



**Koske v Soi & another (Environment & Land Case
10 of 2018) [2024] KEELC 5073 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5073 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 10 OF 2018**

LA OMOLLO, J

JULY 4, 2024

BETWEEN

SOFIA CHELANGAT KOSKE PLAINTIFF

AND

KIPLANGAT ARAP SOI 1ST DEFENDANT

THE LAND REGISTRAR BOMET 2ND DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff/Applicant’s application dated 17th November, 2023. The application is expressed to be brought under Order 24 Rule 1, 3(1), Order 51 Rules 1, 3 & 12 of the [Civil Procedure Rules](#) and Sections 1, 3 & 3A of the [Civil Procedure Act](#).
2. The Plaintiff/Applicant’s seeks the following orders;
 - a. That this Honorable Court do cause the legal representative of the deceased Plaintiff namely Francis Kibii Ngeno to be substituted and be made a party in this suit in place of the Plaintiff and proceed with this suit on behalf of Sofia Chelangat Koskei (Deceased).
 - b. That pursuant to the granting of prayer (1) above, the honorable court be pleased to allow the Plaintiff to amend his pleadings to reflect the true parties to the suit.
 - c. That such order and or further direction be given by this honorable court to meet the ends of justice.
 - d. That costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn on 17th November, 2023 by one Franklin Obondo Koko counsel for the Plaintiff/Applicant.



Factual Background.

4. The Plaintiff/Applicant commenced this suit by way of the Plaint dated 5th February, 2018. She seeks the following prayers;
 - a. A order of temporary injunction restraining the Defendants, their servants, agents, employees, representatives, assigns and heirs from encroaching into, cultivating, grazing animals, cutting down trees or receiving any payment and or money out of an easement executed by the 1st Defendant and or payment out of the said parcel of land from Kenya Electricity Transmission Co. Limited (KETRACO) and or doing any acts that are detrimental to the Plaintiff's peaceful right of occupation, possession and use over land parcel No. Kericho/Sotik East Settlement Scheme/249 measuring 13.1 Hectares and the resultant title deed number Kericho/Sotik East Settlement Scheme/1206 illegally acquired.
 - b. An order to be issued directing the 2nd Defendant to cancel the title deed for land parcel No. Kericho/Sotik East Settlement Scheme/1206.
 - c. An eviction order to be issued directing the 1st Defendant to vacate land parcel No. Kericho/Sotik East Settlement Scheme/249.
 - d. Mesne profits.
 - e. Costs of this suit.
 - f. Any other remedy this honorable court may deem fit and just to grant.
5. On 2nd May, 2018 the 1st Defendant filed his statement of Defence wherein he denies the averments in the Plaint and prays that the suit be dismissed with costs.
6. On 4th July, 2018 the 2nd Defendant filed its statement of defence wherein it denies the averments in the Plaint and seeks that the Plaintiff's suit be dismissed with costs.
7. The application under consideration first came up for directions on 20th December, 2023 when the court gave the 1st Defendant/Respondent seven days to file his response.
8. On 7th February, 2024, directions were issued that the application would be heard by way of written submissions.
9. The application was mentioned severally to confirm whether parties had filed their submission. It was finally reserved for ruling on 13th May, 2024.

The Plaintiff/applicant's Contention.

10. The supporting affidavit is sworn by Franklin Obondo Koko counsel for the Plaintiff/Applicant. It is shocking that counsel deposes on matters of fact. His deposition is captured in the subsequent paragraphs.
11. He contends that the Plaintiff died intestate on 13th September, 2022.
12. He also contends that the deceased Plaintiff instituted the present suit against the Defendants/ Respondents herein vide the Plaint dated 5th February, 2018 which is still pending before the court.
13. He further contends that an Administrator of the Estate of the deceased was required to take out letters of administration and be made a party to the suit.



14. It is his contention that the deceased Plaintiff's son Francis Kibii Ngeno has obtained a Grant of Letters of Administration limited for purposes of this suit to pursue the deceased Plaintiff's claim on behalf of the estate and other family members.
15. It is also his contention that it is a requirement of the law that this application be made for purposes of substituting a party.
16. He ends his deposition by stating that the court should substitute the deceased Plaintiff with the legal representative of her estate.

The 1st Defendant/respondent's Response.

17. In response to the application, the 1st Defendant/Respondent filed a Replying Affidavit sworn on 23rd January, 2024.
18. He deposes that the Plaintiff died on 13th September, 2022 and that he is advised by his advocates on record that as per Order 24 Rule 3(2) of the [*Civil Procedure Rules*](#), where no application for substitution of a deceased person has been made within one year, the suit abates.
19. He also deposes that the "intended Applicant" filed the present application on 21st November, 2023 which is outside the stipulated period of one year and therefore the suit has abated.
20. He further deposes that when a suit abates, the court lacks jurisdiction to allow for substitution except in an application to revive the suit.
21. It is his deposition that the intended Plaintiff has neither sought nor secured an order for revival of the suit and as such the jurisdiction of this court has not been properly invoked to grant the orders sought in the application.
22. He ends his deposition by asking the court to uphold the Provisions of Order 24 Rule 3(2) of the [*Civil Procedure Rules*](#) and dismiss the application.

Issues For Determination.

23. The 1st Defendant/Respondent filed submissions on 23rd February, 2024 while the Plaintiff/Applicant elected not to file submissions.
24. The 1st Defendant/Respondent submissions are on whether the court should grant the orders sought.
25. It is the 1st Defendant/Respondent's submissions that the deceased Plaintiff died on 13th September, 2022. It is also the 1st Defendant/Respondent's submissions that the application for substitution was filed on 21st November, 2023 which is outside the stipulated period of one year and therefore the suit has already abated.
26. The 1st Defendant/Respondent relies on Order 24 Rule 3(2) of the [*Civil Procedure Rules*](#) and submits that where no application for substitution of a deceased Plaintiff has been made within one year the suit shall abate.
27. The 1st Defendant/Respondent relies on [*Titus Kiragu v Jackson Mugo Mathai & another*](#) [2013] eKLR as was cited in [*Kishor Kumar Dhanji Varsani v Amalok Singh & 4 Others*](#) [2016] eKLR and submits that a court of law does not have jurisdiction to adjudicate and resolve a suit that has abated until an order for revival is granted.



28. The 1st Defendant/Respondent relies on Order 24 Rule 7(2) of the *Civil Procedure Rules, Wallace Kinuthia v Anthony Nd'ung'u Muongi & 3 Others* [2013] eKLR and submits that the suit has to be reinstated before substitution.
29. It is the 1st Defendant/Respondent's submissions that any attempt to substitute parties without first reinstating the suit is void.
30. The 1st Defendant/Respondent relies on Section 67 of the *Law of Succession Act, The Hon. Attorney General v The Law Society of Kenya & another* Civil Appeal (Application) No. 133 of 2011 and prays that the Plaintiff/Applicant's application be dismissed with costs.

Analysis And Determination.

31. I have considered the application, the response thereto and the 1st Defendant's submissions.
32. It is my view that the only issue that arises for determination is whether Francis Kibii Ng'eno should be substituted in place of Sofia Chelangat Koske the deceased Plaintiff.
33. The law relating to substitution is found in Order 24 Rule 3 of the *Civil Procedure Rules*. In relation to deceased Plaintiff(s), it provides as follows;

“3.

- (1) Where one of two or more Plaintiffs 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.
- (2) 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 Plaintiff:

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

34. The Court of Appeal in *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others* [2015] eKLR held as follows;

“There are three stages according to these provisions. As a general rule the death of a Plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the Plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased Plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the Plaintiff's legal representative to the suit. (Emphasis mine)

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.



Thirdly, the legal representative of the deceased Plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff”.

35. It is not disputed that Sofia Chelangat Koske died on 13th September, 2022. It is also not disputed that the Plaintiff/Applicant filed the application for substitution on 21st November, 2023. This application was therefore filed one year, two months and three days after Sofia Chelangat Koske died.

36. The 1st Defendant/Respondent submits that by the time the application for substitution was filed, the suit had already abated. The Plaintiff/Applicant did not respond to this submission.

37. The Court of Appeal in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR held as follows;

“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. (Emphasis mine) 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.”

38. A perusal of the court record shows that on 23rd October, 2023 the Court made the following orders;

“Order 24 Rule 3(2) of CPR is clear that if there has been no substitution of a deceased Plaintiff within one year, the suit abates unless there has been a good reason given for extension of time. I have considered the submission by counsel for the delay in the filing of an application. I hence do extend time within which the Plaintiff should be substituted, to a period of 30 days’ failure to which the suit herein shall be marked as abated”

39. It is evident that this Court granted thirty days for the deceased Plaintiff to be substituted. This period of 30 days was set to lapse on 23rd November, 2023. The application for substitution was filed on 21st November, 2023 which was well within the thirty-day period.



40. Annexed to the affidavit in support of the application under consideration is a copy of a Special Limited Grant of Letters of Administration Ad Litem for the estate of the late Sofia Chelangat Koskei issued by the Chief Magistrate's Court at Kericho Ad Litem No. E143 of 2023 to Francis Kibii Ngeno.

Disposition.

41. I find that the application dated 17th November, 2023 was filed within the time enlarged by this Court and is therefore merited. Consequently, the application is allowed in the following terms:

- a. Francis Kibii Ngeno is hereby substituted as a Plaintiff in place of Sofia Chelangat Koskei (Deceased).
- b. Leave is hereby granted to the Plaintiff to amend his pleadings to reflect the said substitution.
- c. The costs of the application shall abide the outcome of the suit.

42. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 4TH DAY OF JULY, 2024.

L. A. OMOLLO

JUDGE

In the presence of:-

Mr. Koko for the Applicant.

Mr. Kefa for the 1st Defendant/Respondent.

Miss Chepkemei for the 2nd Defendant/Respondent.

Court Assistant; Mr. Joseph Makori.

