



**Mugekenyi (Suing as the Administrator of the Estate of Mbugua  
Mugekenyi - Deceased) v Waweru & 10 others (Environment & Land Case  
162 of 2017) [2024] KEELC 6790 (KLR) (15 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6790 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 162 OF 2017**

**JG KEMEL, J**

**OCTOBER 15, 2024**

**BETWEEN**

**JOHN GEORGE MUGEKENYI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF MBUGUA MUGEKENYI - DECEASED) ..... PLAINTIFF**

**AND**

**ARTHUR KABIRIRI WAWERU ..... 1<sup>ST</sup> DEFENDANT**  
**SHEM KIHORO ..... 2<sup>ND</sup> DEFENDANT**  
**JOHN MBURU WAWERU ..... 3<sup>RD</sup> DEFENDANT**  
**AMOS KAHUHA ..... 4<sup>TH</sup> DEFENDANT**  
**JAMES MUCHAI WACHIRA ..... 5<sup>TH</sup> DEFENDANT**  
**MARY WACHUKA WACHIRA ..... 6<sup>TH</sup> DEFENDANT**  
**NJUGUNA MATHU ..... 7<sup>TH</sup> DEFENDANT**  
**PETER WANGO GATHATA ..... 8<sup>TH</sup> DEFENDANT**  
**PETER NDUNGU MBUGUA ..... 9<sup>TH</sup> DEFENDANT**  
**LAND REGISTRAR , KIAMBU ..... 10<sup>TH</sup> DEFENDANT**  
**HON ATTORNEY GENERAL ..... 11<sup>TH</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect to two applications filed by the 4<sup>th</sup> and 5<sup>th</sup> Defendants.
2. The 4<sup>th</sup> Defendant's application is dated 24/8/2020 seeking Orders THAT;



- a. Spent.
  - b. The Court do grant stay of execution pending the hearing and determination of this Application.
  - c. The Court to review its Judgment and Decree given on 8<sup>th</sup> April 2020 as against the 4<sup>th</sup> Defendant Amos Kahuha and have the Plaintiff's pleadings filed as against the 4<sup>th</sup> Defendant struck out and the Judgment entered against the 4<sup>th</sup> Defendant set aside herein.
  - d. Costs be in the cause.
3. The Application is based on grounds on the face of it which are restated in the Supporting Affidavit of Keziah Wangui Kahuha, the Applicant. She deposed that her father, Amos Kahuha sued herein as the 4<sup>th</sup> Defendant died on 15/3/2004 as evidenced by copy of Death Certificate marked 'a'. That her mother as well died on 12/5/2004 as shown by Death Certificate marked 'b'. That at the time of her parents' deaths she was only 4 years old and being orphans, her and her three siblings were separated for upbringing in different households. That her late father was the registered owner of parcel LARI/KIRENGA/1820 since 1997 as shown by title deed marked 'd'. That her late parents tilled and developed the land which developments are in place to date and she was not aware of any Court case against her father until August 2020 when neighbors informed them of the Court Judgement. She further deposed that according to the Affidavit of Service sworn on 4/5/2006, the process server Alexander Musungu averred that he was informed of the late Amos' demise but the area assistant chief accepted service on behalf of the 4<sup>th</sup> Defendant's family.
  4. The Plaintiff through the firm of Rakoro & Co. Advocates filed submissions dated 25/10/2021 while the Applicant's submissions dated 28/7/2021 are filed by E.W Kamuyu & Co. Advocates.
  5. The Plaintiff submitted that the genesis of this suit was the Nairobi HC Succ. Cause No. 406 of 2001 in which the late Amos Kahuha was the Objector as represented by the law firm of Mwicigi Kinuthia & Co. Advocates. That thereafter HCC No 12/2004 and HCC No. 21 of 2005 were filed and later consolidated on 22/3/2006 giving rise to the instant suit. Defending the Court' Judgement, the Plaintiffs agreed with the Court that no documentary evidence was tendered to prove the 4<sup>th</sup> Defendant's death. The Plaintiffs accused the Applicant of indolence for not informing the Court of Amos' demise but waiting until post Judgment to move the Court. Citing order 45 rule 1 of the Civil Procedure Rules, the Plaintiffs pointed out that the Applicant has not addressed the Court on any of the three limbs stipulated therein to necessitate review of Judgment. Further that the 4<sup>th</sup> Defendant actively defended the suit by filing the list of agreed issues dated 14/5/2012 and 4/6/2012 being 8 years after the Amos' death. The Plaintiffs urged the Court to dismiss the Application with costs.
  6. On the other hand, the Applicant rehashed the grounds in her Application and posited that no interlocutory Judgement was entered against the 4<sup>th</sup> Defendant for want of filing a defence. That it is clear that the summons was never served on the 4<sup>th</sup> Defendant who died before the commencement of this case.
  7. The 5<sup>th</sup> Defendant's Application is dated 30/9/2020 seeking Orders THAT; -
    - a. Spent.
    - b. The firm of E.W Kamuyu & Co. Advocates be granted leave to come on record for the state of James Muchai Wachira alias Muchia Wachira Ngaruiya the 5<sup>th</sup> Defendant herein.



- c. The administrator for the 5<sup>th</sup> Defendant Peter Muchai Ngaruiya be substituted in place of the deceased James Muchai Wachira.
  - d. The Court to re-open this case and grant the Applicant extension of time to defence the estate of the deceased, the 5<sup>th</sup> Defendant.
  - e. The Court do grant the Applicant an order of stay of execution pending the hearing and determination of this Application.
  - f. The Judgement entered against the 5<sup>th</sup> Defendant in this matter be set aside and the administrators of the 5<sup>th</sup> Defendant to be given an opportunity to Defendant (sic) this cause on merit.
8. The Application is premised on grounds that the Applicant's father died on 1/6/2013 when this suit was pending hearing. That at the time of his demise, the 5<sup>th</sup> Defendant had furnished his Advocates with evidence to prove his case in line with Order 11 of the Civil Procedure Rules. That however, his Advocates despite knowledge of the 5<sup>th</sup> Defendant's death, failed to take appropriate steps to safeguard the 5<sup>th</sup> Defendant's case.
  9. In his Supporting Affidavit, Peter Muchai Ngaruiya deposed that he is the son and administrator of the estate of the late James Ngaruiya Muchai as shown by Letters of Grant of Administration dated 10/9/2020 annexed as 'a'. That the firm of Mwicigi Kinuthia Advocates failed to substitute his father who died on 1/6/2023. That he now wishes the firm of E.W Kamuyu Advocates to come on record in place of the former Advocates. That the abatement of suit against the 5<sup>th</sup> Defendant is due to the mistake of Counsel and the Court ought not to visit such mistakes on litigants.
  10. The Application is opposed by the Plaintiff only.
  11. Mr. Ng'ang'a Mwongeri swore the Replying Affidavit dated 18/11/2020 in his capacity as co-administrator of the estate of John Mbugua Mugekenyi as per copy of Grant of letters ad litem issued on 18/8/2015 annexed as NM001. He deponed that the genesis of this suit was the Nairobi High Court Succession Cause No. 406 of 2001 in which James Muchai Wachira was represented by the firm of Mwicigi Kinuthia & Co. Advocates as an Objector. That later two files namely HCCC No.12 of 2004 (O.S) and HCCC No. 21 of 2005 (O.S) were consolidated resulting in the instant suit. Terming the Application as unmerited, the deponent avowed that the Application does not disclose any ground for review and nonetheless the 5<sup>th</sup> Defendant was all along represented by Counsel. That no explanation has been tendered to explain the inordinate delay of over 18 years this suit has been live in Court for the Applicant to apply for letters of administration earlier. Further that the issue of the 5<sup>th</sup> Defendant's substitution was live as at 2016 but it was not done. See annexure marked NM005 copy of letter dated 24/8/2016 addressed to the Deputy Registrar.
  12. The Application was canvassed by way of written submissions.
  13. The firm of Rakoro & Co. Advocates filed the Plaintiff's submissions dated 25/10/2021 whereas the Applicant's submissions dated 28/7/2021 are filed by E.W Kamuyu & Co. Advocates.
  14. In similar fashion as the former Application, the Plaintiff submitted that the Court properly held that the 5<sup>th</sup> Defendant's death was not proven by way of documentary evidence. That to date, no copy of the 5<sup>th</sup> Defendant's Death Certificate has been availed to the Court nor the Plaintiff. That according to the Plaintiff, the 5<sup>th</sup> Defendant as readily admitted was ably represented by Counsel and any allegation of Counsel's failure to act squarely falls between the said Counsel and the Applicant. That nothing stopped the Applicant from duly substituting his father's estate in 2020 when he obtained the Letters



of Administration. On setting aside the Judgment, the Plaintiff posited that no ground has been relied on under Order 45 of the Civil Procedure Rules and in any event, it is the Plaintiff who stands to suffer prejudice if he's denied an opportunity to enjoy the fruits of his Judgment.

15. On the other hand, the Applicant blamed the 5<sup>th</sup> Defendant's Advocate for failing to apply for substitution despite being informed of the demise of James Muchai Wachira. That the Applicant obtained the Limited Grant of Administration in Githunguri Succ. Cause No. 16 of 2020 for his father's estate. That he has also appointed the firm of E.W Kamuyu Advocates to act for him. The Applicant posited that the Plaintiff did not apply for an order for abatement of the suit against the 5<sup>th</sup> Defendant during the hearing of this suit. To support that preposition the cases of Murang'a ELC 188 of 2017 Gladys Njeri Muhura Vs. Daniel Kariuki Muthiguru [2018]eKLR and Machakos HCCC 67 of 2011 Elizabeth Mutuku & Others Vs. Aimi Ma Kilungu Co. Ltd [2019] eKLR were cited.

### **Analysis and Determination**

16. Both Applications in the main seek substantive orders for the Applicants to substitute the 4<sup>th</sup> and 5<sup>th</sup> Defendants respectively. They also pray for stay of execution of the impugned Judgment. Notably the 4<sup>th</sup> Defendant urges the Court to strike out the pleadings filed against him whereas the 5<sup>th</sup> Defendant wishes to have the Judgment set aside and the case be re-opened and heard on merit.

17. Accordingly, I distil the following issues for determination;

- a. Whether the Applicants have met the threshold for substitution;
- b. Whether the prayer for stay of execution is merited;
- c. Whether the Judgment hereon can be set aside and case be re-opened for hearing; and
- d. Who bears costs?

18. On the first issue, the relevant law is found in Order 24 Rule 4 of the Civil Procedure Rules that;

“ 4. Procedure in case of death of one of several Defendants or of sole Defendant [Order 24, rule 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.”

19. On the part of the 4<sup>th</sup> Defendant, it is contended and demonstrated by annexure 'a' that Amos Kahuha sued herein as the 4<sup>th</sup> Defendant died on 15/3/2004 way before filing of this suit. No evidence was adduced contrary to this averment and the Court takes it as the correct position. It is trite that a suit against a dead man/woman without requisite letters of administration respecting his/her estate is null and void. Differently put, such suit is a non-starter as it goes to the root of a party's locus standi. I rely on



the Court of Appeal decision in *Geeta Bharat Shah & 4 Others Vs. Omar Said Mwatayari & Another, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008*, [2009] eKLR where it was held as follows:

“Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the Court to do so for once the respondent also admitted that he sued a dead person, the Court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the Plaint as the first Defendant was already dead by the time the suit was filed meant that the Plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the Plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first Defendant was long dead whereas paragraph 2 of the Plaint he allegedly verified stated:-”

20. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An Application to set aside the Judgment was disallowed and the Applicants appealed to the Court of Appeal. The Court of Appeal held that the Judgment could not be sustained as it was entered against a person who was already dead.
21. Applying the above captioned binding decision, it follows that the suit against the deceased 4<sup>th</sup> Defendant was void ab initio because a nullity is a nullity and nothing can come out of a nullity/this suit. See the case of *McFoy Vs. United Africa Co. Ltd 1967 3 ALL E.R 1169* that anything which is a nullity is incurably bad and anything founded on it is also a nullity. The present suit against the 4<sup>th</sup> deceased Defendant cannot therefore be resuscitated by infusing any remedy least of all substitution.
22. Turning to the 5<sup>th</sup> Defendant, going by the record and concession by the Applicant in his motion, it is not in dispute that no Application for substitution for the late James Muchai Wachira was made within one year of his death. According to Peter Muchai Ngaruiya, his family duly informed the firm of Mwicigi Kinuthia Advocates who were acting for their late father of his demise in 2013. However, that the said firm failed to file for substitution which fact is conceded by the Plaintiff in annexure NM005.
23. In light of the forgoing I conclude that the provision of Order 24 Rule 1(3) of the Civil Procedure Rules above sets in and as a result the suit against the 5<sup>th</sup> Defendant abated in a period of one year after James Muchai’s demise. That is to say late James Muchai Wachira having died on 1/6/2013 his suit abated on 1/7/2014.
24. In urging for substitution, the 5<sup>th</sup> Defendant relied on the cases of Gladys Njeri and Elizabeth Mutuku (supra). I have read the persuasive authorities and wish to distinguish them as follows. In Gladys Njeri (supra), the Applicants were co-Plaintiffs of the late 1<sup>st</sup> Plaintiff. The 1<sup>st</sup> Plaintiff died on 2/1/2014 and Grant of Letters of Administration was obtained on 14/3/2015 and the Application for substitution was made in 2018, about 4 years after his demise. The Court appreciating explanation for the inordinate delay proffered by the Applicants, exercised its discretion and ordered revival of the suit and allowed the 1<sup>st</sup> Plaintiff’s substitution.
25. Regarding the case of Elizabeth Mutuku (supra), the Plaintiff moved the Court seeking revival of the suit against the deceased Defendant and her substitution to that end. The Plaintiff argued that the Defendant’s suit had abated one year after her death and there being no Application for substitution the case against her abated but the cause of action survived her hence the Application. In allowing the Application, the Court relied on Order 24 rule 4 (1) of the Civil procedure Rules above and the substituted the late Defendant with Daniel Kariuki who was issued with letters of administration. What comes out clearly from the above authorities is that an order for substitution can only lie in a



revived suit when the same has abated by operation of law. See Order 24 rule 4 (4) of the Civil Procedure Rules above.

26. The Applicant herein sought an order for substitution of the 5<sup>th</sup> Defendant's cases. It is trite that an order for substitution without revival of the suit is a nullity in law and of no effect. See the case of Kenya Farmers' Co-operative Union Ltd Vs. Charles Murgor (Deceased) T/A Kiptabei Coffee Estate (2005) eKLR.
27. Besides the Court appreciates that there are no live ongoing proceedings to warrant substitution of parties. The Judgment delivered on 8/4/2020 is still in force and binding. It has not been set aside by a Court of competent jurisdiction by way of appeal or Review.
28. Suffice to add that I am cognizant of the doctrine of *functus officio* as considered by the Court of Appeal in Telkom Kenya Limited Vs. John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR, where the Court affirmed that *functus officio* is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon.
29. The Supreme Court of Kenya in the case of Raila Odinga & 2 Others Vs. Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR, cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, "The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law" (2005) 122 SALJ 832 which reads: -

"The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

30. The express exceptions to this rule are anchored in Sections 34 and 99 of the [Civil Procedure Act](#) that;

" 34. Questions to be determined by Court executing decree

- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
- (2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit, or a suit as a proceeding, and may, if necessary, order payment of any additional Court fees.
- (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation. — For the purposes of this section, a Plaintiff whose suit has been dismissed, and a Defendant against whom a suit has been dismissed, are parties to the suit.



99. Amendment of Judgments, decrees or orders Clerical or arithmetical mistakes in Judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the Application of any of the parties.”
31. The Court finds that the Application for substitution falls outside the purview of the aforesaid sections as exceptions to the doctrine of functus officio. The upshot of the forgoing is that the prayer for substitution fails on that limb.
32. Regarding the prayers for stay of execution, I find that the conditions set out in the guiding law found in Order 42 rule 6 (2) of the Civil Procedure Rules have not been established herein. That is to say;
- “ (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the Application has been made without unreasonable delay; and
- (b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”
33. The Applicants in my view have not demonstrated the substantial loss they stand to suffer in the event that the impugned Judgment is not stayed. Additionally, the Applications were filed four and five months respectively after delivery of the assailed Judgement. The Applicants have not proffered any plausible explanation for the delay which I find inordinate in light of the Order 42 above.
34. On the third issue, the considerations for setting aside the Judgment and re-opening of the cases for hearing are moot at this point. This is because the Court has already found that the case against the 4<sup>th</sup> Defendant was a nullity ab initio while that of the 5<sup>th</sup> Defendant already abated by dint of operation of law.
35. On the issue of costs, it is trite that costs follow the event. The Applications having failed, I hereby order that each party bears their own costs.
36. In the end the 4<sup>th</sup> and 5<sup>th</sup> Defendants’ Applications dated 24/8/2020 and 30/9/2020 are bereft of merit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 15<sup>TH</sup> DAY OF OCTOBER, 2024 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of:**

Plaintiff – represented by Keziah Wambui

1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants – Absent

Ms. Kamuyu (not audible) for 4<sup>th</sup> and 5<sup>th</sup> Defendants

Thuita for 6<sup>th</sup> Defendant



7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants - Absent

Court Assistants – Phyllis

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