



**Hantooshi & another (Suing as the Personal Representatives of the Estate of the Late Said Karama Hantooshi) v Hantooshi & another; Hantoosh (Applicant) (Environment & Land Case 113 of 2001) [2024] KEELC 6736 (KLR) (16 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 113 OF 2001  
SM KIBUNJA, J  
OCTOBER 16, 2024**

**BETWEEN**

**AHMED SAID KARAMA HANTOOSHI ..... 1<sup>ST</sup> PLAINTIFF**

**AREF KARAMA HANTOOSHI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS THE PERSONAL REPRESENTATIVES OF THE ESTATE OF THE  
LATE SAID KARAMA HANTOOSHI**

**AND**

**SWALEH KARAMA HANTOOSHI ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MOHAMED SWALEH KARAMA HANTOOSH ..... APPLICANT**

**RULING**

**[notices of Motion Dated 16th November 2023 & 12th February 2024]**

1. The application dated 16<sup>th</sup> November 2023 was brought by the plaintiffs under Order 24 Rule 4 and Rule 7 of the *Civil Procedure Rules*, Sections 1A, 1B and 3A of the *Civil Procedure Act*, seeking for orders that;

- " 1. "That this Honourable Court be pleased to revive the suit for hearing and determination on its merits.
2. That this Honourable Court be pleased to extend time to substitute the Deceased 1<sup>st</sup> Defendant and the suit against him be deemed as subsisting.



3. That this Honourable Court be pleased to substitute the Deceased 1<sup>st</sup> Defendant Swaleh Karama Hantoosh with his legal representative namely Khalid Swaleh Hantoosh.
4. That leave be granted to the Plaintiffs to amend the Further Amended Plaint to reflect the substitution.
5. That cost of this application be provided for.”

The application is based on fourteen [14] grounds on its face and supported by the affidavit of Aref Said Hantooshi, the 2<sup>nd</sup> plaintiff, inter alia deposing that the 1<sup>st</sup> defendant died on 5<sup>th</sup> April 2018 and the suit survived him; that his heirs filed Kadhi’s Court Succession No. 180 of 2019 and Kadhi court case No. 239 of 2019, but no legal representative was appointed; that due to the delay in appointing a legal representative the court marked this suit as abated on 25<sup>th</sup> September 2019; that Citation Cause No. 36 of 2021 was filed on 20<sup>th</sup> December 2021, but before it could be determined, Khalid Swaleh Hantoosh, was appointed for the purpose of prosecuting/defending this suit in High Court Succession Cause No. E012 of 2023; that the court should revive the abated case, substitute the deceased 1<sup>st</sup> defendant with the legal representative of his estate to enable the plaintiffs prosecute their case; that the family of the 1<sup>st</sup> defendant has taken advantage of the abated suit to continue to utilize the suit property Mombasa/Block XVII/1304, which was acquired fraudulently; and the court should exercise its discretion, revive the abated suit and set aside the order of closing the file.

2. Mohamed Swaleh Karama Hantoosh, the proposed interested party, hereinafter referred to as the applicant, responded to the application through the further affidavit sworn on the 7<sup>th</sup> June 2024, inter alia deposing that the grant was issued to Khalid Swaleh Hantoosh on 21<sup>st</sup> March 2023, on condition he filed a petition for full grant in sixty (60) days; that the petition for full grant was filed on 24<sup>th</sup> October 2023, when the 60 days had lapsed and without seeking for extension of time; that by the time the plaintiffs’ application dated 16<sup>th</sup> November 2023 was filed, there was no legal administrator to the estate of Swaleh Karama Hantoosh appointed by the court, and Khalid Swaleh Karama cannot be joined in this suit; that the applicant filed a revocation of grant application, but it was found there was no existing grant capable of being revoked; that the plaintiffs’ application has no merit and should be dismissed with costs.
3. The applicant filed the application dated 12<sup>th</sup> February 2024 under Order 1 Rule 14 and 15, Order 2 Rule 15(1), Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, & 3A, of the Civil Procedure Act, seeking for inter alia:

”

1. Spent.
2. That this honorable court be pleased to enjoin Mohamed Swaleh Karama Hantoosh as an interested party in this suit.
3. That this honourable court be pleased to order a temporary stay of proceedings in respect to the plaintiffs’ application dated 16<sup>th</sup> day of November, 2023 pending the hearing and determination of this application.
4. That this honourable court be pleased to struck out the application dated 16<sup>th</sup> day of November, 2023 with costs for being frivolous, vexatious, scandalous and a blatant abuse of the law.



5. That costs of this application and the suit be borne by the plaintiffs.”

The application is premised on the five [5] grounds on its face and supported by the affidavit of Mohamed Swaleh Karama Hantooshi, applicant, deposing among others that the 1<sup>st</sup> defendant, who was his father died on 5<sup>th</sup> April 2018; that as a beneficiary to his late father’s estate, he was aware of material facts that are crucial to the court for it to come to a just and logical conclusion of this matter; that as a family member and beneficiary of the deceased estate he was not consulted before and after the proceedings in succession cause no. E012 of 2023 in respect of the estate of Swaleh Karama Hanvoosh, that was instituted by one Khalid Swaleh Hantoosh, which he claimed was only filed to defraud the estate of the deceased, and deny the rightful beneficiaries of the estate; that the said Khalid Swaleh Hantoosh filed Succession Case No. 239 of 2018 in respect to the estate of Swaleh Karama Hantoosh and listed three beneficiaries of the estate leaving out other family members and demanded the distribution of specific properties of the deceased to himself; that upon discovering this he moved to the Kadhi Court and obtained copies of the proceedings thereof and proceeded to file a reply to the said petition on behalf of the family, but the petition was later dismissed by the court; that he later filed Succession Petition No. 180 of 2019 including all the names of the Dependents of the Deceased Estate, together with all the properties owned by the deceased; that in the said cause, the said suit Khalid Swaleh Karama Hantoosh moved to join Ahmed Said Karama and Aref Said Karama, the plaintiffs herein, to frustrate the issuance of letters of administration and obtain extra share of the estate; that upon the court rejecting their application, they filed a Citation No. E036 of 2021, seeking a grant of representation, and Khalid Swaleh Karama Hantoosh supported the said Citation despite the existence of Succession Number 180 of 2019, in bid to obtain illegal and unlawful representation of the deceased estate; that the Citation was dismissed by the Court, and Khalid Swaleh Karama Hantoosh proceeded to file Succession Cause No E012 of 2023 and obtained a grant of representation through mischief and deceit to the court; that upon discovering that through the contents of the plaintiffs’ application dated 16<sup>th</sup> November 2023 for revival of the abated suit, he filed summons for revocation of the grant in Succession Cause No. E 012 of 2023, which was still before the family court; that the plaintiffs contributed to the delay in obtaining grant of representation to the estate of Swaleh Karama Hantoosh by meddling with his estate in court through unnecessary litigation; that the court in Succession Cause No. E 012 of 2023 was duped by the petitioner in granting the said grant of representation without full disclosure of material facts and by dint of doing so, the grant of representation submitted in this court by the plaintiffs is not admissible in law unless the proceedings challenging the same are concluded.

4. The application is opposed by the plaintiffs through the replying affidavit of Aref Said Hantooshi sworn on 13<sup>th</sup> May 2024 and Grounds of Opposition dated 3<sup>rd</sup> May 2024. It is the plaintiffs’ case that it’s only upon the appointment of a legal representative for the estate of the deceased 1<sup>st</sup> defendant, that the plaintiffs could have approached the court for the revival of the abated suit, and substitution of the 1<sup>st</sup> defendant; that Mohamed Swaleh Karama Hantooshi could not be considered as an interested party by the court since he was not an administrator of the estate of the 1<sup>st</sup> defendant, and as such had no legal capacity to seek joinder in the legal affairs of the estate; that Khalid Swaleh Hantooshi was appointed by the court as the legal representative of the estate of the 1<sup>st</sup> defendant, and had the mandate to act as such; that the application dated 12<sup>th</sup> February 2024 was an attempt to derail the proceedings and should be dismissed with costs.



5. The applicant filed a further affidavit sworn 7<sup>th</sup> June 2024, whose depositions are as summarized in paragraph (2) above.
6. The court issued directions on the 6<sup>th</sup> May 2024 to file and exchange submissions. The learned counsel for the plaintiffs and applicant filed their submissions dated 6<sup>th</sup> June 2024 and 7<sup>th</sup> June 2024 respectively, that I have considered. The learned counsel for defendants informed the court on 10<sup>th</sup> June 2024 that they will rely on the filed grounds of opposition.
7. The following are the issues for the court's determinations in the two applications:
  - a. Whether the plaintiffs have met the threshold for revival of the abated suit, and substitution of the deceased 1<sup>st</sup> defendant.
  - b. Whether the applicant has met the threshold for joinder as an interested party.
  - c. Who pays the costs?
8. The court has carefully considered the grounds on the two applications, grounds of opposition, affidavit evidence, submissions, superior courts decisions cited, the record and come to the following conclusions:
  - a. That the record confirms this suit was marked abated on 25<sup>th</sup> September 2019, for reasons that 1<sup>st</sup> defendant had died on 8<sup>th</sup> April 2018, and more than one year had lapsed without an application to substitute him being made in accordance with Order 24 of *Civil Procedure Rules*.
  - b. On 6<sup>th</sup> November 2018, Mr. Odero, counsel for the plaintiffs, informed the court that the 1<sup>st</sup> defendant had passed away, and that the family was pursuing a succession case, before undertaking substitution. The court directed the matter to be mentioned on 17<sup>th</sup> December 2018 for directions. On 17<sup>th</sup> December 2018, Mr Odero informed the court again that the 1<sup>st</sup> defendant was deceased, and that they had provided the court with proceedings in Kadhi's Court Succession No. 239 of 2018. The counsel prayed for further mention, which was slotted for 21<sup>st</sup> March 2019. On 21<sup>st</sup> March 2019, Mr. Odero informed the court that they had managed to get the death certificate of the deceased which indicated he died on 5<sup>th</sup> April 2018. He urged the court for further mention to enable the plaintiff to do a citation of the estate of the 1<sup>st</sup> defendant. The court proceeded to direct the matter to be mentioned on 25<sup>th</sup> September 2019 to confirm the progress of the citation proceedings.
  - c. When the matter came up for mention on 25<sup>th</sup> September 2019, there was no appearance from both parties and their counsel. The court noted it had been more than a year since the defendant died on 5<sup>th</sup> April 2018 and no substitution had been made. The court declared the matter abated under the provisions of Order 24 of the Civil Procedure Rules and ordered the file to be closed. This prompted the plaintiff to file the application dated 16<sup>th</sup> November 2023, which seeks for the revival of the abated suit and for substitution the 1<sup>st</sup> defendant with Khalid Swaleh Hantoosh.
  - d. The cause of action against the 1<sup>st</sup> defendant, who died on 5<sup>th</sup> April 2018 continued beyond his death, and the suit did not abate automatically. However, it abated by operation of the law, when there was no application made to substitute him within one year following his death. This means the suit abated on 5<sup>th</sup> April 2019, even before the court declared it so, on 21<sup>st</sup>



September 2019. Order 24 of the *Civil Procedure Rules* gives the court discretionary powers to revive a suit that has been abated. Rule 1 states:

“The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.”

Rule 4 states;

- “(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.”

Rule 7 Subrule 2 states:

““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.”

As stated above, this case stood abated as no application was made to substitute the 1<sup>st</sup> defendant within one year after his death. The court is well guided by the Court of Appeal decision in the case of *Rebecca Mijide Mungole & Cleophas Ongau Omwenga versus Kenya Power & Lighting Company Ltd, Atlas Copco Eastern Africa Ltd & Falcon Signs Ltd* [2017] KECA 544 (KLR) where it was held,

““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...

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 operating phrase in rule 7(2) “sufficient cause” has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.”

- e. Swaleh Karama Hantoosh died on 5<sup>th</sup> April 2018 as seen from his death certificate number 0670781 dated 12<sup>th</sup> April 2018. The plaintiffs presented the application on 16<sup>th</sup> November 2023, which was about 5 years and 7 months from the date the 1<sup>st</sup> defendant died. The plaintiffs have maintained that there was a delay from the 1<sup>st</sup> defendant’s family in applying to the court for a legal representative of the estate. From the record before the court, the plaintiffs filed Mombasa High Court Citation No. 36 of 2021 on 20<sup>th</sup> December 2021, where they sought to cite Mohamed Swaleh Hantoosh, Khalid Swaleh Hantoosh, Awadh Swaleh Hantoosh, Anisa Swaleh Hantoosh, Asiya Swaleh Hantoosh and Awatif Swaleh Hantoosh to accept or refuse letters of administration to the estate of their deceased father, 1<sup>st</sup> defendant. Swaleh Karama Hantoosh was granted limited letters of administration ad litem on 21<sup>st</sup> March 2023 by the court in Mombasa High Court Succession Cause No. E012 of 2023. The court ordered that petition for letters of administration intestate to be filed within 60 days from 21<sup>st</sup> March 2023, failure to which the said grant would lapse. Swaleh Karama Hantoosh filed the petition for letters of administration intestate on 25<sup>th</sup> October 2023, by which time the said limited grant had lapsed.



- f. The plaintiffs herein have not given the court a justifiable reason as to why it took them three years to cite the children of the deceased to take out letters of administration. The plaintiffs were under no duty to wait for the family of the 1<sup>st</sup> defendant to take out the letters of administration. They should have taken out the citation immediately they became aware of the death of the 1<sup>st</sup> defendant. From the court record, the plaintiffs first informed the court of the death of the 1<sup>st</sup> defendant on 6<sup>th</sup> November 2018 and claimed to be waiting for substitution from the 1<sup>st</sup> defendant's family. They sought for other mentions on 17<sup>th</sup> December 2018 and 21<sup>st</sup> March 2019, when they informed the court that they were seeking a further mention date when they would give a progress of the citation they were undertaking. The court proceedings show that on 21<sup>st</sup> March 2019, the plaintiffs informed the court that they needed further mention to enable them to do a citation for the estate of the 1<sup>st</sup> defendant. However, during the mention date of 25<sup>th</sup> September 2019, neither the plaintiffs nor their counsel attended court to give a brief on the progress of the citation proceedings. This prompted the court to order the suit abated and declare the file closed. There was no other action that was taken in this court until the plaintiffs made the application on 16<sup>th</sup> November 2023.
- g. It is clear from the foregoing that the plaintiffs knew as 21<sup>st</sup> March 2019, that they needed to take out citation in respect of the estate of the 1<sup>st</sup> defendant, so as to initiate substitution proceedings for the deceased party, but they only actualized it on 20<sup>th</sup> December 2021, when they finally filed Citation No. 36 of 2021 before the High Court of Mombasa. The plaintiffs have not tendered any reasonable explanation for the inordinate delay, while they had had ample time between the time they became aware of the death of the 1<sup>st</sup> defendant and the time the suit was abated.
- h. There is no reasons why the plaintiffs could not have commenced the citation proceedings in good time, before this suit abated. They had assured the court they would file the citation on 21<sup>st</sup> March 2019, when they sought for a further mention to confirm the progress of the citation proceedings. The court fixed the matter for mention on 25<sup>th</sup> September 2019, but the plaintiffs and their counsel did not attend court to tender a brief the status of the citation proceedings, or even to seek for extension of time. In the case of *Rotich Cherutich & 3 Others Versus The Director Of Surveyors* [2013] EKLK the court held that,
- “A suit abated after one year of death unless an application for substitution was made. The court was at liberty to extend time for good reason in accordance with the proviso in order 24 rule 3 of the Civil Procedure Rules. Good reason had to be provided. It could not be said that good reason had been provided where general sweeping statements that were unsupported by any evidence were made. The discretion of court to extend time was not granted as a matter of course. It was not to be assumed that the discretion of the court to extend time would be given without good reason, and it could not be said that good reason had been demonstrated when no specific details were provided.”
- i. The plaintiffs have not presented any good reason to warrant the court to exercise its discretion and extend time, for substitution of the 1<sup>st</sup> defendant, deceased. No specific reason has been given why they did not file the citation proceedings in time, as they had promised to do during the mention of 21<sup>st</sup> March 2019. The alleged family disagreements among the children of the 1<sup>st</sup> defendant, deceased, that had caused the delay or refusal in appointing of a legal representative, or better still, petitioning the Succession Court for letters of administration,



cannot be a justifiable reason that would warrant the court to exercise its discretion and extend time. The alleged disagreements at best are in my view, a mere excuse that the plaintiffs have and hope the court will take it and sympathize with them. The plaintiffs' application for revival of the abated suit and substitution of 1<sup>st</sup> defendant, deceased, has no merit. I am therefore not persuaded to consider the joinder of Khalid Swaleh Hantoosh as a substitution for Swaleh Karama Hantoosh and the revival of the suit, as it stands abated.

- j. The application dated 12<sup>th</sup> February 2024, has been brought by Mohamed Swaleh Karama Hantooshi, the proposed interested party. He has sought to be joined into the suit as an interested party in this suit, stay of proceedings pending the determination of the application, as well as striking out the plaintiff's application dated 16<sup>th</sup> November 2023, with costs. As held above, in law an abated suit is non-existent, and the only way to breathe life into such a suit is by an application under Order 24 Rule 7(2) of the Civil Procedure Rules. The plaintiffs' application dated 16<sup>th</sup> November 2023, was such an application, but the court has found it unmerited. Subsequently, this suit remains abated and there being no order of substitution of deceased defendant and revival of the suit, there is no suit before this court in which the proposed interested party could apply to be joined to or pending any other determination.
  - k. Under section 27 of *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless otherwise ordered for good cause. In this instance, I am of the view that justice will better be served by an order that each party bears their costs in each of the two applications.
9. As a consequent of the findings set out above, I find and order as follows:
- a. That the plaintiff's application dated 16<sup>th</sup> November 2023 lacks merit and is dismissed.
  - b. That the proposed interested party's application dated 12<sup>th</sup> February 2024 is hereby struck out.
  - c. That each party bears their own costs in each of the applications.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 16<sup>TH</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF:**

Plaintiffs : No Appearance

Defendants : Mr Gilenga for 1<sup>st</sup> Defendant

Mr. Penda for 2<sup>nd</sup> Defendant

Applicant : Mr Mummin for Mwangoro.

Leakey – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

