



REPUBLIC OF KENYA



**Wekesa & 6 others v Juma & another (Environment & Land Case  
85 of 2002) [2022] KEELC 14791 (KLR) (17 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14791 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT & LAND CASE 85 OF 2002**

**BN OLAO, J**

**NOVEMBER 17, 2022**

**BETWEEN**

**CLEOPHAS WANGILA WEKESA ..... PLAINTIFF**

**AND**

**JOHN WAMBULWA WASWA ..... 1<sup>ST</sup> APPLICANT**

**PATRICK MASIKA ..... 2<sup>ND</sup> APPLICANT**

**WILSON WANYAMA KWANUSU ..... 3<sup>RD</sup> APPLICANT**

**THOMAS VINCENT WEKESA MURUMBA ..... 4<sup>TH</sup> APPLICANT**

**CLEOPHAS BARASA SABUNI ..... 5<sup>TH</sup> APPLICANT**

**JAMES WANYONYI WACHIE ..... 6<sup>TH</sup> APPLICANT**

**AND**

**PASILISA NANGEKHE JUMA ..... 1<sup>ST</sup> RESPONDENT**

**FELIX MAKENGA SIMIYU ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a notice of motion dated March 6, 2022, one Godfrey Mukhebi Wangila who is described therein as the applicant although the supporting affidavit is sworn by one Geoffrey Nyongesa Wanyama (I shall revert to this later in this ruling), sought the following orders from this court:
  1. The applicant be granted leave to substitute the 4<sup>th</sup> plaintiff herein.
  2. Costs of this application be provided for.



2. The application is predicated on grounds that the applicant was granted letters of administration ad litem *vide* Bungoma Succession Cause No E25 of 2022 on March 5, 2022.
3. The application is however supported by the affidavit of one Geoffrey Nyongesa Wanyama dated April 6, 2022 in which it is deponed that he obtained a grant of letters of administration ad litem in respect of the deceased's estate on 4<sup>th</sup> plaintiff *vide* Succession Cause No 25 of 2022 on March 3, 2022 who died on July 17, 2011 while this suit was still pending. That he wishes to substitute the deceased 4<sup>th</sup> plaintiff for purposes of proceeding with this suit. That it is in the interest of justice that the application be allowed.
4. Annexed to the application is a copy of the limited grant ad litem issued to Geoffrey Nyongesa Wanyama on March 3, 2022 *vide* Bungoma Chief Magistrate's Court Succession Cause No 25 of 2022 limited for purposes of proceeding with this suit on behalf of the estate of Wilson Wanyama Kwanusu The deceased 4<sup>th</sup> plaintiff herein.
5. The application is opposed and the respondents have filed grounds of opposition raising the following issues:
  1. That the application is incompetent by dint of the provisions of order 24 rule 3(2) of the *Civil Procedure Rules 2010*.
  2. That the applicant is guilty of laches and/or inordinate delay.
6. When the application was placed before me on June 30, 2022, I directed that it be canvassed by way of written submissions and gave the parties upto July 14, 2022 to file the same. However, it was not until August 24, 2022 that the parties confirmed having complied.
7. I have considered the application, the grounds of opposition and the submissions by both Mr Kassim instructed by the firm of Kassim Sifuma & Associates Advocates for the application by Mr Murunga instructed by the firm of JO Makali & Company Advocates for the respondents.
8. The application is predicated under the provisions of section 3A of the *Civil Procedure Act* and order 51 rule 1 of the *Civil Procedure Rules*. The correct provision is infact order 24 rule 3 of the *Civil Procedure Rules*. However, as is now clear from the provisions of article 159 (2) (d) of the Constitution;

“Justice shall be administered without undue regard to procedural technicalities.”
9. Similarly, it is provided under order 51 rule 10 (2) of the *Civil Procedure Rules* that;

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”
10. There is no doubt in my mind that the respondents were not prejudiced by the citing of the wrong legal provision and infact referred to the correct provision in their grounds of opposition.
11. Having said so, and as I stated at the commencement of this ruling, the applicant is recorded in the body of the application as one Godfrey Mukhebi Wangila. The affidavit in support of the application is deponed and signed by one Geoffrey Nyongesa Wanyama who is therefore a stranger in these proceedings. There is therefore no affidavit filed in support of the application because the affidavit filed



is defective. An affidavit is evidence and its importance was emphasized by the Supreme Court in the case of *Gideon Konchella -v- Julius Lekakeny Ole Sunkuli & others* 2018 eKLR wherein it said:

“We have not hesitation in finding that the purported replying affidavit filed by the 1<sup>st</sup> respondent is fatally defective as the same controverts all the legal requirements for this making of an affidavit. Hence it has no legal value in the matter before us. We have checked all the eight copies of the replying affidavit as filed in the court registry and confirmed that none of the copies was signed, commissioned and dated. Consequently, as the same is defective, it is deemed that there is no replying affidavit on record filed by the 1<sup>st</sup> respondent.”

12. The Supreme Court in the above case was dealing with a case of an affidavit that had not been commissioned before a magistrate or a commissioner of oaths. In this case, the supporting affidavit by Geoffrey Nyongesa Wanyama has been duly signed by him and is commissioned by David Were Advocates. However, The said Geoffrey Nyongesa Wanyamais not the applicant in this case. He is a stranger. The applicant is one Godfrey Mukhebi Wangila who has not sworn and filed any supporting affidavit. An affidavit being evidence, it follows that there is no evidence to support the application yet on the face of the application, it has been stated thus:

“Which applicationis premised on the annexed affidavit of Geoffrey Nyongesa Wanyama and on the grounds that:”

13. I notice from the record that on June 28, 2022, the said Geoffrey Nyongesa Wanyama filed a supplementary affidavit dated June 15, 2022 in which he is named as the applicant. However, the notice of motion dated March 6, 2022 and which is the primary pleading for purposes of this application still retains the name of the applicant as Godfrey Mukhebi Wangila. There is even no attempt made in the supplementary affidavit to correct this latent defect.
14. I have toyed with the thought of acting suo motto by virtue of the power conferred upon this court by section 100 of the *Civil Procedure Act* and order 8 rule 5 of the *Civil Procedure Rules* and amend the notice of motion to reflect that the applicant is Geoffrey Nyongesa Wanyama. I would probably have done so were it not for the fact that the applicant has been unable to surmount another crucial hurdle.
15. It is common ground that the deceased 4<sup>th</sup> plaintiff one Wilson Wanyama Kwanusu In respect of whose estate this application has been field died on July 17, 2011. Pursuant to the provisions of order 24 rule 3(2) of the *Civil Procedure Rules*, the deceased 4<sup>th</sup> plaintiff ought to have been substituted within one year from the date of death failure to which his suit abates. Order 24 rule 3(1) and (2) provide that:

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- (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.” Emphasis mine.



16. The 4<sup>th</sup> plaintiff having died on July 17, 2011, he should have been substituted “within one year”. That was not done and his suit abated by effluxion of the law on July 18, 2012. No application has been made to revive the suit and so with respect to the 4<sup>th</sup> plaintiff, there is no suit in which the applicant can be substituted. In the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* 2017 eKLR, the Court of Appeal addressed that issue and said:

“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 rejoinder 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.” Emphasis mine.

17. There is no doubt that counsel for the applicant was aware that the deceased 4<sup>th</sup> plaintiff should have been substituted within one year from the date of death. That is why in his submissions, he has stated as follows in the 2<sup>nd</sup> paragraph:

“The 4<sup>th</sup> plaintiff died on July 17, 2010 and left a pending suit and substitution was not done within one year after his death as stipulated by the law, a clear indication that the suit against the 4<sup>th</sup> plaintiff abated by operation of law. However, there is sufficient cause/ reason(s) explaining the delay in terms of compliance with the law which includes family issues concerning representation of the deceased estate.”

18. In paragraph 6, 8 and 9 of his supplementary affidavit which, in any event, was even filed without leave, Geoffrey Nyongesa Wanyama has deponed, inter alia, that the failure to apply for substitution within one year was due to family disagreements which were only resolved in 2021. That may be true. However, there is no application before me seeking for the revival of the abated suit to which the applicant can then be enjoined.
19. The upshot of the above is that the notice of motion dated March 6, 2022 is incompetent. It is accordingly struck out with costs.

**B.N. OLAO**

**JUDGE**

**17TH NOVEMBER 2022**

**Ruling dated, signed and delivered at BUSIA on this 17th day of November 2022 by way of electronic mail as was advised to the parties on 30th June 2022 and in compliance with the COVID-19 pandemic guidelines.**

**Right of Appeal.**



**B. N. OLAO**

**JUDGE**

**17TH NOVEMBER 2022**

