



REPUBLIC OF KENYA



Muburi v First Credit Exchange Development Limited (Environment & Land Case 61 of 2017) [2023] KEELC 550 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEELC 550 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 61 OF 2017
LA OMOLLO, J
FEBRUARY 2, 2023**

BETWEEN

TERESA KIRANGARI MUBURI PLAINTIFF

AND

FIRST CREDIT EXCHANGE DEVELOPMENT LIMITED DEFENDANT

RULING

Introduction

1. This is a ruling with respect to the notice of motion application dated September 12, 2022. The said application is expressed to be brought under order 24 rule 1, 3(2), 7(2) of the [Civil Procedure Rules, 2010](#) and section 1A, 1B and 3A of the [Civil Procedure Act](#).
2. The application seeks the following orders:
 - a. spent
 - b. That the suit herein be revived for hearing and determination on merits.
 - c. That the plaintiff herein Teresa Kirangari Muburi (deceased) be substituted with the administrators of her estate to wit Mathew Johnston Muburi, Josephine Joan Wathi Muburi and Evelyn Njoki Muburi.
 - d. That the costs of this application be in the course.
3. The application is based on the grounds on its face and the supporting affidavit sworn by Mathew Johnston Muburi.



Factual Background.

4. The plaintiff commenced this suit vide the originating summons dated October 2, 2015 and sought the following orders:
 - a. That the applicant Teresa Kirangari Muburi of P O Box 28483-00200 Nairobi be declared by this honorable court as the legal and lawful owner of the property known as IR number 37496/1.
 - b. That the charge dated August 15, 1990 registered against the property known as LR No 1144/846 as defined in the grant registered as IR number 37496/1 in favour of First Credit Exchange Development Limited be discharged.
 - c. That the deputy registrar of this honorable court do sign all documents necessary to discharge the said charge and to effect the court order.
 - d. That costs of this summons be provided.
5. The court record does not contain any response filed by the defendant/respondent.
6. The application under consideration first came up in court on September 21, 2022 where the court directed that the application be heard on October 4, 2022.
7. On October 4, 2022, the court reserved the matter for ruling.

The Applicant's Contention.

8. The applicant contends that he is the intended 1st plaintiff, the plaintiff herein having passed on July 2, 2019.
9. The applicant also contends that he was the husband to the deceased as well as the father to the co-administrators/co-Applicants Josephine Joan Wathi Muburi and Evelyn Njoki Muburi.
10. The applicant further contends that his co-administrators and himself were appointed administrators to the estate of the deceased plaintiff herein *vide* Nairobi High Court succession cause No E1153 of 2021, are conversant with the facts relating to the suit herein and thus competent to swear the affidavit.
11. It is his contention that upon the plaintiff's demise, their former advocates Kivuva Omuga & Co Advocates advised them that they could not proceed with the matter until succession was done.
12. He contends that they subsequently instructed their advocates to apply for grant of letters of administration intestate which were finally issued on September 7, 2021.
13. He also contends that they were frustrated by the delay in the processing of the grant and upon various enquiries with their then advocates on record, they were informed that the delays were attributed to closure of their offices as well as those of the court on account of the covid-19 pandemic.
14. He further contends that upon issuance of the grant, they agreed with the advocates that they were to apply for the substitution of the plaintiff with the administrators but despite constant follow ups, the same was not done.
15. It was his contention that it was by sheer coincidence that one of his co-administrators was following up with the said advocate when she found out that the said advocate had been served with a notice to show cause dated May 27, 2022 on June 14, 2022 and which was scheduled for hearing on July 19, 2022 and yet the same had not been brought to their attention.



16. He contends that that is when they, on July 15, 2022 changed advocates and instructed the firm of Githara & Associates to take up the matter.
17. He also contends that the late plaintiff was desirous to have the matter heard and determined expeditiously and always travelled all the way from Nairobi to Nakuru but the matter would not proceed for one reason or the other.
18. He further contends that the delays in prosecuting the case emanated from the difficulties in tracing the defendant/respondent herein as it was no longer operational and the plaintiff had a hard time gathering any information about it.
19. He contends that he has been advised by his advocates on record which information he verily believes to be true that no details exist at the registrar of companies concerning the defendant/respondent herein.
20. He also contends that the defendant/respondent no longer operates at its last known offices which is 3rd floor, Mageso chambers, Moi Avenue, Nairobi or any other floor in that building.
21. He further contends that the plaintiff had filed an application for substituted service dated October 24, 2018 but unfortunately before the same could be heard, the plaintiff died and hence the matter could not proceed.
22. It is his contention that they cannot proceed with the application for substituted service before revival of the suit and substitution hence their prayer that the application be heard *ex parte*.
23. It is further his contention that as administrators of the estate of the deceased, they are desirous of prosecuting the suit and thus plead with this court to hear the application *ex parte* to enable them revive it and substitute the deceased with the administrators so that the case may be heard and determined on merits.
24. He ended his deposition by stating that no prejudice will be occasioned to the respondent if the orders sought are granted.

Issues for Determination.

25. The applicant filed his submissions dated October 3, 2022 on the same date. The applicant identifies the following issues for determination:
 - i. Whether the suit should be revived and determined on merits.
 - ii. Whether the plaintiff herein Teresa Kiranguri Muburi (deceased) be substituted with the administrators of her estate to wit Mathew Johnston Muburi, Josephine Joan Wathi Muburi and Evelyn Njoki Muburi.
 - iii. Whether the application for substituted service should be allowed summarily for parties to proceed with the main suit.
26. On the first issue, the applicant relies on order 24 rule 7 of the *Civil Procedure Rules* and the case of *Timothy Limo & 2 others v Joel Kinyanjui Muchiri (suing as the legal representative of the late Jacob Muchiri Kinyanjui)* [2020] eKLR and submits that he has demonstrated that it was beyond his control that he was not able to revive the suit on time.
27. The applicant also submits that he has shown sufficient cause to warrant the revival of this suit and relies on the cases of *Rukwaro Waweru v Kinyutho Ritbo & another* [2015] eKLR and *Said Sweilem Gbeithan Saannum v Commissioner of Lands & 5 others* [2015] eKLR in support of his arguments.



28. On the second issue, he submits that he has demonstrated that the defendant/respondent cannot be traced and therefore the application dated October 25, 2022 should be allowed summarily to enable the applicant effect summons by way of substituted service. He relies on the case of *Mathenge Ngatia Ngari (suing for himself and on behalf of his deceased brothers represented by their wives) v Christopher Wangombe Ngatia & another* [2020] eKLR.
29. He concludes his submissions by seeking that the two applications be allowed as prayed.

Analysis and Determination.

30. After considering the application and the submissions, the issues that arise for determination are
- a. whether the suit should be revived and
 - b. whether the plaintiff should be substituted with the administrators of her estate.

31. Order 24 rule 3 provides as follows:

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 subrule (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.

32. The Court of Appeal in the case of *Rebecca Mijide Mungole & another 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. 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. (emphasis is mine). 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. (emphasis is mine). 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.”

33. In the present matter, the plaintiff is alleged to have died on July 2, 2019. The applicant has attached to his supporting the death certificate which confirms that the plaintiff indeed died on July 2, 2019.
34. As per the provisions of order 24 rule 3, where a plaintiff dies and the cause of action survives, an application can be made to court to cause the legal representative of the deceased to be made a party to the suit. If the application is not made within one year, the suit abates.
35. As pointed out before, the plaintiff died on July 2, 2019. No application for substitution was made within one year after her death and therefore, the suit abated on July 2, 2019. Order 24 rule 3 requires that if the legal representative is not joined within one year, an application for extension of time to apply for joinder of the deceased’s plaintiff’s legal representative should be made.
36. The Court of Appeal in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* (supra) quoted above expounded on that issue further and stated that it is only after the time has been extended that the legal representative can have capacity to apply to be made a party.
37. In this matter, the applicant did not seek extension of time to apply to be joined as the deceased plaintiff’s legal representative and as was held in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* (supra), without the extension of time no application for joinder or revival can be made.

Disposition.

38. In view of the foregoing, the application dated September 12, 2022 is struck out with no order as to costs.
39. The applicant is at liberty to institute a fresh application bearing in mind the proper procedure.
40. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr Githara for Plaintiff/Applicant.

No appearance for the Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

