



**Mutura & 2 others v Njue (Deceased) & another; Mwaniki (Applicant) (Environment & Land Case 246 of 2015) [2024] KEELC 1740 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1740 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT & LAND CASE 246 OF 2015  
A KANIARU, J  
FEBRUARY 8, 2024**

**BETWEEN**

**NYAGA MUTURA ..... 1<sup>ST</sup> PLAINTIFF**

**CHRISTOPHER KARIUKI GEOFFREY ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LILIAN RUGURU NJIRU ..... INTENDED PLAINTIFF**

**AND**

**NAOMI CIUMWARI NJUE (DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**JAMES GICHOVI KAMAU (DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MOSES MWANIKI ..... APPLICANT**

**RULING**

1. What is before me for determination is a Notice of Motion filed on 17.02.2023. The Applicant – Moses Mwaniki - intends to be substituted with the 1<sup>st</sup> Defendant, who is deceased. He is seeking the following prayers:
  1. That the Honourable Court be pleased to grant leave to the Applicant Moses Mwaniki to file application for substitution of the 1<sup>st</sup> Defendant herein.
  2. That the Honourable Court be pleased to extend time within which to file application for substitution of the 1<sup>st</sup> Defendant herein.
  3. That costs of this application be provided for.



2. The grounds on which the application is premised are set out on its face and include; that the Applicant is an administrator of the estate of the late Naomi Ciumwari Njue (deceased) who was the 1<sup>st</sup> Defendant in this suit; that the 1<sup>st</sup> Defendant passed away on 25.08.2012; that the Applicant had given proper instructions to his advocate, who failed to file the application for substitution on time; and that the applicant ought not to be punished for the mistakes of his advocate.
3. The Application came with a Supporting Affidavit sworn by the Moses Mwaniki elaborating the same grounds set out above.
4. The 2<sup>nd</sup> Plaintiff in his submissions says that he filed Grounds of opposition in response to the Application. However, I have been unable to find the same as the ones they point to are for a different application. Nevertheless, it was agreed that the Application be disposed of by way of written submissions. The Applicant filed his submissions on 27.10.2023. He submitted that he is the Administrator of the Estate of Naomi Ciumwari Njue, who is deceased, having filed Succession Cause No 7 of 2017 whereby he was issued with letters of administration on 22.02.2017 and subsequently confirmed on 17.11.2017. He submitted further that he stands to suffer irreparable loss and damage if the application is not allowed as he will lose entitlement of the land parcel in dispute and remain landless. He urged that he is deserving of the orders sought and therefore the court should allow his application.
5. The Administrator to the estate of the 1<sup>st</sup> Plaintiff, who also intends to be substituted with the 1<sup>st</sup> Plaintiff who is deceased, filed her submissions on 30.10.2023. The submissions do not disclose any new material as they are a complete replica of the Applicants submissions. Therefore I need not reproduce them here.
6. The 2<sup>nd</sup> Plaintiff on the other hand filed her submissions on 16.11.2023. She set the provisions of Order 24 Rule 4(4) of the *Civil Procedure Rules* which provides for the procedure to be followed on the death of a Defendant. He submitted that in this suit the 1<sup>st</sup> Defendant died on 25.08.2012 and there is no cause of action surviving against her as the suit against her abated upon lapse of the one year statutory period provided for under the law. That the application seeking leave for substitution by the Applicant cannot be merited unless the said suit against the 1<sup>st</sup> Defendant is revived first. They cited the case of *Kenya Farmers' Cooperative Union Ltd v Charles Murgor (deceased) t/a Kiptabei Coffee Estate* (2005) eKLR where the court held that a court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.
7. She submitted further that the court lacks the jurisdiction to order substitution, except in an application to revive the suit, where the suit has already abated by the operation of law. It cannot also hear and determine a suit that has abated by operation of law. That if a suit has abated it has ceased to exist and that there is no suit upon which a trial can be conducted and judgement pronounced. That purporting to hear and determine a suit that has abated is an exercise in futility and therefore the application before court is devoid of merit and should be dismissed with costs.
8. I have considered the application and the rival submissions filed. The Applicant is seeking for this court to extend the time within which to file an application to substitute the 1<sup>st</sup> Defendant, who is deceased, and after such extension of time, the court to grant leave to the Applicant to substitute the said defendant. He argued that the 1<sup>st</sup> defendant died on 25.08.2012 and that he was appointed as the administrator of the deceased's estate. He argued further that he had given proper instructions to his advocate who failed to move the Honourable court as per the law. He further urged that he ought not be punished for the mistakes of his advocate.



9. The 2<sup>nd</sup> Plaintiff while opposing the application was of the view that the 1<sup>st</sup> Defendant having died on 25.08.2012, there is no cause of action surviving against the 1<sup>st</sup> Defendant as the suit against her abated upon the lapse of the statutory period of one year. It was further argued that the application seeking leave for substitution cannot be merited unless the suit against the 1<sup>st</sup> Defendant is revived first.
10. The provisions of Order 24 Rule 4 of the Civil Procedure Rules provide for substitution of a deceased defendant 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.
  - (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..

Order 24 Rule 7(2) however gives the court discretion to revive an abated suit and provides;

- (2) 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.
11. From the foregoing provisions of law, it is clear that a suit 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 confirm or have the court declare such abatement. The 1<sup>st</sup> Defendant in this case is said to have died on 25.08.2012. The suit against her therefore abated exactly one year after her death, which would be on 25.08.2013. The court did on 15.02.2018 order 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 12.03.2020 and later amended on 25.01.2021 and by that time the suit had already abated by operation of law. The court in its ruling on that application dismissed the said application for substitution on the grounds that the abated suit against the deceased had not been revived. The Applicant has now filed an application seeking for extension of time to file for substitution as well seeking leave to be substituted against the 1<sup>st</sup> Defendant. He has not asked for revival of the abated suit.
12. As previously observed, there is no surviving suit as against the 1<sup>st</sup> Defendant for the applicant to be substituted as the suit abated on 25.08.2013 by operation of law. In order for substitution to take place, there must an existing suit and the same can only come into existence once the suit against the 1<sup>st</sup> Defendant has been revived. This observation was made in the case of;

*Kenya Farmers' Cooperative Union Ltd. v Charles Murgor (deceased) t/a Kiptabei Coffee Estate* [2005] eKLR held as follows;

“In the instant case there was no application for substitution made within one year since the death of the Defendant. Therefore as a matter of law the suit as against him abated. When substitution was subsequently purportedly made on



5<sup>th</sup> March, 1998 there was no suit subsisting in which substitution could be made. It had abated on or about 23<sup>rd</sup> April, 1996, that is, one year since the death of the Defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered.

It is to be noted that under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. In the present case there was no application for revival of the suit which had abated by operation of the law.

The suit having abated on or about 23<sup>rd</sup> April, 1996, as seen above, the order of substitution of 5<sup>th</sup> March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law; the resulting decree was also equally a nullity. It is not a sufficient answer that the application has come too late in the day or that these issues ought to have been raised at the time of hearing the application for substitution or at the latest at the time of hearing of the suit. Of course it would have been best had these issues been raised as early as possible. But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated, it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.

13. The court of appeal also in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR observed that;

“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.”

14. Consequently the Applicants Notice of Motion filed on 17.02.2023 must fail as there is no suit surviving against the 1<sup>st</sup> Defendant, the same having abated. No application to revive the suit has been made and therefore there is no existing suit in respect of which the Applicant can be substituted with



the deceased 1<sup>st</sup> Defendant. The application filed on 17.02.2023 is therefore dismissed with no orders as to costs.

**RULING DATED, SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 8TH DAY OF FEBRUARY, 2024.**

In the presence of Njeru Ithiga for 2<sup>nd</sup> plaintiff/ respondent and Silvia Wairimu – Court Assistant.

**A KANIARU**

**JUDGE – EMBU**

**8.2.2024**

