Mutura(Deceased) & 2 others v Njue (Deceased) & 2 others (Environment & Land Case 246 of 2015) [2022] KEELC 15556 (KLR) (6 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15556 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 246 OF 2015

A KANIARU, J

DECEMBER 6, 2022

BETWEEN

NYAGA MUTURA (DECEASED) ..... 1ST PLAINTIFF

CHRISTOPHER KARIUKI GEOFREY ..... 2ND PLAINTIFF

AND

LILIAN RUGURU NJIRU ..... INTENDED PLAINTIFF

AND

NAOMI CIUMWARI NJUE (DECEASED) ..... 1ST DEFENDANT

JAMES GICHOVI KAMAU (DECEASED) ..... 2ND DEFENDANT

AND

MOSES MWANIKI ..... INTENDED DEFENDANT

RULING

1. This is a composite ruling on two applications; an amended notice of motion dated January 25, 2021, filed by the intended defendant; and a notice of motion dated January 20, 2021, filed by the intended plaintiff.

2. In the first application the applicant, Moses Mwaniki sought to be allowed to be substituted in place of Naumi Ciumwari Njue, the 1st defendant and James Gichovi Kamau, the 2nd defendant who are now deceased. The application was supported by the grounds on the application and the supporting affidavit sworn by the said Moses Mwaniki. He averred that he was the administrator of the estate of Naomi Ciumwari Njue and deposed that both defendants had died on 25.8.2012 and 11.10.2018 respectively during the pendency of the suit. He stated that he was son and brother to the 1st and

2nd defendants respectively and had been issued with letters of administration in Succession Cause Number 7 of 2017.

3. He was of the view that it was only fair and just that he be substituted in their place in order to pursue the suit which was pending. He argued that he would suffer irreparably if the application is not granted and contended that on the contrary no prejudice will be occasioned on the respondents.

4. The 2nd plaintiff opposed the application by filing grounds of opposition dated March 17, 2020. He averred that the suit as against the 1st defendant had abated one year after her death on August 25, 2013, that the succession and distribution of the estate of the 1st defendant had been determined in Embu CM Succession Cause No 7 of 2017 which estate was said not to comprise the 1st plaintiff's parcel of land Ngandori/Kiriari/3911 and lastly that the application was an abuse of the court process and ought to be struck out with costs.

5. The 2nd plaintiff later filed further grounds of opposition in which he averred that the suit against the two defendants had abated and the application to substitute them a year after their respective deaths, had no basis in law as substitution was being applied outside the statutory period. He maintained that the application was an abuse of the court process and ought to be struck out with costs.

6. The intended defendant filed a replying affidavit in response to the grounds of opposition. He deposed that he had given instructions for filing of an application for substitution through the firm of Duncan Muyondi Advocates in the year 2017 but that the advocate had failed to commence the process. He further deposed that the 2nd plaintiff had no *locus standi* to move the court for reason that he had ceased being a plaintiff in this suit, pursuant to orders issued by the court on August 1, 2003 and December 18, 2007. It was said that the decrees and orders of the court against the 2nd plaintiff indicated that he had no parcel of land as the title to the land had been cancelled by the court. The court was therefore urged not to entertain him and his claim was termed as *res judicata*.

7. The applicant reiterated that he was the administrator to the estate of Naumi Ciumwari. He further urged the court to visit the suit parcel of land and conduct the hearing at the disputed parcel in order to enable the parties demonstrate facts on the ground for the interest of justice. The applicant was of the view that the grounds of opposition were a sham in view of the orders against the 2nd plaintiff and it was therefore devoid of merit and ought to be dismissed.

8. The application was canvassed by way of written submissions. The applicant filed submissions on August 5, 2021. He relied on the provisions of order 24 rule 4(1)(3) of the *Civil Procedure Rules* which provides that "where one or two defendants die..... and where within one year no application is made under sub-rule (1) the suit shall abate as against the deceased defendant". It was submitted that amendment of pleadings may be allowed at any stage of the proceedings but not when they are significantly changing the core of the dispute. On this, reliance was made on the case of *Raila Odinga and 5 Others Vs Independent Electoral and Boundaries Commission and 3 Others* (2013) eKLR where the court, in allowing an application for substitution, held that the trial court did not change the substance of the claim and stated that there was no prejudice occasioned by the amendment.

9. With regard to the issue of delay in bringing the application, the same was said not to be deliberate but was as a result of deficiency on the part of counsel who had conduct of the matter who was said to have had the duty to advise the rest of the family members of the need to file for substitution. The applicant urged the court to take note of the fact that he could not have substituted the deceased persons without taking out letters of administration as well as have the grant confirmed and that this was done on November 17, 2017 in Embu Succession Cause No 7 of 2017. It was the applicant's assertion that the delay was excusable based on the omission on the part of the advocate and the court ought not to

mete punishment on an innocent litigant since the dispute touches on ancestral land encroached by the respondent.

10. The applicant further argued that the court had power to extend such time upon which an application could be filed, provided the applicant has proven beyond reasonable doubt that the delay was not deliberate. In the circumstances the court was urged to render justice despite the fact that the applicant was in violation of order 24 of the *Civil Procedure Rules* and urged the court to consider the application in view of the provisions of rule 59 of the *Interpretation and General Provision Act*.

11. It was also argued that there existed a court order in the matter, which was yet to be appealed against and the 2nd respondent was therefore said to lack *locus standi* in opposing the application. In conclusion the court was urged to dismiss the grounds of opposition and allow the application herein.

12. The 2nd plaintiff filed his submissions on November 1, 2021. He reiterated the averments in the application and the grounds of opposition. He relied on the provisions of order 24 rule 4(4) of the *Civil Procedure Rules*. He submitted that the 1st defendant and 2nd defendant had died on August 25, 2013 and October 11, 2018 respectively and the suits against them had abated. The 1st defendant was of the view that the intended defendant ought to have instead filed an application to first revive the suit.

13. Reliance was made on the case of *Kenya Farmers Co-operative Union Limited V Charles Murgor (deceased) T/a Kaptabei Coffee Estate*[2005] eKLR where it was held that the suit therein having abated then the order for substitution was a nullity and of no effect. The 2nd plaintiff argued that the application was devoid of merit and prayed for it to be dismissed with costs.

14. The second application was filed by Lilian Ruguru Njiru who sought to be substituted in place of Nyaga Mutura the 1st plaintiff who is deceased. The application was supported by the grounds on the face of it and the supporting affidavit sworn by Lilian Ruguru. She deposed that she was one of the administrators of the estate of the 1st plaintiff who had died on January 29, 2013 before conclusion of the suit. She averred that the matter had stalled for reason that the 1st plaintiff was yet to be substituted upon her demise. She prayed that the court allows her to be substituted in place of the said deceased and averred that it was in the interest of justice for the application to be allowed. She was of the view that no prejudice would be occasioned to any party if the orders sought are allowed.

15. This application was opposed by counsel for the 2nd defendant who filed grounds of opposition dated May 18, 2021. He averred that the 1st plaintiff had died on January 29, 2013 and that the suit as against him had abated on January 29, 2014. The application for substitution was said to have no basis in law as it was being applied outside the statutory period and lastly that the amended application was an abuse of the court process and ought to be struck out.

16. The intended 1st plaintiff filed submissions on September 8, 2022. She reiterated the averments in the application. She submitted that the suit concerned a land case and it was argued that the case should not be stalled since the deceased person was survived by children who depended on the subject matter, which was their source of livelihood as well as their place of abode. It was also her submission that the court has powers and jurisdiction to grant the prayers sought.

17. It was contended that allowing the application for substitution would not change the substance of the claim and no prejudice would be occasioned by the amendment. It was also argued that the court would not only be maintaining the primary object of dispensing substantive justice to the departed parties but also those whose lives will be affected by the orders made by this court. The applicant reiterated that she is one of the administrators of the estate of the deceased and she has the requisite *locus standi* to file the application before the court. She urged the court to grant the application in the interest of justice.

18. The 2nd plaintiff filed submissions in support of his grounds of opposition to the application. He reiterated the averments in the application and grounds of opposition. He submitted that the suit against the 1st plaintiff had abated in the year January 29, 2014, an year after his demise. Reliance was made on the case of *Cleophas Ongau Omwenga Vs KPLC & 2 Others* Civil Appeal No 283 of 2015 where it was stated that,...

> " 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".

19. It was contended that the applicant had waited for ten years in order to bring this application, which had been filed without a grant- ad litem. It was said that the applicant ought to have first sought extension of time to revive the suit first. The 2nd plaintiff also argued that the applicant, despite stating to have been appointed an administrator of the estate of the 1st plaintiff, had failed to file the grant ad litem giving her *locus standi* before the court. The application was therefore termed as being devoid of merit and one that ought to be dismissed with costs.

20. I have looked at the two applications, the respective responses, and the submissions by the parties. In the two applications, the parties are generally seeking orders of substitution of the deceased persons to wit; Naomi Ciumwari Njue, James Gichovi Kamau and Nyaga Mutura. However, before I proceed to determine the said applications, I note that the applicant in the first application has challenged the capacity of the 2nd plaintiff in responding to the applications. It is alleged that the 2nd plaintiff has no *locus standi* to move the court for reason that he had ceased being a plaintiff in this suit, pursuant to orders issued by the court on August 1, 2003 and December 18, 2007.

21. I find it worthwhile to first determine this issue, as the question of locus standi goes to the jurisdiction of the court. Assuming the court determines the issue of the lack of *locus standi* in the affirmative, then it would not go ahead to consider the pleadings filed by the said party as his presence in the suit and the pleadings filed would be void *abinitio*. The court, in the case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2014] eKLR stated thus "the issue of *locus standi* raises a point of law that touches on the jurisdiction of the court, and it should be resolved at the earliest opportunity".

22. In that regard, I have perused the court file and have come across the two orders referred to. The orders emanate from Civil Appeal No 20 of 2003, which orders were issued before the filing of this case by the plaintiffs. Indeed, it is that outcome that the plaintiffs sought to challenge by filing this suit. I find that in the circumstances, any orders made in that suit cannot affect the *locus* of the parties in this present suit, as the Civil Appeal No 20 of 2003 is a separate suit from the suit herein and no orders have been in this suit to exclude the 2nd plaintiff from participating in this case. I find that the said issue lacks merit.

23. Now I focus on the two applications. The first one is filed by Moses Mwaniki who seeks to be substituted in place of Naumi Ciumwari Njue and James Gichovi Kamau who died on August 25, 2012 and October 11, 2018 respectively. He averred that he was an administrator to the estate of the Naomi Ciumwari Njue and brother to James Gichovi Kamau. He argued that it was fair for him to be substituted in order to continue with the case to the end and that he would suffer irreparably if the orders sought are not granted.

24. The 2nd plaintiff while opposing the application argued that the suit as against the said deceased persons had abated, having been filed more than a year after the death of the said persons. He termed the application as having no legal basis in the circumstances. The applicant herein however raised a defence to the effect that the delay was occasioned by their advocate, whom on one hand was said to have been instructed to file for substitution but had failed to and on the other hand that he had failed to advise them on the need to move the court to seek for substitution.

25. In the second application, the same orders were sought and the 2nd plaintiff also argued that the suit as against the said deceased abated one year after his death and the applicant could therefore move the court for orders of substitution. In both applications, the 2nd plaintiff was of the view that the proper way of approaching the court was for the parties to seek first to revive the suit against the deceased which had since abated then seek to have the parties substituted.

26. The legal provision on substitution of deceased persons is order 24 of the *Civil Procedure Rules*. Order 24 rule 3 of the *Civil Procedure Rules* governs substitution of a deceased plaintiff where it provides that

> " 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.
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> 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."

27. Further the provisions of order 24 rule 4 of the *Civil Procedure rules* provide for substitution of a deceased defendant where it is stated

> (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.
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> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

28. From the foregoing it is clear that a suit as against a deceased person abates if no application is made within one year. Such abatement is by operation of law and there is no need for the parties to move the court to confirm or have the court declare such abatement. However, a party can seek to invoke the provisions of order 24 rule 7(2) to move the court for reviving of a suit which has abated. The said order 24 rule 7(2) of the *Civil Procedure Rules* provides that "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".

29. The Court of Appeal in the case *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others* Civil Appeal No 16 of 2015 [2015] eKLR expounded on the stages to be followed on substitution of a party where the court stated thus;

> " 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.
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> 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".

30. The applicants in the two applications sought for substitution of the suit as against the two deceased defendants and the 1st plaintiff. In the first application the two deceased sought to be substituted, died in the years August 25, 2012 and October 11, 2018 respectively. The suits as against the said deceased persons abated exactly one year after such death which would be on August 25, 2013 and October 11, 2019. However, with regards to the 1st defendant, the court via an order dated February 20, 2018 directed the parties to take such steps and file for substitution within 90 days from the date of the orders. This was never done. The application for substitution was instead filed on March 12, 2020 and later amended on January 25, 2021. By the time the application was filed the suits had abated by operation of the law. No application was made for revival of the suit and for extension of time within which to revive the suit as contemplated by the provisions of order 24 of the *Civil Procedure Rules*.

31. It is also worth pointing out that such an application only ought to be brought by the legal representative to an estate; one who has been vested by the court through a grant to represent and attend to the affairs of the deceased person. Even assuming the application before the court was proper, the applicant lacked capacity to seek substitution of the suit as against the estate of James Gichovi since he has not been issued with a grant by the court to represent the said estate.

32. The second application suffers the same fate as the first one. The deceased person sought to be substituted died on January 29, 2013, the suit as against him abated on January 29, 2014. No application has also been filed to revive the suit or seek for extension of time within which to substitute the said deceased person. The applicant though having letters of administration issued in this suit failed to seek for revival of the suit and only sought to be substituted in place of the deceased person.

33. The Court of Appeal, in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, had this to say concerning abated suits:

> "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.

34. In tandem with the above decision, I find that the application before this court cannot be sustained as the parties failed to seek to extend time within which to file for the application for substitution and then also seek to revive the suits which had abated against the deceased persons. In the circumstances, the applications dated January 25, 2021 and January 20, 2021 are hereby dismissed. I make no orders as to costs.

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

M/s Mwinja for Njeru Ithiga Ithiga for 2nd defendant.

Court assistant: Leadys

A.K. KANIARU

JUDGE