



REPUBLIC OF KENYA



Kasyoki (Suing as the Administrator and Legal Representative of the Estate of Kasyoki Maliti (Deceased)) v Kimuli; Tuli (Applicant) (Suing as the Legal Representative of the Estate of Mary Kimuli (Deceased)) (Environment & Land Case 20 of 2018) [2024] KEELC 7340 (KLR) (6 November 2024) (Ruling)

Neutral citation: [2024] KEELC 7340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 20 OF 2018**

TW MURIGI, J

NOVEMBER 6, 2024

BETWEEN

**AGNES KALUKI KASYOKI PLAINTIFF
SUING AS THE ADMINISTRATOR AND LEGAL REPRESENTATIVE OF THE
ESTATE OF KASYOKI MALITI (DECEASED)**

AND

MARY KIMULI DEFENDANT

AND

**NDAMBUKI TULI APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MARY
KIMULI (DECEASED)**

RULING

1. This ruling is in respect of an amended Notice of Motion dated 10th July 2023 brought under Articles 40 & 159 of *the Constitution* of Kenya, Order 24 Rule 4 & 7, Order 51 Rule 1 of the Civil Procedure rules in which the Applicant seeks the following orders:-
 1. That leave do issue for the firm of Stanley Nthiwa & Co Advocates LLP to come on record for the Defendant.
 2. Spent.
 3. That the court be pleased to set aside all the proceedings, judgment dated 15.12.2021 and all other consequential and or subsequent orders and/or decree.



4. That a declaration do issue that the suit herein abated on 3.2. 2020 thus the proceedings herein, the resultant judgment and decree are null and void and the file herein be closed forthwith.
 5. That the costs pursuant to the application dated 17/6/2019 this application be awarded to the applicant.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Ndambuki Tuli sworn on even date.

The Applicant's Case

3. The Applicant averred that the Defendant herein is his late mother who died intestate on 3/2/2019. He further averred that the suit herein automatically abated on 2/2/2020 as no application was made to cause the legal representative of the Defendant to be made a party herein.
4. He further averred that the matter proceeded for hearing and judgment was delivered on 15/12/2021. That in its judgment, the court alluded to a defence filed on 19/06/2019 which is a clear indication of fraud on the part of the Plaintiff. He contended that the directions issued by the court on 19/04/2021 for the suit to proceed for hearing as undefended were null and void as the suit had already abated by operation of law.
5. He further contended that failure by the Defendant's beneficiaries to reply to a citation in Makueni P & A No. 182 of 2020 did not revive the abated suit nor confer jurisdiction on the court to proceed without the legal representative of the deceased Defendant.

The Respondent's Case

6. The Respondent filed a replying affidavit sworn on 22/04/2024 in opposition to the application. The Respondent contended that it is improper for the Firm of Stanley Nthiwa and Co Advocates to come on record for the Applicant as the firm of Munyasya and Co Advocates was still on record for the Defendant. She further contended that the application is improperly before the court since the application dated 12th August 2022 was struck out vide a ruling delivered on 26/4/2023.
7. The Respondent averred that at some point the Defendant's Advocate wrote to her Advocate indicating that she wanted to proceed by way of (Kithitu) a Kamba oath. She insisted that the suit had not abated by the time the court gave directions for the matter to proceed for hearing as undefended. That despite citing the Applicant, he failed to apply for a grant of letters of administration. She explained that the Defendant had prior to her death expressed her intention of not pursuing the matter through her advocate hence the matter proceeded as undefended long before her death. She asserted that the orders sought in the application herein will hinder her from enjoying the fruits of her judgment. She averred that the Applicant did not appeal against the judgment and has not explained the delay of three years in bringing the instant application. She urged the court to dismiss the application with costs.
8. The application was canvassed by way of written submissions

The Applicant's Submissions

9. The Applicant filed his submissions dated 18th April 2024.
10. On his behalf, Counsel submitted that the following issues are not in dispute:-
 - a) Mary Kimuli the Defendant died intestate on 03.02.2019.



- b) The court directed that the suit proceeds undefended on 19.04.2021, a period in excess of two years from the death of the Defendant.
 - c) The citation order made on 04.02.2021 directed that the Plaintiff herein petitions for letters of administration on behalf of the estate of the Defendant herein which she never did.
11. Counsel identified the following issues for the court's determination:-
- 1. Whether the suit abated and if so what are the legal consequences.
 - 2. Whether the firm of Stanley Nthiwa is properly on record for the Applicant
12. On the first issue, Counsel relied on the provisions of Order 24 Rule 4 of the Civil Procedure Rules to submit that a suit abates by operation of law where no substitution is made within one year on the death of the Defendant. Counsel submitted that the suit herein abated by operation of law as no application was made to substitute the Defendant within a period of one year after her death. Counsel further submitted that the citation in Makueni CMCC No. 182 of 2020 was filed out of time and therefore the same could not have any legal effect to this suit since the substitution would have been made when the suit had already abated. Counsel contended that after a suit abates, any further proceedings conducted in it is null and void as the suit is deemed as non-existent unless it is revived. It was argued that any proceedings conducted after 2/2/2021 when the suit abated are null and void as the suit was never revived.
13. With regards to the second issue, Counsel submitted that the firm of Stanley Nthiwa and Co Advocates has never come on record for the Defendant. Counsel submitted that the firm of Stanley Nthiwa & Co Advocates is properly on record for the Applicant. He argued that the firm is seeking leave to come on record after judgment pursuant to the ruling delivered on 26th April 2023.

The Plaintiff/Respondent's Submissions

14. The Respondent filed her submissions on 26th April 2024.
15. On her behalf, Counsel outlined the following issues for the court's determination:-
- 1. Whether the amended Notice of Motion is properly before the court?
 - 2. Whether or not the suit abated?
 - 3. What are the appropriate orders?
16. On the first issue, Counsel submitted that Order 51 Rule 1 of the Civil Procedure Rules does not provide for amendment of pleadings. Counsel submitted that the law governing amendment of pleadings is to be found in Section 100 of the [Civil Procedure Act](#) and in Order 8 of the Civil Procedure Rules. Counsel further submitted that Order 8 Rule 4 of the Civil Procedure Rules provides for amendment of original processes which includes originating summons, a petition and an originating notice of motion since they have the same effect as a plaint. Counsel argued that an interlocutory notice of motion is not a pleading and as such the Applicant cannot purport to amend the said application.
17. Counsel submitted that the application which is sought to be amended was struck out hence it does not exist. That the orders sought in the amended application are similar to those in the application dated 24th August 2022 that was struck out with costs. Counsel argued that the application dated 24/08/2022 does not exist as it was struck out and as such, it cannot be amended.



18. Counsel further submitted that the Applicant wants to evade the provisions of Order 9 Rule 9 of the Civil Procedure Rules in that the firm of Munyasya is still on record for the Defendant. Counsel argued that the Applicant has not appointed the firm of Stanley Nthiwa & Co Advocates to take over the matter from the firm of Munyasya & Co Advocates nor availed a consent from the said firm.
19. On whether or not the suit has abated Counsel relied on the provisions of Order 24 Rule 4 of the Civil Procedure Rules to submit on when a suit is deemed to have abated. Counsel further relied on Order 24 Rule 7 of the Civil Procedure Rules to submit on when a court can revive a suit that has abated.
20. Counsel submitted that, the Defendant abandoned this matter vide her letter dated 22/2/2019 where she indicated that she wanted the matter to proceed by way of the Kamba oath known as Kithitu. Counsel insisted that the matter had not abated as the court gave directions for it to proceed as undefended.
21. Finally, Counsel submitted that the Applicant has not satisfied the conditions for stay of execution set out under Order 42 Rule 6 of the Civil Procedure Rules or the conditions for setting aside the judgment. Concluding his submissions, Counsel urged the court to dismiss the application with costs. To buttress his submissions, Counsel relied on the following authorities:-
 - a) NBI HC COMM Case No. 647 of 2025(Jaribu Credit Limited v Fidelity Bank Limited).
 - b) Arun C. Sharma vs Ashana Raikundalia t/a A. Raikundalia & Co. Advocates & 2 others (2014 eKLR)

Analysis and Determination

22. Having considered the application, the respective affidavits and the rival submissions, the following issues arise for determination:-
 1. Whether the amended application is properly before the court?
 2. Whether the firm of Stanley Nthiwa & Co. is properly on record for the Applicant?
 3. Whether or not the suit herein has abated?
23. On the first issue, the Respondent contended that the instant application does not exist as the initial application was struck out vide the ruling delivered on 26th April 2023.
24. The Applicant filed the application dated 24th August 2022, seeking the following orders:-
 1. That leave do issue for the firm of Stanley Nthiwa & Co Advocates LLP to come on record for the Defendant.
 2. That pending the hearing and determination of this application, this court be pleased to issue an order staying the execution of the judgment issued on 15.12.2021 and all other consequential and/or subsequent orders and/or decree.
 3. That the court be pleased to set aside all the proceedings, judgment dated 15.12.2021 and all other consequential and or subsequent orders and/or decree.
 4. That a declaration do issue that the suit herein abated on 03.02.2020 thus the proceedings herein, resultant judgment and decree are null and void and the file herein be closed forthwith.
 5. That costs of this application be awarded to the Applicant.
25. In a ruling delivered on 26th April 2023, the application was struck with costs to the Respondent.



- 26. On 10th July 2023, the Applicant filed an amended Notice of Motion of even date seeking similar orders which is the subject of this ruling.
- 27. The record shows that the orders sought herein, are similar as to those in the application dated 24th August 2022. The court having struck out the application, there is no valid application on record. Once a pleading is struck out, it cannot be amended either with or without the leave of the court. In the matter at hand, the application was struck out and therefore there is nothing to amend in that application. I therefore find that the application herein is improperly before the court. Having found that the application is improperly before the court, I will not delve into the other issues for determination
- 28. In the end, the application dated 10th July 2023 is hereby struck out with costs to the Respondent.

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HON. T. MURIGI

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 6TH DAY OF NOVEMBER, 2024.

In the presence of:

The absence of the parties

Court Assistant- Alfred

