



**Mohamed v Abdalla & another; Sketty (Applicant) (Environment & Land Case 194 of 2014) [2022] KEELC 15259 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15259 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 194 OF 2014**

**SM KIBUNJA, J  
DECEMBER 7, 2022**

**BETWEEN**

**NASSOR MOHAMED ..... PLAINTIFF**

**AND**

**MOHAMED SAID ABDALLA ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MUNIR MOHAMED SKETTY ..... APPLICANT**

**RULING**

1. The applicant filed the notice of motion dated the June 6, 2022, seeking to be allowed to substitute the plaintiff in the suit, leave to amend the plaint, annexed amended plaint be deemed as filed and served upon filing fees being paid and that costs be provided for. The application is based on the six (6) grounds on its face and supported by the affidavit sworn by the said applicant on the June 6, 2022. It is the applicant's case that the plaintiff is deceased, and that the beneficiaries of his estate have filed Mombasa HC Succession Cause No 91 of 2016, and a grant of letters of administration intestate was issued to him on the September 20, 2016. That it is therefore necessary to allow the applicant to be substituted for the plaintiff to continue with the prosecution of the case on his own behalf and on behalf of the family.
2. The application is opposed by the 1<sup>st</sup> defendant through the three grounds of opposition dated the June 29, 2022, that it is incompetent, bad in law, offends "order 24 (3) (2) of the *Civil Procedure Rules*"; that plaintiff died on the December 19, 2015 and no application for substitution was filed within one year as required under the said order; and that the application should be found to be without merit and struck out with costs.



3. The 2<sup>nd</sup> defendant also opposed the application through their preliminary objection dated the July 5, 2022 raising thirteen (13) grounds summarized as follows; that the application was brought late in the day as the grant was obtained on September 20, 2016 and no explanations of the delay have been tendered; that the suit was filed in 2014 and has not been prosecuted for seven (7) years; the application offends order 24 rule 3 (2) of the [Civil Procedure Rules](#) and should be dismissed.
4. That following directions taken on the July 21, 2022, the 2<sup>nd</sup> defendant's preliminary objection was deemed as a reply to the application, and counsel given timelines to file and exchange written submissions. The learned counsel for the 2<sup>nd</sup> defendant and applicant filed their written submissions dated July 25, 2022 and August 22, 2022 respectively.
5. The 2<sup>nd</sup> defendant submitted that as the plaintiff reportedly died on the December 19, 2015, and the applicant was appointed the personal representative of the plaintiff's estate on the September 20, 2016, then the application for substitution should have been filed not later than the December 19, 2016 to be within the one (1) year window provided under order 24 rule 3 (2) of the [Civil Procedure Rules](#). That the applicant herein filed the substitution application after six (6) years delay, which delay has not been explained, and by then the suit had long abated by operations of the law. The learned counsel relied on the decision in the cases of [Mathenge Ngatia Ngari \[suing for himself and on behalf of his deceased brothers represented by their wives\] v Christopher Wangombe Ngatia & another](#) [2020] eKLR, [The Hon Attorney General v The Law Society of Kenya & another](#) Court of Appeal Civil Appeal [application] No 133 of 2011 and [Phillips, Harrison & Crosfield Ltd v Kassam](#) [1982] EA 458, and submitted that the application should be dismissed with costs.
6. The learned counsel for the applicant submitted that the court has discretion to grant the orders on a matter that touches on subsisting rights which must be preserved for posterity. That the applicant had filed a similar application on 1<sup>st</sup> October 2020 that was dismissed on a technicality, and hence the current application. The counsel further submitted that under order 24 rule 3 (2) of the [Civil Procedure Rules](#), the court has the discretion to extend time, and cited article 159 (2) of the [Constitution](#) 2010 and asked the court to consider substantive justice. That should the court fail to grant the prayer sought, the estate of Nassor Mohamed right to property under article 40 of the [Constitution](#) will be adversely imperilled.
7. The following are the issues for the court's determinations;
  - a. When the plaintiff died.
  - b. Whether the applicant is the legal representative of the plaintiff's estate, and if so, from when.
  - c. Whether the plaintiff's suit has abated, and if so, when.
  - d. Whether there exists a suit in which the applicant can be substituted for the deceased plaintiff.
  - e. Who pays the costs of the application.
8. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition and preliminary objection, submissions by counsel, superior courts decisions cited thereon and come to the following findings;
  - a. That the applicant has disclosed that the plaintiff's date of death as the December 19, 2015, which has not been disputed by any of the defendants. That under the operations of order 24 rule 1 of the [Civil Procedure Rules](#), the suit herein survived the plaintiff's death in view of the nature of the claim, so long as an application for substitution was filed with the court within one year from the date of death. That no such application was filed by the time one year



lapsed on or about the December 19, 2016, and by operation of rule 3 (2) of the said order, the plaintiff's suit abated.

- b. That the applicant has approached the court as the legal administrator of the estate of Nassor Mohamed, the deceased plaintiff. He has deposed that the succession court granted him the letters of administration on the September 20, 2016, which deposition has not been challenged by any of the defendants. That bearing in mind that his prayers are first, to be substituted for the deceased and secondly, leave to amend the plaint, and further noting the finding in (a) above that the plaintiff's suit abated on or about the December 19, 2016, then it follows that there is no existing suit in this matter in which his prayers can be considered.
- c. That the applicant has correctly submitted that the court has the power to extend time. That however, the court has to be moved by a party through an application to consider such a request as is clearly captured in the proviso to order 24 rule 3 (2) of the Civil Procedure Rules that states as follows:-

“Provided the court may, for good reason on application, extend time”.

That such a prayer should be through a party's or applicant's pleadings and not written submissions. There is no prayer in the applicant's notice of motion for extension of time to apply for substitution, and the court need not say any more on that matter.

- d. That further, order 24 rule 7 (2) of the Civil Procedure Rules *inter alia* provides that a person claiming to be a legal representative of a deceased plaintiff may apply for an order to revive a suit which has abated, and if it is proved that the applicant was prevented by sufficient cause from continuing with the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. In the instant application subject matter of this ruling, there is no prayer for reviving of the abated suit, and as parties are bound by their pleadings, the attempt by counsel to implore the court to consider such an order through written submissions on the strength of article 159 of the Constitution so as to protect the deceased plaintiff's right to property as enshrined under article 40 is definitely not a regular process of moving the court. A counsel knows the law, and should know what prayers, and in what order or sequence to seek where a suit has long abated, and a client wishes to come in through substitution.
  - e. There being no doubt that the applicant's notice of motion has no merit, then he should pay the defendants costs in the application pursuant to section 27 of the Civil Procedure Act chapter 21 of laws of Kenya.
9. Flowing from the foregoing, the court finds and orders as follows;
- a. The applicant's notice of motion dated the June 6, 2022 is without merit and is hereby dismissed.
  - b. That the applicant to pay the defendants costs in the application.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 7<sup>th</sup> DAY OF DECEMBER 2022.**

**SM Kibunja, J**

**ELC MOMBASA.**

**In The Presence Of;**

Plaintiff: Absent



Defendants : Absent

Applicant: Absent

Counsel : Mr Birir for plaintiff/applicant

Wilson .. Court assistant.

**SM Kibunja, J**

**ELC MOMBASA.**

