDEI ..... PLAINTIFF**

**AND**

**SAMUEL MUREITHI MURIUKI ..... 1<sup>ST</sup> DEFENDANT**

**UNCLE SAM'S GITHURAI LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**HOUSING FINANCE CO OF KENYA LTD ..... 3<sup>RD</sup> DEFENDANT**

**JOSEPH MUIRURI ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**MERCY WAMBUI MUIRURI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before the court is the notice of motion application dated September 21, 2020 by the legal representatives of the estate of the deceased plaintiff, Silas Muriuki Ndei namely, Samuel Mureithi Muriuki, Cecilia Wanjiku Kibare and Consolata Wangechi Muriuki (hereinafter referred to as “the applicants”). The applicants have sought the following orders;
  1. That the time for filing the application be extended.
  2. That the suit be and is hereby revived.
  3. That the applicants be substituted as the Plaintiffs in place of the deceased.
  4. That the costs of the application be in the cause.
2. The application which is supported by the affidavit of Samuel Mureithi Muriuki has been brought on the grounds that the cause of action herein survived the deceased plaintiff, Silas Muriuki Ndei



(hereinafter referred to only as “the deceased”) and that the applicants are seeking to be substituted as plaintiffs in the suit so that they can pursue the same against the defendants to its logical conclusion. The applicants have averred that the suit that has abated should be revived in the interest of justice. The applicants have averred that an earlier application that had been brought for the substitution of the deceased plaintiff in 2018 was withdrawn on technical grounds. The applicants have averred that the delay in bringing the application which is explained in the affidavit that was filed in support of the said withdrawn application is regretted. The applicants have annexed to the affidavit in support of the application a grant of probate that was issued to the applicants on August 4, 2016.

3. The application is opposed by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. In their grounds of opposition dated March 11, 2022, the 3<sup>rd</sup> defendant has contended that the application has no basis. The 3<sup>rd</sup> defendant has contended further that the application is defective and unprocedural in that the 1<sup>st</sup> defendant has sought to be both a defendant and a plaintiff in the same suit. The 3<sup>rd</sup> defendant has contended further that the applicants are guilty of undue delay. In its replying affidavit sworn by Christine Wahome on March 11, 2022, the 3<sup>rd</sup> defendant has reiterated the contents of its grounds of opposition.
4. In a replying affidavit sworn by Joseph Muiruri on February 22, 2022, the 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the applicants’ application is fatally defective in that the applicants have sought the revival of the suit before the court determines the issue of extension of time to file the application for substitution. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the applicants have filed the application after unreasonable delay that has not been reasonably explained. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the first application for substitution was filed on March 5, 2018, three (3) years after the death of the deceased plaintiff. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the grant of probate on the basis of which this application has been brought was issued in 2016 and that the present application was filed 7 years after the date of the said grant and 2 years after the withdrawal of the first application. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the delay in filing the application is inordinate and inexcusable.
5. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that to revive a suit that abated 5 years ago would be prejudicial to them in that there must be an end to litigation. The 4<sup>th</sup> and 6<sup>th</sup> defendants have averred that the applicants have been indolent which is inconsistent with their alleged desire to have the suit determined on merit.
6. During the hearing of the application, the applicants submitted that the delay in the filing of the application was occasioned by a family feud that frustrated the prosecution of the application for a limited grant of letters of administration in respect of the estate of the deceased. The applicants submitted that they were seeking the substitution of the deceased plaintiff with the 1<sup>st</sup> defendant who is his son and legal representative. The applicants submitted that after the 1<sup>st</sup> defendant is made a plaintiff in place of the deceased, he would cease to be the 1<sup>st</sup> defendant.
7. In its submission in reply, the 3<sup>rd</sup> defendant submitted that the delay in the filing of the application was not explained. The 3<sup>rd</sup> defendant submitted that the application was filed 4 years after the issuance of the said grant. On their part, the 4<sup>th</sup> and 6<sup>th</sup> defendants submitted that the application was defective in that the applicants sought revival of the suit before substitution. The 4<sup>th</sup> and 6<sup>th</sup> defendants submitted that the suit having abated, the same was non-existent and as such could not be revived. The 4<sup>th</sup> and 6<sup>th</sup> defendants submitted that the revival of the suit would be prejudicial to them.

**Determination:\_\_\_**

8. Order 24 rule 3 of the [Civil Procedure Rules](#) provides as follows:



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 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 rule 7(2) of the [Civil Procedure Rules](#) provides as follows:

”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.”

Order 50 rule 6 of the [Civil Procedure Rules](#) provides that:

”Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”

9. It is not disputed that the plaintiff died on July 1, 2015 and that he was not substituted herein within 1 year as a result of which the suit abated as against all the defendants. On July 21, 2016, the 1<sup>st</sup> and 2<sup>nd</sup> defendants made an application seeking an order that this suit had abated and that the same was no longer tenable. On February 15, 2017, the court allowed the 1<sup>st</sup> and 2<sup>nd</sup> defendants’ application. The suit was declared as having abated and the costs thereof awarded to the defendants.
10. On March 1, 2018, one, Joseph Ngasha applied for extension of time to file an application for substitution of the deceased plaintiff and for him to be substituted as plaintiff in place of the deceased. The said Joseph Ngasha claimed to be the legal representative of the deceased. The application that was brought by the advocates on record for the deceased plaintiff was opposed. When the said application came up for hearing on February 17, 2020, the same was withdrawn.
11. The present application was filed on September 25, 2020 slightly over 5 years since the death of the plaintiff and 7 months after the withdrawal of the earlier application. I have also noted that the grant of probate in respect of the estate of the deceased was issued to the applicants on August 4, 2016 which means that the applicants brought the present application 4 years after they obtained the grant of probate. The other striking factor in the application is that the court declared the suit as having abated on application by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 1<sup>st</sup> defendant from the material on record is a director of the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant is now one of the applicants seeking an order for the revival of the suit. In fact, he is seeking to be one of the plaintiffs in the suit.



12. The court has discretionary power to revive an abated suit and to extend time within which a deceased plaintiff in a suit can be substituted. What I need to determine is whether the applicants have shown sufficient cause to warrant the grant of the orders sought. Sufficient cause was defined in *Attorney General v Law Society of Kenya & another* [2017] eKLR as follows:

"Sufficient cause or good cause in law means:

...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary, 9th Edition, page 251*.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

13. I am not satisfied that the applicants have established sufficient grounds to warrant the revival of this suit and the substitution of the deceased plaintiff with the applicants. I am in agreement with the 4<sup>th</sup> and 6<sup>th</sup> defendants that litigation must come to an end. I am also in agreement with the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants that the present application has been brought after unreasonable delay which delay has not been explained. The applicants have not explained to the court why they took 4 years after obtaining a grant of probate to seek the substitution of the deceased. The applicants cannot take cover on the first application for substitution that was filed in 2018. The application was not brought by the applicants before the court and the applicant in that application did not rely on the grant of probate that was issued to the applicants herein. The applicants have urged the court to consider the grounds for delay that was given in the said earlier application. In the affidavit in support of the 2018 application for substitution that was withdrawn, the reason for delay was given as family feud. I do not think that this is a valid reason that would justify revival of an abated suit. I see no reason why the court should subject the respondents herein to defend a suit that abated 6 years ago merely because the applicants took their sweet time quarrelling over the estate of the deceased instead of filing an application for substitution.
14. What I have said is sufficient to dispose of the application before me. I wish to add however that the involvement of the 1<sup>st</sup> defendant in the application gives me the impression that there is no genuine intention on the part of the applicants to prosecute the suit. As I have mentioned earlier, the 1<sup>st</sup> defendant who is one of the sons of the deceased plaintiff is a director of the 2<sup>nd</sup> defendant. In this suit, the deceased plaintiff has accused the 1<sup>st</sup> defendant of fraudulently causing the suit property, Nairobi/Block116/33 that was registered in the deceased's name to be transferred to the 2<sup>nd</sup> defendant which charged the same to the 3<sup>rd</sup> defendant to secure a loan. The deceased claimed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants failed to pay the loan that they borrowed from the 3<sup>rd</sup> defendant as a consequence of which the 3<sup>rd</sup> defendant sold the suit property to the 4<sup>th</sup> and 6<sup>th</sup> defendants to recover its debt.
15. In their defence, the 1<sup>st</sup> and 2<sup>nd</sup> defendants denied that they fraudulently acquired the suit property and charged the same to the 3<sup>rd</sup> defendant. They contended that the 2<sup>nd</sup> defendant acquired the suit property lawfully from the deceased and that the charge to the 3<sup>rd</sup> defendant was similarly lawful. The 1<sup>st</sup> and 2<sup>nd</sup> defendants had urged the court to dismiss the deceased's suit with costs. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not bring any claim against their co-defendants. It is the same 1<sup>st</sup> and 2<sup>nd</sup> defendants who had applied to the court to order that the deceased's suit had abated and which application was granted by the court. It is the same 1<sup>st</sup> defendant who has now sworn an affidavit in support of the present application contending that the applicants are desirous of prosecuting this suit and the 1<sup>st</sup> defendant has lined himself up as one of the proposed Plaintiffs although he is a defendant together with his company which is the 2<sup>nd</sup> defendant. I wonder how the 1<sup>st</sup> defendant who has denied the deceased's claim would be able to prosecute it against his company and the other defendants whom he



has exonerated in his defence. In this state of affairs, the court can only read mischief on the part of the applicants which the court will not lend its aid to.

16. The upshot of the foregoing is that the applicants' application dated September 21, 2020 has no merit. The same is dismissed with costs to the 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> defendants.

**DELIVERED AND DATED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022**

**S. OKONG'O**

**JUDGE**

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

Ms. Mburukwa h/b for Mr. Narangwi for the Applicants

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Juma for the 3<sup>rd</sup> Defendant

N/A for the 5<sup>th</sup> Defendant

Ms. Maina for the 4<sup>th</sup> and 6<sup>th</sup> Defendants

Ms. C. Nyokabi - Court Assistant

