Karega & 17 others v Nthautho (Environment & Land Case 104 of 2014) [2022] KEELC 14575 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14575 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 104 OF 2014

A KANIARU, J

OCTOBER 6, 2022

BETWEEN

ROBERT NJERU KAREGA ..... 1ST APPLICANT

WACHIRA GITARE ..... 2ND APPLICANT

PIUS KIVUTI NGARI ..... 3RD APPLICANT

AMOS MURIITHI NJUKI ..... 4TH APPLICANT

BENSON KIURA NJUKI ..... 5TH APPLICANT

CHARLES NJAGI NJUKI ..... 6TH APPLICANT

JOHN MWANIKI MUNYI ..... 7TH APPLICANT

OBADIA MWANIKI NYAGA ..... 8TH APPLICANT

MRS. ROSE NJAGI ..... 9TH APPLICANT

JACKSON KIURA MBUVI ..... 10TH APPLICANT

PETER MAINA MUSYOKI ..... 11TH APPLICANT

MRS. JANE NDUIKO KIURA ..... 12TH APPLICANT

MRS. IRENE MUCHERE IRERI ..... 13TH APPLICANT

GITENDE MURIUKI IRERI ..... 14TH APPLICANT

JONATHAN E. MURIUKI IRERI ..... 15TH APPLICANT

NICHOLAS MBOGO NYAGA ..... 16TH APPLICANT

JOSEPH KARIUKI KANG'OROTI ..... 17TH APPLICANT

JACK MORRIS NJIRU ..... 18TH APPLICANT

AND

MUTOKAA NTHAUTHO ..... RESPONDENT

RULING

1. I am called upon to determine a notice of motion dated February 15, 2021 filed in court on even date. The Application is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 24 rule 4(1), (3) and Order 24 rule 7(2) of the *Civil Procedure Rules* and all other enabling provisions of the Law.

Application

2. The motion came with four (4) prayers which are as follows:-

> Prayer 1: That the Applicant herein be granted leave to substitute the defendant herein, Mutokaa Nthautho who is now deceased with James Njue Mutokaa and Virginia Ngunyi Mutokaa who are the legal representative to his estate.
>
> Prayer 2: That this honourable court be pleased to revive the abated suit herein.
>
> Prayer 3: That upon grant of the orders sought, leave be granted to the Applicant to amend the plaint in terms of the annexed amended plaint.
>
> Prayer 4: That upon grant of prayer (3) above, the consent annexed herewith be deemed and adopted as a judgment of the court.

3. The application is premised on grounds, interalia, that the present suit had been instituted against the respondent seeking a declaration that suit parcel of land Mbeti/Gachuriri/249 was a customary trust of Mbandi clan. It was deposed that the said parcel of land was also subject of Embu ELC Petition No. 2 of 2018 in which the respondent had been sued in his capacity as a trustee of Mbandi Clan. It was said that the latter suit had prevented the applicants from continuing with the present suit against the said respondent for reason that the prosecution of the present suit was pegged on the outcome of the petition.

4. It was further deposed that the respondent died on August 3, 2018 during the pendency of the said petition and that his son was cited to take out letters of administration ad litem to defend the petition. It was averred that the son failed to enter appearance and the 7th applicant petitioned and was issued with the grant ad litem in order to pursue the two suits. That he was then substituted in place of the respondent in the petition which was determined with finality. With regard to this suit, it was said that the applicants had entered into consent with the legal representatives of the respondent and in the circumstances, it was in the interest of justice to grant the orders sought. With the application was filed a supporting affidavit sworn by John Mwaniki Munyi, the 7th applicant, in which he reiterated the grounds on the face of the application.

5. The application was opposed by the administrators to the respondent's estate who filed various responses both jointly and separately. The first one was what was termed as grounds of objection dated March 8, 2021. The same was filed by James Njue Mutokaa and he averred that the application was incompetent, bad in law and an abuse of the court process. It was also was said that it lacked merit.

6. The second one is a replying affidavit dated April 20, 2021 sworn by both the co- administrators. They deposed that the applicants had not provided sufficient cause to revive the suit. As for the reasons given by the applicants for preventing them from continuing with the present suit during the pendency

of the petition, they argued that the fact that the respondent had been sued in the petition was not sufficient cause the as applicants had not applied for stay of proceedings. Further they averred that the application had been filed three years after the death of the respondent, which amounted to inordinate delay. They urged the court to dismiss the application as the suit had already abated.

7. There is then another replying affidavit sworn by Virginia Ngunyi Mutokaa dated December 2, 2021 and filed on December 3, 2021. This one is similar to the joint replying affidavit filed by the parties. The last one is a replying affidavit filed by James Njue Mutokaa, one of the legal representatives to the estate of the respondent. It was dated February 28, 2022. Unlike the other responses, this one was filed in support of the application by the applicants. He confirmed knowledge of the suits instituted against the respondent (his father) seeking declaration of customary trust over the suit land. He deposed that he was also aware that his father had been awarded the suit land in his capacity as chairman of the Mbandi clan but that the said trust had not been noted on the land register.

8. He further averred that the applicants (members of the Mbandi clan) were in possession and had developed the said suit parcel and he was therefore not opposed to the application. In that regard he had entered into a consent agreement with the applicants which he said he had executed on his behalf and on behalf of the co- administrator. In his view, his co-administrator had been misled into reneging on the consent to delay the expeditious determination of the suit. He also averred that at the time of procuring the consent, the co-administrator had satisfied herself on the bonafides of the consent and could not therefore purport to renege on it. He further stated that the other suit filed by way of petition had affected the progression of the present suit and posited that the application had been filed two (2) months after conclusion of that petition.

9. In support of the application, the applicants filed a supplementary affidavit sworn by the 7th applicant and dated February 15, 2022. They reiterated the averments in the application and argued that the 1st intended respondent had the authority of the 2nd intended respondent to sign the consent on her behalf and was aware and conscious of its effect. They deposed that the purpose of the consent was to facilitate the just and expeditious disposal of the suit and would benefit all parties. The 2nd intended respondent was said not to have demonstrated valid reasons for reneging against the consent and her actions were said to be an afterthought. According to them, they had demonstrated good faith by allowing the respondent to retain 100 acres out of the 230 acres despite the fact that he was holding the land in trust for the Mbandi clan.

10. The 2nd intended respondent Virginia Mutokaa filed a further affidavit dated May 17, 2022. She reiterated the contents in the initial affidavit and asserted that neither she nor her family had given authority to the 1st intended respondent to enter into any consent on their behalf. She averred that the consent had been entered contrary to the family position and that the family had moved to seek for removal of the 1st intended respondent as a co-administrator to the respondent's estate. In support of this, she annexed an application for revocation of grant.

11. The application was canvassed by way of written submissions. The applicants filed their submissions on June 10, 2022. They submitted that the deceased was the former chairman of the Mbandi clan and that the suit land had been registered in his name to hold in trust for the Mbandi clan who were residing on the land. They further claimed that the deceased had failed to subdivide the land prompting them to file the instant suit seeking recognition of a customary trust over the land in their favour. They stated that their case was hinged on the provisions of Section 25(2) of the *Land registration Act* on the duty of a registered proprietor to act as a trustee. They maintained that the 2nd respondent had given authority to the 1st respondent to enter into the consent agreement.

12. It was postulated that this is a matter that falls within the discretion of the court for determination and the court was urged to exercise its discretion judiciously in considering the instant application. The applicants relied on Section 35 of the *Practice Directions on Proceedings in The Environment and Land Courts, and on Proceedings Relating to the Environment and The Use and Occupation of, and Title to Land and Proceedings in other Courts* which allows parties to file a consent when they arrive at a settlement outside court and for the courts to approve and adopt the consent filed by the parties. Further reliance was made on the case of I*sack M'inanga Kiebia v Isaaya Theuri M'lintari & another* [2018] eKLR in which the court cited the provisions of Section 28 of the *Registered Land Act* (now repealed) on the rights of a proprietor, which were subject to overriding interests as provided under Section 30 of the *Registered Land Act* (repealed).

13. It was contended that the deceased was acting in a trust capacity and this was evident from petition No. 2 of 2018 in which he had been sued in such capacity. That upon his demise, the 1st and 2nd respondent had failed to defend that suit or demonstrate reasons for not defending the suit. That instead it was the 7th applicant who was granted letters of administration to defend it. It is their case that the court should allow the application as it would save judicial resources and that their case had overwhelming merits.

14. The 1st intended respondent filed submissions on June 15, 2022. According to him, the only issue for determination was whether the consent order dated February 15, 2021 ought to be adopted as judgment and decree of the court. It was his case that the consent would serve to dispose of the suit without proceeding to full trial as the case was in favour of the applicants. In his view, the suit land had been registered in the deceased name with the intention to have him hold it in trust for the Mbandi clan. He argued that the suit land had been subject of Petition No. 2 of 2018 which had been determined in Mbandi clan's favour. He averred that the clan had paid the requisite fees to defend all cases relating to the suit land and it is therefore his assertion that it would be inequitable and unjust to hold that the respondent's registration was absolute and free from encumbrances.

15. He further argued that the applicants resided on the suit land and that the consent had been agreed upon in advancement of Article 159 of *the Constitution* to pursue Alternative Dispute Resolution.

16. The 2nd intended respondent filed her submissions on June 15, 2022. She identified three issues for determination by the court. The first was whether the suit should be revived. She relied on the provisions of Order 24 Rule 7 of the *Civil Procedure Rules* which is the law that governs revival of abated suits. Further reliance was made on the case of *Titus Kiragu vs Jackson Mugo Mathai* (2015) eKLR where the court held that "It is not the act of the court declaring the suit as having abated that abates the suit but by operation of the law". Reliance was further made on the case of *Charles Mugunda Gacheru vs Attorney General & Another* (2015) eKLR and the case of *Waweru vs Kinyutho Ritho & Another* (2015) eKLR where it was stated that courts have discretion to revive abated suits if satisfied that an applicant was prevented by sufficient cause from continuing the suit.

17. She further relied on the maxim of equity that equity aids the vigilant and not those who slumber on their rights. She averred that the legal basis of the doctrine of laches was to ensure that legal claims are brought forth in a reasonable and timely manner so that evidence and reliable witnesses can be found. She emphasized the strict application of timelines set by the law and in support of this relied on the cases of *Charles Wanjohi Wathuku vs Githinji Ngure & Another* and the case of *John Mutai Mwangi & 26 Others vs Mwenja Ngure & 4 others* Civil Appl No. 126 of 2014.

18. On the reasons given by the applicant for not prosecuting the suit, it was contended that there was no court order that existed preventing them from prosecuting the suit and the reasons given were therefore not sufficient. On whether the consent should be adopted as an order of the court, they averred that the

consent had been given without consultation of the family and it should be disregarded. Finally, the court was urged to grant them costs and that such costs should be borne by the 1st intended respondent.

Analysis And Determination

19. I have considered the application, the responses by the parties, the rival submissions, and the material on the court record. The 1st intended respondent filed grounds of objection to the application. However, I note that he seems to have later filed a replying affidavit supporting the application. The submissions he has filed also support the application. In the circumstances, I see no need to consider his objection. Even if I were to go that direction, what was filed is essentially something different from a preliminary objection. The grounds raised in what he calls "grounds of objection" are factual and would require the court to entertain evidence to confirm the veracity of the said grounds, which is contrary to what amounts to a preliminary objection as captured in *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd.* (1969) EA 696. Mukisa's case (*supra*) is clear that a preliminary objection should only focus on points on law which are based on uncontested or admitted facts.

20. Now to the application. The same seeks for substitution of the deceased with the intended respondents, revival of the suit, amendment of the plaint, and finally adoption of a consent executed between the parties as an order of the court. I will first determine the issue of revival of the suit since the outcome of this prayer will determine whether or not there is need to consider the rest of the prayers sought.

21. The law applicable to revival of suits is found in Order 24 rule 7(2) of the *Civil Procedure Rules*. That section of the law 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."

22. This was restated in the case *Charles Mugunda Gacheru vs Attorney General & Another* (2015) eKLR as relied upon by the 2nd intended respondent where the court stated thus:

> " For the 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".

23. From the foregoing provision, and as stated in the above case, for a suit that has abated to be revived the applicant must prove that he was prevented by sufficient cause from continuing with it. Generally, a suit abates if after one year upon death of a defendant, no application is made to have the deceased substituted in the suit. This is as provided for under Order 24 rule 4(3) of the *Civil Procedure rules*.

24. From the facts of the case, the respondent died on 3.8.2018, meaning the suit abated on 3.8.2019. That was one year after his death. The applicants have deposed that the subject matter in this suit was also subject of Embu ELC Petition No. 2 of 2018. According to them, the prosecution of the present suit was pegged on the outcome of the ELC Petition No. 2 of 2018 and they were therefore prevented from continuing with the present suit until the petition was determined. The 1st intended respondent on his part concurs with the reasons given as being sufficient to warrant revival of the suit. Though he seems to have filed varying responses, on one side opposing the application, and on the other supporting, his submissions as earlier stated give clarity to the fact that he is supporting the application. He started by opposing but later changed his position and supported the application.

25. However, the 2nd intended respondent opposes the application and is of the view that no sufficient cause has been established or proven to revive the suit. It is argued that the pendency of the petition, could not have prevented the applicants from prosecuting the present suit for reason that the applicants had not applied for stay of proceedings and neither was there a court order that existed preventing them from prosecuting the suit.

26. I have looked at the present suit carefully. I have noted that indeed as stated by the 2nd intended respondent, the applicants did not seek for stay of proceedings and neither was there an order preventing them from prosecuting the suit. There is however the argument advanced that the outcome of the petition was to affect the present suit. In that regard, I have looked at the petition as well vis a vis the present suit. In the petition, the petitioners in that suit had sued, among other persons, the respondent in his capacity as trustee of the Mbandi clan. It was alleged that Mbandi clan had instituted several suits with regard to two parcels of land and had failed to join the petitioners in the suit or disclose to the court that the petitioners were in possession of the land. It is not in dispute that the petitioners were litigating over two parcels of land, among them the subject matter in this suit, being Mbeti/Gachuriri/249.

27. Though having acknowledged that fact, it is worth noting that in the prayers sought in the petition, the petitioners were only seeking a declaration that their rights had been violated by failure of the respondents to involve them in previous suits touching on the suit parcel of land. Nowhere had they sought to be recognized as owners of the land as is the case in the present suit. The outcome of the petition, had it been in the petitioners' favour, would have culminated in payment of damages in accordance with their prayers and not a declaration of ownership of the land. In the circumstances I do not see how the outcome of the petition would have prevented the applicants from prosecuting this suit. My finding is that no sufficient cause is shown as to why the applicants delayed in reviving the suit.

28. It is clear to me also that the deceased respondent is sought to be substituted with two people – James Njue Mutokaa and Virginia Ngunyi Mutokaa – who are son and mother respectively. The record shows that the two co-administrators of the estate of the deceased respondent are pulling in different directions. One, James Njue Mutokaa, already has a consent entered into with the applicants which is meant to settle the matter in a manner largely desired by the applicants. The other, Virginia Ngunyi Mutokaa, is completely opposed to the consent and she and her other children have even filed a case in court seeking to remove James Njue Mutokaa as an administrator.

29. When the court is faced with a scenario like that, it is left wondering whether these two are people who can ably represent the best interests of the estate of the deceased respondent. In an ideal situation, they are supposed to speak with one voice. But as things stand now, one wonders whether it is in the best interests of the estate of the deceased respondent to bring the two on board. An additional factor that militate against their inclusion into the matter is that the grant they now hold is already under challenge, with one (the mother) seeking to oust the other (the son) as an administrator. There is therefore a lot of uncertainty regarding the whole issue of representation. The two co-administrators are completely in disagreement as to how the matter should be handled.

30. More fundamentally however is this: The application is incurably defective in terms of the prayers sought. The procedure to be followed while substituting a deceased party is to be found in order 24 of the *Civil Procedure Rules*. That order provides, interalia, that a case abates where a deceased party is not substituted within one year of the party's death. But the court is given power to extend time where an application to that effect is made (see order 24 Rule 3, subrules (1) and (2)). Further, order 24 rule 7(see subrule 2 thereof) provides that an abated suit can be revived where a legal representative of a deceased party makes the necessary application.

31. In *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, the court of appeal had the following to say about order 24 (*supra*).

> " Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without shortcircuiting 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"

32. To my mind, the court of appeal is saying that any application leading to substitution of a deceased party in an abated suit must first begin with a request for extension of time. Once that prayer is granted, the prayer for joinder or substitution can, if made, be granted and once the prayer for joinder or substitution is granted, the person so joined or brought on board as a party can then seeking for the revival of the abated suit. These are mandatory steps and omission of one or more of these requirements renders the application incurably defective or incompetent.

33. A look at the application under consideration here shows that the prayer for extension of time was omitted. That is a serious omission. It needs to be appreciated that it is because of dissipation or expiry of time that the suit abated. The starting point of an application like this one therefore requires that the factor of dissipation or expiry of time be addressed first. It is also a factor which, if addressed in favour of the applicant, gives an abated suit a new lease of life. It is only after granting that prayer that substitution and revival can logically follow. The applicants therefore committed a serious blunder by failing to seek for extension or enlargement of time. That is why the court is saying that the application is defective. It is not one that can be allowed as filed. It failed to address one fundamental step viz: Extension or enlargement of time. And with that omission, the applicants blundered fatally and irredeemably.

34. It is in light of the foregoing that the court declines to allow the application. The same is hereby dismissed with no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6TH DAY OF OCTOBER, 2022.

In the presence of Mogusu for Makworo for 2nd defendant; Onani for Kaluki for 2nd defendant; Ms. Ndegwa for Ndolo for 1st defendant and in the absence of Andade for plaintiff

Court Assistant: Leadys

A.K. KANIARU

E.L.C. JUDGE