



Nyamanga v Makabong'o (Sued as Administrators of the Estate of Philip Odero Makabong'o - Deceased) & 2 others (Environment and Land Case 860 of 2017) [2025] KEELC 5132 (KLR) (7 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5132 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND CASE 860 OF 2017**

FO NYAGAKA, J

JULY 7, 2025

BETWEEN

JOSEPH OKECH NYAMANGA PLAINTIFF

AND

PHILISTER ATIENO MAKABONG'O (SUED AS ADMINISTRATORS OF THE ESTATE OF PHILIP ODERO MAKABONG'O - DECEASED) 1ST DEFENDANT

THE LAND REGISTRAR, MIGORI COUNTY 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before this court is the Notice of Motion dated 2nd October 2024 seeking the following orders;
 1. Spent.
 2. That the applicant be granted leave to substitute the Defendant who is deceased.
 3. That this Honorable court be pleased to grant leave to the firm of Kerario Marwa & Co Advocates to come on record for the Applicant.
 4. Spent.
 5. That this Honorable court be pleased to vary/set aside its judgement and decree delivered and issued on the 29th December, 2023 and 21st March, 2024.
 6. That this Honorable court be pleased to reopen both the plaintiff's and the defendant's case and allow the defendant to tender her viva voce evidence.
 7. That costs be in the cause.



2. The Application is expressed to be brought under Order 51 as read with Order 2(3), Order 50 Rule 6 of the [Civil Procedure Rules, 2010](#) as read with Section 3A of the [Civil Procedure Act](#). Additionally, it is premised on the grounds on the face of it and the averments in the Affidavit sworn by Philister Atieno Makabong'o.
3. In her affidavit, the deponent stated that the Defendant is deceased; and she has obtained a Grant of Letters *Ad Litem* to enable her defend the case. She annexed and marked as AA-01 a copy of the Grant. She further stated that she wishes to be substituted so that she can proceed with the case.
4. The deponent averred that the suit was heard and determined without the participation of the defendant who, before his death, issued instructions to the law firm of S.M. Sagwe & Co. Advocates to defend him in this matter. She stated that during the pendency of the suit, her deceased husband was taken ill and kept moving from one hospital to another such that he could not take any meaningful steps to follow up on his case due to his health condition. She annexed and marked as PAM-02 a copy of his medical records.
5. She stated that until the time of his death, he had placed his reliance on his advocate to defend him. However, it was only after the Defendant's death that she learnt that the said advocate failed to prosecute the case and or update the deceased on the progress of the case. The deceased was unaware that the case had already been scheduled for hearing and subsequently closed without his involvement or participation and, consequently a judgement entered against him. She annexed and marked as PAM-03 a copy of the decree. She urged that her defence raises triable issues and ought to be considered.
6. In response to the Application, the Respondent, who is the Plaintiff, filed a replying affidavit dated 02/12/2024. He urged that he had no objection to the substitution or the applicants' firm coming on record. He however objected to the setting aside of the judgement. His reasons for objection were that the suit is old and delayed on account of the defence not participating in the trial. He disputed the treatment chits and urged that there was no reason to warrant setting aside the judgement.
7. The parties filed submissions on the application. The Plaintiff/Applicant filed his dated 20th March 2024 together with a List of Authorities dated the same date. The Defendant filed Applicant filed hers dated 12th December 2024 although they were wrongly indicated as being for the application dated 29th April 2024.

Issue, Analysis and Determination

8. I have considered the pleadings, the annexures thereto and the submissions of the parties. The issues that arise for determination are;
 - i. Whether the court should vary/set aside the judgement delivered and issued on 29th December 2023
 - ii. Whether the court should allow the substitution of the applicant
9. The issue of the Advocate for the Defendant coming on record was settled by consent. They therefore are properly on the record following the filing of the Notice of Change of Advocate subsequent to the consent. It means that Prayer 3 of the Application is spent. But it is advisable that in times to come, parties should learnt to do first things first. For instance, herein, under Order 9 Rule 9 of the [Civil Procedure Rules](#) the Defendant should have first filed an application to come on record and gotten a consent there to and filed a Notice of Change of Advocates and served it on all parties, or they ought to have sought a consent from the previous counsel and filed it and then filed the Notice of Change of



Advocates before filing an application making the instant prayers. Be that as it may, the Court proceeds to determining the outstanding issues.

i. Whether the court should vary/set aside the judgement delivered and issued on 29th December 2023

10. Review is governed by Section 80 of the [Civil Procedure Act](#) and Order 45 of the [Civil Procedure Rules](#). Section 80 provides as follows: -

Any person who considers himself aggrieved—

- a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

11. Order 45 of the [Civil Procedure Rules](#) provides as follows;

(1) Any person considering himself aggrieved —

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

12. It follows that in order for the court to grant orders of review, the applicant must satisfy the court that;

There is discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or;

On account of some mistake or error apparent on the face of the record; or

For any other sufficient reason.

13. In the instant case, the application is premised on the grounds that the Applicants' husband, deceased, who was the 1st Defendant, passed away during the pendency of the suit. Therefore, the suit proceeded without his participation.

14. I have considered the medical records that were annexed to the application and it is evident that the deceased defendant was unwell for quite some of period of time. His tribulations seem to have begun in 2017 after an accident and he then had a series of health complications until he unfortunately passed



away on 24th December 2023. It is also evident that between February and May 2023 he was constantly visiting Aga Khan Migori Clinic, clearly unwell.

15. I have also had a look at the record of the court, specifically, the proceedings. The matter commenced for hearing on 24th May 2023 and was concluded on 31st May 2023, with the close of the defence case. It was then scheduled for judgement on 20th June 2023 and eventually, Judgement was delivered on 29th December 2023. The court closed the Defendant's case on the basis that no explanation was given to the court for their absence.
16. I have also considered the respondents' opposition to the reopening of the case. I find that the same is insufficient to warrant dismissing the application. The Respondents have deliberately closed their eyes to the fact that the deceased was taken ill and suffered until his demise, and that even after the demise they proceeded in absence of his substitution.
17. In light of the information on his health now being made known to the court, it would be a travesty to allow the judgement to stand as it is. There is an error on record and therefore the judgement is irregular. The Court would be inclined to review the judgment. As the applicant was not involved in the prosecution of the matter, she was not in a position to produce the proof of the illness at the time the court closed the defendants' case or during the pendency of the suit. Article 50 of the Constitution of Kenya provides:
 - (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
18. This court has a duty to ensure that said right is protected. It follows that the application succeeds on the prayer for setting aside on account of the fact that the 1st defendant was sick during the hearings and therefore unable to attend court. The proceedings would be set aside only to the extent where the proceedings were undertaken when the Plaintiff was unwell and could not attend court. The parties to consider whether all their written witness statements and documents for all their clients are in place. Trial bundles be made ready, filed and exchanged before then.

ii. Whether the Applicant should be granted leave to substitute the 1st Defendant

19. I am guided by Order 25 Rule 1 of the Civil Procedure Rules which provides as follows;
 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
20. I note that the Respondents are not opposed to the substitution of the deceased with the Applicant. The deceased be substituted pursuant to Order 25 Rule 1 of the Civil Procedure Rules. The upshot of the foregoing is that I find that the Application is merited. I hereby order as follows;
 - i. The 1st Defendant is substituted by the Applicant herein as prayed. The Pleadings be amended within the next forty five days.
 - ii. The Judgement delivered on 29th December 2023 is hereby set aside
 - iii. The Plaintiff and Defendants' Case are hereby re-opened to the extent where the applicant's deceased husband fell ill and was not able to testify and until his demise.



21. Mention on 22nd October 2025. Costs in the cause.

22. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIA THE TEAMS PLATFORM THE 7TH DAY OF
JULY 2025**

HON. DR. IUR NYAGAKA

JUDGE

