



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kimani v Mutua (The Administratrix of the Estate of the Late Titus  
Mutua Kilome-Deceased) & another (Environment & Land Case  
121 of 2009) [2022] KEELC 13691 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13691 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 121 OF 2009**

**JO MBOYA, J  
OCTOBER 21, 2022**

**BETWEEN**

**SIMON KANGETHE KIMANI ..... PLAINTIFF**

**AND**

**SAPHINA MULEE MUTUA (THE ADMINISTRATRIX OF THE ESTATE OF  
THE LATE TITUS MUTUA KILOME-DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Background and Introduction**

1. Vide notice of motion application dated the March 30, 2022, the plaintiff herein seeks the following reliefs;
  - i. This application be hereby heard on priority basis.
  - ii. The honourable court be hereby pleased to stay proceedings and/or the taking of further directions in respect of the filing of written submissions and/or the fixing of a judgment date pending the hearing and determination of the instant application.
  - iii. Leave be hereby granted to the plaintiff/applicant to re-open his case limited to the production of the plaintiff's further bundle of documents dated March 30, 2022 annexed hereto and marked as exhibit "SK1" to the plaintiff/applicant's supporting affidavit.
  - iv. Upon leave being granted under prayer 3 hereinabove, the plaintiff's further bundle of documents dated March 30, 2022 be hereby deemed to duly form part of the court record.



- v. The defendant be hereby granted corresponding leave to re-open its case, but limited strictly to responding to the evidence adduced/produced pursuant to prayers 3 and 4 hereinabove.
  - vi. Costs of this application be provided for.
2. The subject application is anchored and premised on various grounds enumerated on the face thereof and same is further supported by the affidavit of the plaintiff sworn on the March 30, 2022, wherein the plaintiff/ applicant has attached assorted documents in support thereof.
  3. Upon being served with the subject application, the 1<sup>st</sup> defendant filed and lodged grounds of opposition dated the June 8, 2022 whereby the 1<sup>st</sup> defendant has enumerated thereof *inter-alia*, that the suit abated longtime ago following the death of the original defendants. Consequently, the 1<sup>st</sup> defendant contends that the instant application is not only misconceived, but is legally untenable.
  4. When the subject application came up for hearing on the July 21, 2022, the parties agreed to canvas and dispose of the subject application by way of written submissions. In this regard, the parties thereafter proceeded to and exchanged their written submissions.

### **Submissions by the Parties:**

#### **a. Plaintiff's/applicant's submissions:**

5. The plaintiff/applicant filed written submissions dated the July 12, 2022 and wherein same has highlighted and amplified three pertinent issues for consideration.
6. First and foremost, counsel for the plaintiff submitted that the subject matter touches on the validity of the sale agreement that was entered into and executed between the current plaintiff and the original defendants, namely, Florence Ndinda Mutua and John Mutio Mutua, respectively over and in respect of the suit property.
7. Counsel has further submitted that even though the original defendants appeared to have procured and obtained grant of letters of administration over and in respect of the estate of Titus Mutua Kilome, the current defendant has challenged the validity of the suit and alleged that the impugned sale agreement was entered into and executed prior to the issuance of the requisite certificate of confirmation of grant.
8. Nevertheless, counsel for the plaintiff has added that after the close of the hearing in respect of the subject matter, the plaintiff discovered or established material and relevant evidence including certificate of confirmation of grant which was issued on the July 18, 1986.
9. Based on the discovery of the certificate of confirmation of grant which was issued on the July 18, 1986, counsel for the plaintiff has submitted that the said document is critical and essential to the plaintiff's/ applicant's case, insofar as same would go along way to confirm that the impugned sale agreement was executed long after the estate of Titus Mutua Kilome had been issued with grant of letters of administration and which was duly confirmed.
10. To this extent, counsel for the plaintiff has added that the impugned documents would therefore be useful and helpful to the court, in pursuit of the truth over and in respect of the subject matter.
11. Premised on the foregoing, counsel for the plaintiff has therefor invited the court to grant the plaintiff latitude to adopt and rely on the impugned documents, which were only discovered after the close of the hearing of the respective parties' cases.
12. The second issues that has been highlighted by counsel for the plaintiff relates to the propriety and validity of the subject application. In this regard, counsel has submitted that the application relates



to reopening of the plaintiff's case and that the court has the requisite jurisdiction and discretion to entertain and adjudicate upon the subject application.

13. For completeness, counsel for the plaintiff/applicant has submitted that it was not necessary for the applicant to file an application for review, either in the manner propagated by the 1<sup>st</sup> defendant or at all.
14. Thirdly, counsel for the plaintiff has submitted that the plaintiff herein has met the requisite threshold to warrant the re-opening of the plaintiff's case with corresponding liberty to re-open the defendant's case, if the defendant so pleases.
15. In respect of this ground, counsel has pointed out that what is important is for the honourable court to consider whether the new evidence which has been discovered and which forms the basis of the application for re-opening of the plaintiff's case, is relevant and material; and similarly, relevant for determination of the issues in dispute.
16. On the other hand, counsel has also added that it is also important for the court to take cognizance of the fact that same, ( the honourable court), is on a mission to discern the truth and to administer justice to the parties.
17. Essentially, counsel for the applicant has therefore invited the honourable court to apply the import and tenor of article 159 (2) (d) of the Constitution and thereafter to find and hold that the subject application ought to be granted.
18. In support of the foregoing submissions, learned counsel for the plaintiff has cited and relied on various decisions *inter-alia*; Daniel kibet Mutai & 9 others versus The Attorney General (2019)eKLR, Peter O Nyakundi & 6 others versus Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another (2016)eKLR, Pinnacle Projects Ltd versus Presbyterian Church of East Africa, Ngong Parish & another and Rain Drops Ltd versus County Government of Kilifi (2020)eKLR.

**b. 1<sup>st</sup> defendant's/respondent's submissions:**

19. The 1<sup>st</sup> defendant filed written submissions dated the July 29, 2022 and same has similarly raised, highlighted and amplified three issues for consideration.
20. Firstly, counsel for the 1<sup>st</sup> defendant has submitted that though the honourable court is vested with and seized of the discretion to entertain and adjudicate upon the subject application, it is incumbent upon the applicant to establish and prove that the failure to procure and adduce in evidence the additional documents, was not borne out of want of diligence and negligence.
21. In this regard, counsel for the 1<sup>st</sup> defendant has submitted that before the honourable court can exercise his/her discretion, the applicant must therefore come clean on the inability that led to the non-production of the impugned documents.
22. Secondly, counsel for the 1<sup>st</sup> defendant has also submitted that the honourable court must be careful not to allow an application to re-open a party's case, in this regard, the plaintiff's case with a view to enabling the plaintiff to fill the gaps that were exposed or became apparent after cross examination.
23. To this extent, counsel for the 1<sup>st</sup> defendant added that the current application is merely meant to help the plaintiff to fill the gaps that became evident in the applicant's case after the conclusion and close of the applicant's case.
24. Consequently, counsel for the 1<sup>st</sup> defendant has submitted that to allow the current application would be tantamount to granting the plaintiff/applicant a second bite at the cherry which would be prejudicial and detrimental to the 1<sup>st</sup> defendant's case.



25. At any rate, counsel for the 1<sup>st</sup> defendant has added that the documents which are now sought to be brought forth and be produced as additional evidence, subject to re-opening of the plaintiff's case, were well within the knowledge of the plaintiff/applicant and thus would have been procured and availed to the court in good time.
26. Lastly, counsel for the 1<sup>st</sup> defendant has raised the issue that the substitution of the current 1<sup>st</sup> defendant took place long after the suit had abated. In this regard, counsel has contended that the suit having abated, the resultant proceedings and the evidence that were taken were therefore anulity.
27. In support of the foregoing submissions, counsel has cited and relied on various decisions including *Vincent Moseti versus Charles Somoke Onsase & another* (2017)eKLR, *Re-Estate of Baraza Kangenje Manya, Deceased*, Succession Cause 263 of 2002 (2020) KEHC 1(KLR) and *Samuel Thiongo versus George Kimani & another* (2002)eKLR.

#### **Issues for Determination:**

28. Having reviewed the application dated the March 30, 2022, the supporting affidavit thereto; as well as the grounds of opposition filed on behalf of the 1<sup>st</sup> defendant and having similarly considered the written submissions filed by the parties, the following issues are germane for and deserving of determination;
  - i. Whether the honourable court has the requisite jurisdiction to determine the subject application.
  - ii. Whether the plaintiff/applicant has established and met the requisite threshold to warrant the exercise of the discretion sought.
  - iii. Whether the instant suit has abated.

#### **Analysis and Determination**

##### **Issue number 1**

##### **Whether the honourable court has the requisite jurisdiction to determine the subject application.**

29. The counsel for the 1<sup>st</sup> defendant has opposed the current application *vide* the grounds of opposition dated the June 8, 2022 and wherein same has contended that the subject application is bad in law, insofar as the respective parties cases have already been closed.
30. In this regard, counsel for the 1<sup>st</sup> defendant therefore contends that after the closure of the respective parties cases, the honourable court is divested of jurisdiction to entertain an application for re-opening of the plaintiff's case.
31. On the other hand, counsel for the 1<sup>st</sup> defendant has also argued that the current application is misconceived and that if the plaintiff has discovered new/additional evidence, then same ought to have filed an application for review.
32. Essentially, counsel for the 1<sup>st</sup> defendant/respondent therefore contends that this honourable court is not seized of the requisite jurisdiction to entertain and adjudicate upon the subject application, insofar as the application does not seek review of the orders that have since been made by the honourable court.
33. Before venturing to answer or adjudicate upon the issue herein, it is appropriate to take cognizance of the provisions of order 18 rule 10 of the *Civil Procedure Rules* which deals with re-opening of cases.



34. For convenience, the provisions of order 18 rule 10 of the Civil Procedure Rules 2010 provides as hereunder;

Court may recall and examine witness [order 18, rule 10.]

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.

35. Other than the foregoing provisions, it is also important to take cognizance of section 1A of the Civil Procedure Act, cap 21 laws of Kenya, which is also imperative and offers useful guidance.

36. For coherence, the provisions of section 1A of the Act, (supra), are reproduced as hereunder;

1A. Objective of Act:

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court.

37. Additionally, it is also imperative to take cognizance of the provision of section 63 (e) of the Civil Procedure Act.

38. Similarly, it is pertinent to reproduce same. For convenient, the provisions of section 63 (e) of the Act are reproduced as hereunder;

63. Supplemental proceedings In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed—
- (a) issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance, and if he fails to comply with any order for security commit him to prison;
  - (b) direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property;
  - (c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold;
  - (d) appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property;
  - (e) make such other interlocutory orders as may appear to the court to be just and convenient.

39. From the foregoing provisions, which I have alluded to in the preceding paragraphs, it is evident and apparent that the court is vested with inherent jurisdiction which enables the court to entertain and adjudicate upon numerous interlocutory applications, including one for re-opening of a party's case and recall of a witness who has hitherto testify.



40. In this respect, the application before hand relates to the re-opening of the plaintiffs case and consequential recall of the plaintiff, who testified as PW1, for purposes of further examination on the basis of the additional documents.
41. To my mind, this honourable court is seized and vested with the requisite jurisdiction to entertain the subject application. For clarity, the jurisdiction is both statutory and inherent and hence exercisable, subject to proof of the requisite conditions and in the wider interest of justice.
42. Nevertheless, as to whether or not the application would be allowed, is another issue that can only be addressed after considering the obtaining the circumstances and the explanation belying the failure to produce the impugned documents at the onset and during the trial.
43. Be that as it may, I must point out that the disposal of the application for re-opening of a party's case and recall of a witness is premised on the exercise of discretion of the honourable court.
44. Consequently and in a nutshell, I find and hold that the subject application is not bad in law, either in the manner contended by the 1<sup>st</sup> defendant/respondent or at all.
45. Similarly, I also find and hold that the honourable court is seized of the requisite jurisdiction to entertain and adjudicate upon the subject application, for re-opening of the plaintiff's case.

## **Issue number 2**

### **Whether the plaintiff/applicant has established and met the requisite threshold to warrant the exercise of the discretion sought.**

46. It is true that the dispute before hand relates to the propriety and validity of a sale agreement entered into and executed between the plaintiff/applicant on one hand and the original defendants, on the other hand.
47. At the foot of the validity is the question whether or not the original defendants had procured and obtained grant of letters of administration over and in respect of the estate of Titus Mutua Kilome, deceased and whether the grant of letters, if any, had been confirmed.
48. Towards and in respect of an endeavor to prove that indeed grant of letters of administration had hitherto been issued and were subsequently confirmed, the plaintiff contends that same has since discovered the existence of a certificate of confirmation of grant which is said to have been issued on the 18<sup>th</sup> of July 1986.
49. On the other hand, counsel for the plaintiff/applicant has added that indeed the relevant summons for confirmation of the grant, which was hitherto issued in favor of the original defendants is said to have been filed by the same advocate, who is currently on record for the 1<sup>st</sup> defendant.
50. Other than the foregoing, counsel for the plaintiff/applicant has also submitted that the certificate of confirmation of grant and the attendant documents, were never within the knowledge of the plaintiff/applicant.
51. Nevertheless, counsel has added that the information pertaining to and concerning the existence of a certificate of confirmation of grant and the consequential documents, only came to the knowledge and attention of the plaintiff/applicant shortly after the close of the respective party's cases.
52. To the extent that the information was established and gathered, essentially after the close of the plaintiff's case, counsel for the plaintiff pointed out that it is important and material that the impugned documents be considered by the court.



53. To my mind, the additional documents and in particular, the certificate of confirmation of grant, if any had hitherto issued, is an essential document in determining whether or not the original defendants were vested with the requisite capacity to enter into and execute the impugned sale agreement. See section 82 of the *Law of Succession Act*, cap 160 laws of Kenya.
54. Given the importance of the said documents, it would therefore be appropriate that the honourable court does allow same to be brought forth and be produced. For clarity, the production of such a document, subject to proof, would be helpful to the honourable court in ascertaining the validity of the impugned sale agreement which underpins the subject suit.
55. I beg to add, that intended additional documents and essentially the certificate of confirmation of grant, which is the subject of the current application is of great relevance to the determination of the issues in dispute and hence the admission thereof, subject to the known provisions of the law of evidence, would be useful to the court.
56. At any rate, it is common ground that the 1<sup>st</sup> defendant would also have *inter-alia* a right to cross examine the plaintiff on the validity, propriety and credibility of the certificate of confirmation of grant as well as to re-open her case limited to responding to the new/documents.
57. On the other hand, it is also imperative to observe that the subject application was filed shortly upon the close of pleadings and in this regard, it is evident that same was filed timeously and with due promptitude. In this regard, the applicant can not be blamed or accused of dilatoriness.
58. In view of the foregoing analysis, I am compelled to find and hold that indeed the applicant has demonstrated extreme good faith and due diligence, in the making of the subject application.
59. Consequently and in view of the findings already alluded to; coupled with the purpose and intendment of the court to achieve/ render substantial justice, I would be obliged to grant the application.
60. To buttress the observation articulated herein before, it is appropriate to adopt, reiterate and endorse the holding of the honourable court in the case of *Pinnacle Projects Limited versus Presbyterian Church of East Africa, Ngong Parish & another* (2019) eKLR. For coherence, the honourable court held and observed as hereunder:

“It seems to me that a reading of the above cases the principles elaborated upon is that the discretion of the court is not fettered on admission of additional evidence after the trial has commenced and the plaintiff case has been heard fully. When considering the additional evidence in my view a careful inquiry by the court ought to be made into the nature of the evidence as to its relevance, materiality to facts in issue, admissibility and the strength of the evidence sought to be introduced within the trial. Merely because the witness statement was not served during pre-trial conference and discovery period does not prevent the trial court to allow such further additional evidence to be taken on record and allowed to be challenged in accordance with law. In the instant case although the plaintiff has closed its case and it is time for the defendant to answer both of them are on a mission for the quest of administration of justice. There is no greater duty for the court than to deliver substantive justice as provided for under article 159 2(d) at the end of it all.”

61. Additionally, the essential ingredients that underline the exercise of discretion while dealing with an application for re-opening of a case and production of additional evidence were also considered in the case of *Raindrops Limited v County Government of Kilifi* [2020] eKLR.



62. For completeness, the honourable court stated and held as hereunder;

“Whether good cause is shown, whether the new evidence is significant; whether the jury or judge would be likely to give undue emphasis, prejudicing the party against whom it is offered; whether the evidence is controversial in nature, and whether re-opening is at the request of the jury or judge or a party to the claim. Or is the additional evidence new or merely to corroborate and clarify the earlier testimony.”

### **Issue number 3**

#### **Whether the instant suit has abated.**

63. The 1<sup>st</sup> defendant/respondent has also opposed the subject application on the basis that the suit has also abated following the death of the original defendants.
64. Certainly, the abatement of a suit would of necessity extinguish the suit. For clarity, an abated suit ceases to exist in the eyes of the law. Consequently, where it is proven that the suit had abated, there would be no need of continuing with proceedings. See the holding of the Court of Appeal in the case of *Said Sweillem Gheitham Saanum versus Commissioner of Lands (sued through the Attorney General) and others* (2015) eKLR.
65. Nevertheless, even though counsel for the 1<sup>st</sup> defendant/respondent has contended that the suit herein had abated, counsel for the 1<sup>st</sup> defendant has however not denied nor disputed that an application was duly made for substitution and thereafter the current 1<sup>st</sup> defendant/respondent was admitted into the suit in place of the original defendants.
66. Secondly, counsel for the 2<sup>nd</sup> defendant has also not contested the facts that the application for substitution was duly served and similarly canvassed inter-parties and yet, the issue of abatement, was never raised.
67. On the other hand, there is also no dispute that when the matter came up for hearing, counsel for the 1<sup>st</sup> defendant and by extension the 1<sup>st</sup> defendant/respondent participated on the hearing of the subject matter.
68. For completeness, it is also common ground that the 1<sup>st</sup> defendant also testified and tendered her evidence before the honourable court, certainly, long after the impugned substitution of same into the proceedings.
69. In view of the foregoing, it is difficult to understand the basis upon which the 1<sup>st</sup> defendant/respondent now contends that the suit herein had long abated upon the death of the original defendants.
70. Notwithstanding the foregoing, if indeed the subject suit had long abated, in the manner propagated by counsel for the 1<sup>st</sup> defendant then same ought to have taken the objection pertaining to abatement at the time of substitution, which does not appear to be the case.
71. Better still, counsel for the defendant/respondent was and is at liberty to take out an appropriate application seeking to have the suit declared to have abated and when such application is taken, the honourable court will be at liberty to adjudicate upon same and return a suitable verdict.
72. For clarity, subject to filing such an application and upon proof that indeed the suit had abated the honourable court would be at liberty to entertain, evaluate and determine such an application.
73. However, it cannot lie in the mouth of counsel for the 1<sup>st</sup> defendant/respondent at this juncture to throw unto the face of the Honourable court a paragraph in the grounds of opposition, without



availing evidence of when the original defendants died; and when the application for substitution of the 1<sup>st</sup> defendant was made.

74. Suffice it to point out that a finding on abatement would require proof of certain facts, before the honourable court can venture to make such a pronouncement.
75. Essentially, what I am saying is that I cannot make a determination on abatement of the suit, in the absence of a substantive application by the 1<sup>st</sup> defendant/respondent and particularly, while alive to the fact that the self-same 1<sup>st</sup> defendant has indeed participated in the hearing of the matter and even tendered evidence.
76. Premised on the foregoing, it is my finding and holding that the issue of abatement of the suit remains moot, unless an appropriate application, if any and subject the doctrine of waiver, abandonment and estoppel, is mounted.

### **Final Disposition**

77. Having reviewed the pertinent issues that were isolated and highlighted in the body of the ruling herein, it must have become evident and indeed, apparent that the motion dated the March 30, 2022 is meritorious.
78. Consequently, I make the following orders;
  - i. Leave be and is hereby granted to the plaintiff/applicant to re-open his case limited to the production of the plaintiff's further bundle of documents dated March 30, 2022.
  - ii. In this regard, the further bundle of documents dated the March 30, 2022 be and is hereby deemed as having been duly filed and served.
  - iii. The defendants and essentially the 1<sup>st</sup> defendant be and is hereby granted corresponding leave to re-open her case but limited strictly to responding to the evidence adduced/produced at the foot of the further bundle of documents dated the March 30, 2022.
  - iv. The 1<sup>st</sup> defendant is similarly granted liberty to file and serve any additional/further bundle of documents, if any, relating to the Succession cause wherein the certificate of confirmation of grant is said to have been issued. For clarity, such further/additional documents, if any, to be filed and served within 14 days from the date herein.
  - v. The plaintiff and the 1<sup>st</sup> defendants shall be recalled for purposes of examination and cross examination, albeit limited to the issues attendant to the defined additional/further documents herein.
  - vi. Costs of this application assessed and certified in the sum of Kshs 20, 000/= Only, are awarded to counsel for the 1<sup>st</sup> defendant and same shall be paid within 14 days from the date herein.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

In the Presence of;

Kevin Court Clerk



Ms Mutonyi h/b for Mr. Karungo for the Plaintiff/Applicant

Ms. Waweru for the 1st Defendant/Respondent

N/A for the 2nd Defendant/Respondent

