



**Githunguri v Githunguri & another (Environment & Land Case
1 of 2020) [2024] KEELC 4570 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 1 OF 2020**

BM EBOSO, J

JUNE 3, 2024

BETWEEN

STANLEY MUNGA GITHUNGURI PLAINTIFF

AND

ROSEMARY WANJIKU GITHUNGURI 1ST DEFENDANT

SARAH NJOKI MAINA 2ND DEFENDANT

RULING

1. In his presentation to the court today, Mr Gatheru Gathemia – counsel for the defendants informed the court that the plaintiff, Stanley Munga Githunguri, died on 29/11/2022. Counsel added that, since then, there had been no substitution in terms of Order 24 of the *Civil Procedure Rules*. It was the position of counsel that the primary claim by Stanley Munga Githunguri had consequently abated. Counsel, however, took the view that the counterclaim by the defendants had not abated. It was the position of Mr Gathemia that Mr Stanely Munga Githunguri’s death did not cause the defendants’ counterclaim to abate. He invited the court to continue entertaining the counterclaim in the absence of an order of substitution.
2. Ms Kyalo, counsel for Mr Stanley Munga Githunguri, agreed with counsel for the defendant on the view that the claim by Mr Githunguri abated upon expiry of 12 months from the date of his death. She, however, took the view that the defendants’ counterclaim similarly abated upon expiry of 12 months.
3. Against the above background, the court is invited to make a determination on whether the defendants’ counterclaim has abated. Put differently, the court is required to make a finding as to whether there is a live counterclaim to warrant further proceedings in this cause.
4. A counterclaim is a suit/claim by a defendant who has been in the first instance sued by a plaintiff. When a defendant brings a counterclaim in a cause, the plaintiff’s claim becomes the primary claim/suit



while the defendant's claim is referred to as the counterclaim. Both the primary claim by the plaintiff and the counterclaim by the defendant are distinct suits sharing the same cause number.

5. Consequently, the framework in Order 24 rules 3 and 4 which provides for substitution in the event of death of a plaintiff or in the event of death of a defendant applies to the scenario where a defendant to a counterclaim dies. For avoidance of doubt, the framework in Order 24 rule 4 provides as follows:

“4.

(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.”

6. The late Stanley Munga Githunguri was the plaintiff in the primary suit/claim in this cause. He was the defendant in the counterclaim brought in the same cause by Rosemary Wanjiku Githunguri and Sera Njoki Maina. He is confirmed to have died on 29/11/2022. By dint of the provisions of Order 24 rule 3 of the *Civil Procedure Rules*, in the absence of any order allowing substitution, his claim against Rosemary Wanjiku Githunguri and Serah Njoki Maina abated on 29/11/2023. Similarly, by dint of the provisions of Order 24 rule 4 of the *Civil Procedure Rules*, in the absence of any order allowing substitution, the suit against him [the counterclaim] by Rosemary Wanjiku Githunguri and Serah Njoki Maina abated on 29/11/2023. That is the finding of the court on the question as to whether the counterclaim against the late Stanley Munga Githunguri has abated.

7. In the absence of any motion for enlargement of time, substitution or revival of any part of this cause, the cause is marked as abated and the case file is marked “case closed”. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 3RD DAY OF JUNE 2024

B M EBOSO

JUDGE

In the presence of: -

Ms Kyalo holding brief for Mr Nyaburi for the Plaintiff

Mr Gatheru Gathemia for the Defendants

Court Assistant: Hinga

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