



Registered Trustees Gospel of God Church International v Mborothi & 7 others (Environment & Land Case 114 of 2011) [2023] KEELC 582 (KLR) (8 February 2023) (Ruling)

Neutral citation: [2023] KEELC 582 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 114 OF 2011**

CK NZILI, J

FEBRUARY 8, 2023

BETWEEN

**REGISTERED TRUSTEES GOSPEL OF GOD CHURCH
INTERNATIONAL PLAINTIFF**

AND

**ELIAS RIMBERIA MBOROTHI 1ST DEFENDANT
ZAUVERIO NGURU MBOROTHI 2ND DEFENDANT
MOSES KAMUNDI 3RD DEFENDANT
GEDIEL KIRIMI 4TH DEFENDANT
FRANCIS MUCHERU 5TH DEFENDANT
REGISTERED TRUSTEES GOSPEL OF GOD CHURCH
INTERNATIONAL 6TH DEFENDANT
NORA MUTAI NTUI 7TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 8TH DEFENDANT**

RULING

1. The ruling relates to the application dated October 3, 2022 in which the 3rd applicant has urged the court to; grant leave for him to substitute the 3rd defendant, now deceased, out of time who passed away in 2021 and to find the plaintiff and the 6th defendant as lacking *locus standi* since the two are an unlawful society which ceased to exist in law and purport to exist in breach of the Societies Act (cap 108) Laws of Kenya. The grounds as contained on the face of the application and the supporting affidavit by Kenneth Mutembei Mugambi sworn on October 3, 2022 are that; the intended 3rd defendant has been a trustee of both the plaintiff and the 6th defendant; the similarity of the two names offend section



- 108 of the *Societies Act*; the certificate issued in 2009 no 7670 was purportedly signed by a post-colonial registrar; no gazette notice of the registration has been published; the church by a letter dated October 2, 1985 was declared unlawful by the Hon Attorney General under sections 11 & 13 of cap 108; after rescission of the church it evolved as the 6th defendant; the two are now fraudulent before court with the intention of getting unjustified judgment.
2. In the supporting affidavit, Kenneth Mugambi averred that in 2009 the registrar of societies was Mr FSM Nganga and one Helen Koki and not Mr R D McLaren. He attached the limited grant, a letter dated October 16, 2008 from the registrar, an order from High Nairobi HCC no 2409 of 1985, a notification of refusal to the register of societies dated March 11, 1986, a letter dated September 27, 1985 from Hon J H Angaine to the Hon AG, a letter dated August 15, 2008 to the registrar of societies, a letter dated June 30, 2011 from the registrar of societies, a letter dated August 21, 2020 to the Hon AG and letter dated October 25, 2019 from the registrar of societies marked as JKMM “1” – “7” respectively.
 3. Through a notice of preliminary objection dated October 6, 2022 by the plaintiff, the 1st application was opposed on the basis that, the applicant lacked *locus standi*; there was no live suit against the 3rd defendant; the affidavit sworn on September 6, 2022 offended section 5 of the *Oaths and Statutory Declarations Act*; it was an abuse of the court process aimed at derailing the suit and that the issues raised can only be determined on merit after a full hearing and which are already captured in the defenses for the 3rd, 4th and 6th defendants.
 4. When the matter came up for hearing on October 24, 2022, the court directed the parties to file and exchange written submissions. Counsel for 5th, 6th, 8th and 9th defendants told the court that they were associating themselves with the submissions by the plaintiff dated November 28, 2022.
 5. The plaintiff submitted that the suit against the 3rd defendant abated when the proposed defendant applicant failed to file an application for substitution within a year after the 3rd defendant’s death. Reliance was placed on said *Sweilen Gbeithan Saanum vs Commisisoner of lands* (2015) eKLR and order 24 rule 4 *Civil Procedure Rules, Kenya Farmers’ Cooperative Union Ltd vs Charles Murgor t/a Kitabei Coffee Estate*, sections 5 of the *Oaths and Statutory Declarations Act* (Cap 15), *Sarah Gathoni Muriruri and another vs Wanjiku Kiguru* (2019) eKLR, *Aggrey swaka Waswa vs Patrick Omonge Khasumba and others* (2020) eKLR, *Muriithi Ngwenya vs Gikonyo Macharia Mwangi & others* (2018) eKLR, *Timoi Farms and Estate Ltd vs Kipngeno arap Ngeny & another* (2022) eKLR.
 6. On his part, the proposed 3rd defendant through written submissions dated November 31, 2022 submitted that the court on September 21, 2022 directed him to apply for the revival and the substitution of the 3rd defendant’s suit which had abated after a year upon his death. On whether he has *locus standi*, the applicant submitted that his application conforms with order 24 rule 7 (2) of the Civil Procedure Rules and that since he has a limited grant *ad litem* and has given a reasonable explanation for the delay, he should not be denied an opportunity to be heard under articles 50 and 159 2 (d) of the *Constitution* more so, being a trustee of the plaintiff and the 6th defendant possessed with invaluable evidence in the matter. Reliance was placed on *Mbaya Nzulwa vs KPLC* (2018) eKLR.
 7. On whether his affidavit dated September 6, 2022 breaches cap 15 the applicant submitted the same was expunged from the court record and if what the plaintiff was referring to the one dated October 3, 2022, it was submitted that lawyers in Meru have declared not to administer oath on any parties acting in person and hence had to go to Chuka town for execution.
 8. Turning to whether the main suit should proceed to full hearing, the applicant submitted that he who comes to equity must come with clean hands and not in a fraudulent manner or through deception



as the plaintiff and the 6th defendant were doing before court and that the earlier they were unmasked, the better to establish if they have *locus standi*, are non-existent or fraudulent.

9. The court record indicates that on October 14, 2020, counsel then appearing for the 3rd defendant told the court that his client had passed on and was buried on September 7, 2020. The court directed that substitution be done. The matter was mentioned before the deputy registrar on various dates including February 4, 2021, March 4, 2021, April 1, 2021, and May 13, 2021. Later on, suit was placed before this court on October 6, 2021 when the plaintiff told the court that the suit had abated for lack of substitution. Counsel for the deceased 3rd defendant informed the court that they had obtained a grant dated August 3, 2021 hence requested and the court granted another mention date for November 11, 2021 to substitute. In absence of compliance the court gave directions for the matter to proceed from where it had reached. Counsel for the deceased 3rd defendant also informed the court that the appeal in Nyeri was yet to be allocated a date. The court gave another mention for April 7, 2022 when a defense hearing was taken for September 21, 2022.
10. Before this date the applicant filed the instant application. The plaintiff filed a preliminary objection dated September 17, 2022 which the applicant conceded on September 21, 2022 for lack of leave to replace the deceased 3rd defendant before filing a notice to act in person dated September 6, 2022. The court struck out the application dated September 6, 2022 and expunged it from the court records.
11. Having set the record straight, there is no dispute that the 3rd defendant passed on August 25, 2020. The capacity in which the 3rd defendant had been sued was stated at paragraph 10 of the plaint dated August 9, 2011. He was described as a former member of the Gospel of God Church. At paragraphs 11 & 12 thereof, it was averred that after the said church was cancelled, the 3rd defendant failed to take over the leadership and attempted to register a similar church so as to take over the properties of the former plaintiff among them LR no Ntima/Igoki/1269, the suit land herein.
12. At paragraph 18 thereof, the plaintiff alleged fraud on the part of the defendants for illegal transfers of the suitland to the new church to the 7th defendant. The plaintiff sought for declaratory orders that LR no Ntima/Igoki/1269 purported sale and transfer to the 6th and 7th defendants be invalidated, the register be rectified and for a permanent injunction to restrain the defendants from interfering with the suitland in any way.
13. The 3rd, 4th, 5th and 6th defendants filed a defence dated September 13, 2011 denying to be former members of Gospel of God church but Gospel of God which was rescinded on September 13, 1985 but said they were now members of the 6th defendant. It was averred that prior to rescission they owned the suit land among other properties which transmitted to the new church upon rescission.
14. The 3rd defendant averred that by an order of the court, he was among those appointed to hold the suit land in trust for Gospel of God, the purchaser of the land from the 1st and 2nd defendants made on November 5, 1990, now abated. It was averred that the 3rd, 4th and 5th defendants lawfully sold the suitland to the 7th defendant hence the suit disclosed no cause of action against them. The 3rd defendant repeated his defence in the witness statement dated August 3, 2017.
15. With this context in mind, order 24 rule 1 of the Civil Procedure Rules provides that the death of a defendant shall not cause the suit to abate if the cause of action survives or continuous. Section 82 of the [Law of Succession Act](#) provides that one of the powers of a legal representative is to enforce by suit or otherwise all causes of action which by virtue of any law, survive the deceased or arise out of his death for his estate.



16. In the case of *Karl Webner Claasen vs Commissioner of Lands and 4 others* (2019) eKLR, the Court of Appeal held that a cause of action of a personal nature did not survive for the benefit of a deceased person since the legal maxim ‘*actio personlalis moritur cum persona*’ (a personal action dies with the person) applies to such causes of action. The court held that a cause of action was not synonymous with a chose in action. In defining a chose in action, the court held it included a right to bring proceedings in court for the recovery of money or damages out of an infliction of a wrong or non-performance of a contract while a cause of action denoted a combination of facts which entitled a person to obtain a remedy in court from another person and included a right of a person violated or threatened with violation of such a right.
17. In the case of Said Sweilean (*supra*), the court held that as a general rule, the death of a plaintiff did not cause the suit to abate and if the application was not made within a year, a good reason must be shown for the extension of time to join a legal representative and thirdly, that a legal representative may apply for an abated suit to be revived after satisfying the court that he was prevented by sufficient cause from continuing with the suit. The court also held that abatement takes place on its own force by passage of time if the legal representative is not impleaded within a year after the death of a party and that the effect of an abated suit was that it ceased to exist in the eyes of the law.
18. The court also gave instances of sufficient cause for the revival of an abated suit as lack of literacy, poor health, advanced age, bereavement and further held that it was no longer fashionable to blame lawyers.
19. In the case of *Beatrice Wakariko Ngumba vs Milicent Wangechi* (2018) eKLR, the deceased had passed on September 8, 2012, the grant had been issued on September 29, 2015 which was 2 years after the suit had abated. The court held that a plausible convincing, tangible or even truthful explanation was not made and the blaming of the advocate was a mere allegation. The court held that the applicant had slept on his rights too long hence equity could not aid such an indolent person. Further, the court held that it was now a constitutional requirement that justice must be done to all irrespective of status including the rights to the opposite party for expeditious disposal of cases.
20. As to the procedure to apply in the revival of an abated suit, the court in *Rebecca Mijide Mungole & another vs KPLC & 2 others* (2017) eKLR, held that where a legal representative is not joined within one year, an application for extension of time to apply for joinder of the legal representative has to be made and that it was only after time had been extended that the legal representative could have capacity to apply to be made a party. The court held that order 24 of the Civil Procedure Rules must be construed by reading it as a whole and the sequence in which it is framed without short circuiting it. The court thus held that the proviso to subrule 3(2) of the Civil Procedure Rules meant that no application for the revival or joinder could be made without time being extended after which the rest could follow. The court further said that it was incompetent to seek joinder of the legal representative or for the revival when the prayer for more time had not been made. The court however said that there was nothing wrong with bringing an omnibus application for all the three prayers, such that once time was enlarged, the legal representative joined, the focus comes to a show cause why the suit should be revived by a demonstration of sufficient cause under sub-Rule (7).
21. The court stated that sufficient cause must be broadly and liberally defined in order to advance substantial justice – though if the delay was due to dilatory tactics, want of bonafide, deliberate inaction or negligence on the part of the applicant, the court will not revive an abated suit. Citing with approval *Charles Wanjohi Wathuku vs Githinji Ngure & another* (2016) eKLR and *John Mutai Mwangi & 26 others vs Mwenja Ngure & 4 others* (2016) eKLR the court said that timelines were not technicalities of procedure which may be accommodated under article 159 of *the Constitution* or sections 3A of the 3B of the *Appellate Jurisdiction Act*, since they ensure the achievement of constitutional and statutory



rules based objective of ensuring that the court process dispense justice in a timely, just, efficient and cost effective manner.

22. In the case of *George M Muchai vs Francis Atwoli & 17 others* (2016) eKLR, the question was whether the deceased in his capacity as an official of COTU survived him and vested on his personal representative upon his demise. The court held that leadership positions were co-terminus with procedural removal or death of the holder and that no action or litigation initiated in such capacity could survive the office holder for it to be continued for the benefit of his personal estate. The court held that the petition as filed was incapable of continuing to be prosecuted as no benefit to the deceased estate would be yielded therefrom.
23. Applying the foregoing caselaw and key principles, it is quite evident that the deceased 3rd defendant had been sued in a personal capacity and not as a representative of the 6th defendant. His witness statement alluded above was clear that even the capacity of trusteeship through the appointment by Ojuk J as he then was, had hit the Law of Limitations Act. There is nowhere in these pleadings the 3rd defendant was described as a trustee even if at all he was holding such an office. Once he passed on, there was no cause of action against him which could survive or for which his estate can be said to derive any benefit from the continued defense of the suit. There is nothing going to accrue to his estate by furthering his defense. The claims against him was *in personam* and not *in rem*/. It was based on an alleged inaction and or fraud. To bring on board the proposed defendant would not only be unconstitutional but also tantamount to exposing the estate of the deceased to unfathomable consequences.
24. If the proposed 3rd defendant wishes to come on board as a party with a demonstrable stake, he does not need to wear the shoes or hat for and on behalf of the estate of the deceased. Additionally, the affidavit in support has not given any sufficient cause why there has been inordinate delay until the suit abated as against the deceased 3rd defendant. Lastly, the applicant has not made the three prayers as envisaged under the rules and the caselaw cited.
25. On the aspect of whether or not the plaintiff and the 6th defendants have capacity to sue and be sued and or whether they are unlawful societies together with their officials, the registrar of societies has mandate to handle society matters in accordance with the *Societies Act*. If the applicant was aggrieved by the similarity of the names, there was nothing stopping him from petitioning the Registrar and or taking an appropriate action by way of judicial review. See Republic vs Registrar of Societies (2008) eKLR. In any event matters of fraud, passing off and the use of false pretenses are matter beyond the mandate of this court under article 165 2 (b) of the *Constitution* as read together with Section 13 *Environment Land Court Act*.
26. The upshot is that the application dated October 3, 2022 lacks merits and it is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Mutembei in person

Mugo for plaintiffs

HOn C K NZILI



ELC JUDGE

