



**Chege v Land Settlement Fund Board of Trustee & 2 others; Chege (Applicant) (Environment & Land Case 303 of 2017) [2021] KEELC 4745 (KLR) (4 March 2021) (Ruling)**

Neutral citation: [2021] KEELC 4745 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 303 OF 2017**

**YM ANGIMA, J**

**MARCH 4, 2021**

**BETWEEN**

**MARGARET MUTHONI CHEGE ..... PLAINTIFF**

**AND**

**LAND SETTLEMENT FUND BOARD OF TRUSTEE ..... 1<sup>ST</sup> DEFENDANT**

**DAN ENOS AORO AONO ..... 2<sup>ND</sup> DEFENDANT**

**LUCY NJERI NDIBA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JAMES MUCHUNU CHEGE ..... APPLICANT**

**RULING**

**A. The Plaintiff's Application**

1. By a notice of motion dated January 30, 2020 based upon Order 24 rules 3 (1) and (2), and 7 (2) of the [Civil Procedure Rules, 2010](#) (the rules) and sections 1, 1A,3 and 3A of the [Civil Procedure Act](#) (cap 21), the Applicant sought the following orders:-
  - (a) That this honourable court be pleased to reinstate the plaintiff's suit.
  - (b) That this honourable court be pleased to extend time to substitute the plaintiff.
  - (c) That this honourable court be pleased to substitute the plaintiff namely, Margaret Muthoni Chege (deceased) with the applicant, namely James Muchunu Chege as the plaintiff in this suit for all intents and purposes.
  - (d) The costs of this application be in the cause.



2. The said application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the applicant, James Muchunu Chege, on January 30, 2020 and the annexures thereto. It was stated that the plaintiff passed away on September 15, 2018 and that the applicant was given a limited grant ad litem to pursue the instant suit on January 16, 2020. The applicant, therefore, wanted the suit to be revived and for him to be joined as the personal representative of the deceased plaintiff.

### **B. The Defendants' Response**

3. Although the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not file a response to the application, the 3<sup>rd</sup> defendant, Lucy Njeri Ndiba, filed a replying affidavit sworn on February 17, 2020 in opposition to the said application. It was contended that no good explanation had been tendered as to why substitution of the deceased plaintiff was not undertaken within 12 months from the date of her demise.
4. It was contended that the deceased plaintiff was not diligent in the prosecution of the suit during her lifetime and that she had failed to pay costs for previous suits she had filed and withdrawn with respect to the suit property. The 3<sup>rd</sup> defendant, therefore, prayed for dismissal of the application to bring the litigation to an end.

### **C. Directions on Submissions**

5. When the application was listed for hearing on 2 September 2, 2020 it was directed that the same shall be canvassed through written submissions. The parties were granted 14 days to file and serve their respective submissions. The record shows that the applicant filed his submissions on November 30, 2020 whereas the 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed theirs on October 19, 2020. However, there is no indication of the Attorney General for the 1<sup>st</sup> respondent having filed any submissions.

### **D. Issues for Determination**

6. The court has considered the notice of motion dated January 30, 2020, the 3<sup>rd</sup> defendant's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the primary issue for determination is whether or not the applicant has made out a case for revival of the suit and substitution of the deceased plaintiff.

### **E. Analysis and Determination**

7. The court has considered the material and submissions on record on the issue for determination. The application is essentially based upon Order 24 rule 3 of the rules which stipulates as follows:-
  - a. Where one of two or more applicants 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.
  - b. Where within one year no application is made under sub rule (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 plaintiffs;

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



8. The court has noted from the material on record that the plaintiff died on September 15, 2018 hence the suit abated by operation of law on or about September 15, 2019 since no application for substitution was made within one year from the date of her demise. The court has considered the explanation for the failure to make the application for substitution within the stipulated period. It was hoped that the plaintiff's husband would take out letters of administration and take up the conduct of the suit but he too fell ill and died in 2019.
9. It would appear that upon losing both his parents in two successive years, the applicant applied for a limited grant in 2020 to enable him prosecute the instant suit on behalf of the estate of her late mother. The material on record indicates that the limited grant ad litem was issued on January 16, 2020 whereas the Applicant filed the instant application on February 3, 2020. The defendants did not dispute the veracity of the applicant's explanation for the failure to apply for substitution within one year.
10. The court is of the opinion that the Applicant has shown good reason or excuse for failure to apply for substitution of the deceased plaintiff within the prescribed period. The absence of a personal representative of the deceased plaintiff for a period of about two years constitutes good cause within the meaning of the proviso to Order 24 rule 3 of the rules.
11. The court is thus satisfied that the applicant has made out a good case for the extension of time within which to apply for substitution and also for revival of the abated suit. The court is, therefore, inclined to grant the orders sought by the applicant.
12. The court is not satisfied that the applicant would be disentitled to the orders sought on account of the alleged default by the deceased plaintiff in paying costs of the previously instituted suits. The court is not satisfied either that the plaintiff's alleged lack of diligence in prosecuting the suit during her lifetime would disentitle the applicant from the orders sought. The defendants had an opportunity of seeking dismissal of the suit for want of prosecution during the plaintiff's lifetime but they did not choose to avail themselves of the remedy.

#### **F. Conclusion and Disposal Order**

13. The upshot of the foregoing is that the court finds merit in the applicant's notice of motion dated January 30, 2020. Accordingly, the same is hereby allowed as prayed. Costs of the application shall be in the cause. It is so decided

**RULING DATED AND SIGNED NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 4<sup>TH</sup> OF MARCH, 2021.**

In the presence of:

Mr. Njoroge Kugwa for the Plaintiff

No appearance for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Court Assistant- Carol

**Y.M. ANGIMA**

**JUDGE**

03.2021

