



**Kombo v Gwede (Environment & Land Case 134 of 2017)
[2024] KEELC 4057 (KLR) (8 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4057 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 134 OF 2017
SM KIBUNJA, J
MAY 8, 2024**

BETWEEN

KOMBO MWAMOSE KOMBO PLAINTIFF

AND

GWEDA RASI GWEDA DEFENDANT

RULING

1. The plaintiff moved the court through the application dated the 18th December 2023 seeking for orders that:
 - a. Ms. Mkan & CO. Advocates to be allowed to come on record for the plaintiff in place of Ms. Obara and Obara Advocates.
 - b. The court to review and or set aside the order of 29th January 2020 and reinstate this suit.
 - c. The court to join Shadrack Nyiro Rasi as the defendant instead of Gwede Rasi Gwede.
 - d. Leave to amend the plaint.
 - e. Costs to be provided for.

The application is premised on the five grounds on its face, *inter alia* that the “The plaintiff passed on 6th December 2018”; that the respondent failed to apply for letters of administration to the estate of Gwede Rasi Gwede; the applicant has cited Shadrack Nyiro Rasi in Miscellaneous Citation No. E012 of 2022. The application is supported by the affidavit of Kombo Mwamose Kombo, the plaintiff, sworn on the 18th December 2023 in which he among others deposed that the suit survived the death of the defendant who died on the 6th December 2018.

2. Directions on service of the application and filing of reply were issued on the 20th December 2023. During the hearing of the application on 20th February 2024, the court noted that the replying affidavit



sworn by Joyce Kangogo Chesaro Advocate on the 28th December 2023 that had been placed on the court record had not been formally filed. That upon request, the hearing was adjourned to the 6th May 2024 with an order that the replying affidavit be filed and served in seven days. The respondent was also ordered to pay Kshs. 2000/= to the court before that date for the delay in filing the reply and therefore occasioning the adjournment. That come the 6th May 2024, the court observed for the second time that the replying affidavit has not to date been formally filed. The matter was then placed for ruling for today.

3. The issues for the determinations by the court are as follows:
 - a. Whether the plaintiff has made a reasonable case for the abatement order to be reviewed and the suit reinstated.
 - b. Who pays the costs.
4. The court has carefully considered the grounds on the notice of motion, affidavit evidence, the record and come to the following findings:
 - a. That this suit was commence by the plaintiff through the plaint dated the 18th April 2017 seeking for permanent injunction, eviction of defendant from, and demolition of structures from Kwale/Kiwegu/Jego/115, suit property, and costs. The defendant opposed the claim through three statement of defence dated the 1st February 2018, claiming ownership and possession of the suit property.
 - b. That on the 23rd September 2019, the court was informed that the defendant had passed on the 6th December 2018, and on the 29th January 2020, the suit was marked abated, as no application to substitute the deceased had been made.
 - c. The effect of death of a defendant in a pending suit is as provided for under Order 24 Rule 4 of the *Civil Procedure Rules* which states that;
 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 sub rule (1), the suit shall abate so far as the deceased defendant.”

That though the plaintiff has deposed that he was compelled to file a citation against Shadrack Nyiro Rasi in Msambweni Citation Cause NO. E012 of 2022, as there has been no person or persons coming forward to apply for letters of administration in respect of the deceased defendant, no document thereof has been attached to the supporting affidavit to confirm that.
 - d. Under Order 24 Rule 4 (3) of *Civil Procedure Rules*, the legal representatives of the deceased defendant ought to have made the application for substitution within a year of his death, that is by 6th December 2019. The substitution is made once the legal representatives are granted letters of administration. In this suit, no such application was filed within one year of the defendant’s death, and the court proceeded to make an



order that the suit had abated with no order as to costs on the 29th January 2020, which was over two years one month after the death. That is the order the plaintiff now seeks to be reviewed and set aside.

- e. Where a suit has abated, a legal representative, as an applicant, has three steps to take; first to seek to extend the time for making an application for substitution; secondly to be substituted and be joined in the suit in place of the deceased party, and lastly seek to reinstate the suit. The Court of Appeal pronounced itself on this in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, where it held that;

“It is only after the time has been extended that the legal representative can have the 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... (emphasis mine)

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit.”

The plaintiff before the court has not sought for an order of extension of time.

- f. The court cannot deal with the prayer for the suit to be reinstated, before the substitution of the deceased defendant is dealt with. Moreover, the substitution of the deceased defendant cannot be done where the application is filed outside the timeframe of one year, unless the time set out for making that substitution is extended first by the court. This application has not sought for leave of court to extend the one-year period set out for an application of substitution to be filed. The prayers for extension of time, substitution and reinstatement of an abated suit may be sought for in one application so long as an applicant sets them in the proper sequence.
- g. That even though there is no formally filed replying documents by the defendant/respondent to the application, the plaintiff still had the legal responsibility to prove that his application meets the threshold required for review and or setting aside orders to issue, and he has failed to do so. However, prayer 2 for Ms Mkan & Company Advocates to come on record in place of Ms. Obara and Obara Advocates is allowed.



h. That under the provisions of section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, the plaintiff will meet his own costs in the application.

5. That in view of the above determinations, the court finds and orders as follows:

- a. Prayer 2 of the Notice of Motion dated 18th December 2023 is allowed.
- b. That the rest of the plaintiff's prayers in the application dated the 18th December 2023 are without merit and are not granted.
- c. The plaintiff to meet his own costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF MAY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff/Applicant : M/s Awino for Mkan.

Defendant/Respondent: No appearance.

Wilson – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

