



Nkonge v Marangu; Marangu (Intended Defendant) ((Legal Representative of the Estate of George Mbaya Marangu)) (Environment & Land Case E019 of 2021) [2024] KEELC 5135 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5135 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E019 OF 2021**

**CK YANO, J
JULY 11, 2024**

BETWEEN

GEORGE NKONGE APPLICANT

AND

GEORGE MBAYA MARANGU DEFENDANT

AND

**FLORENCE MAKENA MARANGU INTENDED DEFENDANT
(LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE MBAYA
MARANGU)**

RULING

1. This ruling is in respect of the Notice of Motion dated 12th June, 2023 brought under the provisions of section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, Order 24 Rule 4, Order 24 Rule 7(2), Order 50 rule 5, Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law. The applicant is seeking for orders that-;
 1. That this Honourable court be pleased to enlarge time within which to substitute the defendant (deceased) with the name of the deceased defendant's personal representative.
 2. That this Honourable court be pleased to substitute the name of the defendant, George Mbaya Marangu (deceased), with that of Florence Makena Marangu, the administrator and personal Representative of the Estate of the deceased defendant.
 3. That this Honourable court be pleased to revive the suit herein.
 4. That the costs of this application be in the cause.



2. The application is premised on the grounds thereon and supported by the affidavit of the applicant sworn on 13th June 2023 and supplementary affidavit sworn on 28th February, 2024. The applicant avers that sometimes in 2021 he instructed the firm of Kiogora Arithi & Associates Advocates to institute a case against the defendant, who in turn defended the suit by instructing the firm of Nyamu Nyaga & co. advocates. That however, the defendant passed away on 16th August 2021.
3. The applicant further avers that he is advised by his advocates that twelve (12) months having lapsed since the defendant's demise and without the requisite substitution, the suit that is the substratum of the application has since abated by operation of law. That the failure to substitute the defendant on time and /or before the expiry of one year after the death of the defendant was not intentional or pre-determined as he made all the necessary efforts and acted within the confines of his knowledge to contact the advocate handling the matter.
4. The applicant states that upon learning of the defendant's demise, he made several attempts to reach the then advocate on record, including the writing of letters, enquiring on the way forward to ensure that the suit is prosecuted to its conclusion on merit and the general progress of the matter, which bore no fruits despite the advocates pledging to do the needful. He annexed a copy of one of his letters dated 31st August Marked "GN -1" addressed to and received by his then advocates over the matter, which he said elicited no response.
5. The applicant avers that he was shocked when he confronted the Advocates then on record in their chambers on 20th May 2023 only to discover that nothing had been done to further the prosecution of the matter since the death of the defendant. That sequel to the developments, he took his file and withdrew instructions from the said firm and hastily embarked on the mobilization of resources to seek legal advice and/or instruct another advocate to act for him in the matter. He annexed a copy of the acknowledgment receipt of the file from the then advocate over the matter Marked "GN – 22".
6. The applicant states that consequently, he instructed the firm of F.M Muteti & Co. Advocates to take over the conduct of the matter from Messrs Kiogora Arithi & Associates Advocates. That the newly instructed advocates informed him that despite succession proceedings having been commenced and a personal representative in respect of the Estate of the defendant appointed Vide Meru MCSUCC E326 of 2021, no application for substitution of the defendant in the suit was undertaken by the defendant's personal representatives and has annexed a copy of Gazette Notice No. 2174 in Special Issue Vol. CXXIV No. 38 of 25th February, 2022 in respect of the Appointment of the deceased's personal representative.
7. The applicant states that he has moved the court expeditiously for substitution of the defendant and for revival of the suit on the advice of his advocate on record. That he stands to suffer substantial loss, should the application be disallowed since he will lose the parcel of land forming the substance of the case and pertinently having invested heavily into its acquisition and being in actual occupation of the same for many years.
8. The applicant avers that no prejudice will be occasioned to the defendant if the defendant's name is substituted with that of the personal representative of the estate of the deceased defendant, as all parties are interested in having the matter concluded on merits as depicted in the defendant's participation in the suit prior to his demise.
9. The applicant states that it is in the interest of justice and fairness that the application be allowed as prayed as it will ensure the determination of the suit on its merits to the delights of the parties involved.



10. In his supplementary affidavit, the applicant has annexed copies of a certificate of confirmation of grant in Meru Misc. succession Cause no. E326 of 2021 and screen shot of the CTS. The applicant states that at the time of filing the application he was unable to get the grant as the file was missing.
11. Florence Makena Marangu, the intended defendant/respondent filed a replying affidavit dated 12th February, 2024 wherein she deposes that George Mbaya Marangu, the deceased defendant was her husband who died on 16th August 2021. That the orders sought by the plaintiff/applicant are incapable of being granted. That the plaintiff applicant has not annexed any grant of letters of administration as a proof that the respondent is the administrator of the estate of the deceased. The intended defendant avers that the Kenya Gazette Notice annexed to the supporting affidavit to the Notice of Motion herein is not a proof or evidence of grant of letters of administration of the deceased defendant's estate.
12. The intended defendant further avers that as regard enlargement of time, the allegations by the plaintiff/applicant that he had issues with his advocates cannot be a good reason to enlarge time. That equally the plaintiff/applicant cannot seek for the suit herein to be revived without him attaching to his affidavit a grant of letters of administration showing that the respondent is the administrator of the deceased's estate.
13. The intended defendant/respondent states that in any event, the applicant's issues with his advocates cannot be a subject matter of litigation before the court and in his case. That the application herein does not meet the threshold required to enable the court to grant the orders sought. That the plaintiff/applicant ought to have done due diligence before filing the application herein. That it is only just and fair that the application be dismissed with costs.
14. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties and which I have read and considered and I need not reproduce the same in this ruling.
15. I have considered the application, the response and the rival submissions. There are only two issues for determination: Whether the court should enlarge time within which to substitute the defendant who is deceased with the deceased personal representative and whether the suit herein should be revived.
16. Order 24 of the Civil Procedure Rules provides as follows;-
 - “ 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
 2.
 3.
 - 4 Where one or 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.
 - (1) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (2) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.



5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such question shall be determined by the court.”

17. Order 50 rule 6 of the *Civil Procedure Rules* provides that:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until the expiration of the time appointed or allowed;

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise”.

18. Further Order 24 Rule 7 (2) of the *Civil Procedure Rules* provides as follows;

“7 (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 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.”

19. From the foregoing provisions, it is trite that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. The suit herein was instituted on 18th May, 2021. From the record, it is apparent that the original defendant died on the 16th August, 2021 and without the requisite substitution of the defendant being done, the suit that is the substratum of the application abated by operation of Law.
20. The application to revive the suit and seeking the substitution of the deceased defendant was made on 13th June, 2023, about over 2 years after the abatement of the suit. The applicant has stated that failure to substitute the defendant on time and/or before the expiry of one year after the death of the defendant was not intentional or predetermined and that the same was not orchestrated by any fault on the part of the applicant herein. That upon learning of the defendant’s demise, the applicant made several attempts to reach his then advocates on record enquiring on the way forward to ensure the suit is prosecuted to its conclusion on merit and was not successful despite the incessant pledge to do the needful. It is not in dispute that the intended defendant/respondent is the legal representative of the estate of the deceased defendant as shown in the certificate of confirmation of Grant dated 21st May 2022 issued in Meru CM Succession Cause No. 326 of 2021. The applicant has explained that he discovered these facts after the expiry of the requisite period, hence the filing of this application.
21. From the foregoing, I am of the most considered opinion that the applicant has shown sufficient cause or reason which prevented him from applying for substitution and revival of the suit earlier. I therefore exercise my discretion in favour of the applicant. In my view no prejudice will be occasioned to the respondent as the suit will be heard and determined on merit.
22. The upshot of this is that the notice of Motion dated 13th June 2023 is allowed in terms of prayers 1,2 and 3 thereof.
23. Costs of the application shall be in the cause.



24. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JULY, 2024.

IN THE PRESENCE OF

Court Assistant- Tupet.

Mitugo holding brief for Mutua for plaintiff/applicant

Nyamu Nyaga for Defendant/respondent

C.K YANO

JUDGE

