



**Kombo v Abdalla & 3 others (Environment & Land Case
117 of 2017) [2025] KEELC 143 (KLR) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 117 OF 2017
LL NAIKUNI, J
JANUARY 24, 2025**

BETWEEN

ABDALLA KOMBO PLAINTIFF

AND

TWALHA ABDALLA 1ST DEFENDANT

ABUBAKAR KOMBO ABDALLA 2ND DEFENDANT

MWIJUMA KOMO ABDALLA 3RD DEFENDANT

FATUMA KOMBO ABDALLA 4TH DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court is tasked to make determine the Notice of Motion application dated 5th July, 2024 filed by Mwinyi Juma Kombo Abdalla, the 3rd Defendant/Applicant herein. It was brought under the provision Order 24 Rule 3 (2). Rule 7 Order 51 Rule 1 of the Civil Procedure Rules 2010, Sections 1A,1B, 3 and 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the Law.
2. Despite of the application having been served, none of the Respondents filed any replies. However, the Honourable Court will still proceed to make a determination on its own merit.

II. The 3rd Defendant/Applicant's case

3. The 3rd Defendant/Applicant sought for the following orders:-
 - a. That this Court be pleased to order that this suit abated.
 - b. That costs of this Application be awarded to the Applicant.



4. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 11th Paragraphed Supporting Affidavit of – Mwijuma Kombo Abdalaa, the 3rd Defendant herein sworn and dated on the same day as the Application with one (1) annexure marked as ‘MKA - 1’. The Applicant averred that:-
- a. The deponent and the Plaintiff were related by virtue of being siblings, being sons of one Abdalla Kombo Abdalla (Hereinafter referred to as “The Deceased”).
 - b. The Plaintiff herein died on 20th December, 2017 as per the annexed copy of the Certificate of Death number 1508818 and marked as “MKA - 1”.
 - c. The deceased was not survived by any child or widow.
 - d. No probate and administration process had ever been commenced by their family since the demise of the Plaintiff.
 - e. One year since the demise of the Plaintiff lapsed on 19th December, 2018.
 - f. Upon perusal proceedings herein with the help of my Advocates on record, he had noted with dismay, that on 10th November 2021 (hence the suit had long abated) the Plaintiff’s Advocates on record applied for and obtained leave to apply for Letters of Administration ad litem.
 - g. Further to the foregoing, the Plaintiff was granted three months to make such an application to date.
 - h. The continued pendency of this suit was causing an untold anxiety to the Deponent.
 - i. Litigation must finally come to an end.
 - j. Therefore make this application in strong support of the instant Application and the orders sought therein.

III. Submissions

5. On 21st November, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 16th June, 2023 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not accessed the written submissions by any of the parties. Pursuant to that a ruling date was reserved on 24th January, 2025 by Court accordingly on its own merit.

IV. Analysis and Determination

6. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
1. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 5th July, 2024 is merited?
 - b. Who will bear the Costs of Notice of Motion application dated 5th July, 2024.



ISSUE No. a). Whether the Notice of Motion application dated 5th July, 2024 is merited

8. Under this Sub – heading, the Honourable Court will decipher on the substratum of the matter herein being the legal position where the suit has abated. The application is brought inter alia under the provision of Order 24 Rules 3 (2) and 7 (2) of the Civil Procedure Rules, 2010. Order 24 Rule 3 provides:

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. [Emphasis supplied]

9. The provision of Order 24 Rule 7 (2) of the Civil Procedure Rules provides:

7.(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. [Emphasis supplied]

10. The Plaintiff commenced this suit through a plaint filed in the Environment and Land Court at Mombasa on 5th April, 2017. The Plaintiff averred that his father owned six of the suit properties. The Plaintiff contended that the Defendants jointly and severally were out to disinherit his siblings and himself unless stopped by the orders of this Honourable Court. He therefore sought judgment against the Defendants for:-

a. A permanent injunction against the Defendants jointly and severally, to stop interfering, selling, leasing and/or otherwise dealing with the suit properties herein until distribution is fully completed.

b. An order of eviction, directing the 1st Defendant and her client to vacate Plot No. Kilifi/Mwahera 'A'/ 422 immediately.

c. Costs of this suit together with interest thereon.

11. The foregoing makes is clear that the cause of action survived the plaintiff and if an application for substitution was made prior to abatement, the legal representative would have been made a party to enable her proceed with the suit. Clearly, from the surrounding facts herein, there no dispute that this suit abated on 20th December, 2017. Consequently, the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules come into operation. Having made the present application, the applicant must prove that he/ she was prevented by any sufficient cause from continuing the suit.



12. In the case of “Rebecca Mijide Mungole & Another – Versus - Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR” the Court of Appeal stated that;

“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. 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.”

13. 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 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. 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.
14. Being that in this particular suit the Legal representatives of the deceased Plaintiff’s estate did not apply for the substitution of the deceased with themselves. Therefore, as it stands this suit is abated and thus dismissed.

ISSUE b). Who bears the costs of the Notice of Motion application dated 5th July, 2024

15. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means



the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).

16. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
17. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion and disposition

18. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the omnibus application, this court arrives at the following decision and makes the orders below:-
 - a. That the Notice of Motion application dated 5th July, 2024 be and is hereby allowed as pleaded.
 - b. That the suit be and is hereby marked as abated.
 - c. That all orders herein including the interim orders of injunction are hereby vacated.
 - d. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS24TH DAY OF JANUARY 2024.

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HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Mokaya Advocate for the Plaintiff/Respondent.
- c. Mr. Achoka Advocate for the 3rd Defendant/Applicant.
- d. No appearance for the 1st, 2nd and 4th Defendants/Respondents.

HON. L.L. NAIKUINI (JUDGE)

