



**Kiratu & another v Wambugu (Environment & Land Case
93 of 2014) [2023] KEELC 15994 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15994 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 93 OF 2014
JO OLOLA, J
MARCH 9, 2023**

BETWEEN

CATHERINE WAIGUMO KIRATU 1ST PLAINTIFF

LUCY MUMBI WARUI 2ND PLAINTIFF

AND

EPHRAIM K. WAMBUGU DEFENDANT

RULING

1. I have before me two applications for determination.
2. By the First Application dated 11th July 2022, the two Applicants Edward Maina Kiratu and Jane Nyambura Kiunge urge the Court to substitute their names for that of the 1st Plaintiff herein Catherine Waigumo Kiratu who is said to be deceased. The two Applicants also pray that the suit against the Defendant be revived for hearing and disposal.
3. The First Application is supported by an Affidavit sworn jointly by the two Applicants and is based on the grounds stated thereon as follows:
 - (i) The suit property L.R Aguthi/Gatitu/3446 had been initially allocated and assigned to the 1st Plaintiff herein in the provincial Disputes Claim No. 14 of 2004 and she filed an Award Case No. 10 of 2005 and obtained a Court Order.
 - (ii) (That) unfortunately before the [1st Plaintiff] could proceed to execute the said order (she) found the Defendant on the ground sub-dividing the land;
 - (iii) That the 1st Plaintiff died on 26th August, 2020 and left behind her family;



- (iv) That the 1st Plaintiff's Counsel delayed and failed to substitute the Plaintiff hence tactfully causing the suit to be abated on 25th August, 2021;
 - (v) That the Applicants being at risk of suffering injustice if the suit is not heard to conclusion took up the task of substituting the 1st Plaintiff;
 - (vi) That the Applicants have pursued substitution of the deceased 1st Plaintiff within the shortest time possible; and
 - (vii) The suit should be revived because despite the delay caused by the Plaintiff's Counsel, the Applicants have endeavoured to comply and substitute the deceased within the shortest time possible.
4. Ephraim Kariuki Wambugu (the Defendant) is opposed to the 1st Application. By his Grounds of Opposition dated and filed herein on 1st August 2022, the Defendant states:
- (1) That the application is misconceived, bad in law and the Court does not have the power to revive the Plaintiff's suit which abated one year ago, without a good reason being advanced and none has been given;
 - (2) That the Applicants should not be allowed to reprobate and approbate on the same issue before the Court;
 - (3) That the Defendant was not a party to the proceedings before the Nyeri District Land Tribunal or the Central Province Land Tribunal apparently in 1990, when the Land Disputes Tribunal Act was not in force or the Defendant involved, and the award made by the Nyeri Chief Magistrates' Court against a non-party in the claim was erroneous, illegal and of no consequence in law;
 - (4) That the Defendant's grounds herein which relate to the Applicants also answer Bernard John Chege and Joseph Wambugu Kiaratu applications to substitute, they being the siblings of the Applicants, and in so far as the two seek to substitute Catherine Waigumo Kiratu, deceased on 26th August, 2020, as such applications abated one year later and should be dismissed with costs to the Defendant.
5. The Second Application dated and filed herein on 1st August, 2022 is instituted by Bernard Chege John also seeking to be substituted for the same Catherine Waigumo Kiratu.
6. The application which is supported by an Affidavit sworn by the said Bernard Chege John is based on the grounds stated in the application as follows:
- (a) That the suit property L.R Aguthi/Gatitu/3446 had been initially allocated and assigned to the 1st Plaintiff herein in the Provincial Disputes Claim No. 14 of 2004 and (she) filed an Award Case No. 1 of 2005 and obtained a Court Order;
 - (b) That unfortunately before the 1st Plaintiff could proceed to execute the said order, she found the Defendant on the ground sub-dividing the land;
 - (c) That the 1st Plaintiff had given her 1st born son Bernard Chege John the Power of Attorney which he (used to) substitute her because of her old age so that he may go ahead with this case to its conclusion;
 - (d) That it was the wish of the 1st Plaintiff that her son Bernard Chege John (do) continue with this case to its conclusion and that is why she gave him the Power of Attorney;



- (e) That Bernard Chege John has been granted the Letters of Administration *Ad Litem* to be able to proceed with this case;
 - (f) That the 1st Plaintiff died on 26th August, 2020 and left the family of 4 sons and a daughter who would suffer greatly if this suit is not concluded;
 - (g) That the Defendant ignored Court orders and went ahead to sub-divide the suit property without considering the awards of the 1st and 2nd Plaintiffs.
7. Ephraim Kariuki Wambugu (the Defendant) is again opposed to the Second Application. By Grounds of Opposition dated 1st September, 2022 and filed herein on 15th September 2022, the Defendant states:
- (1) That the above suit abated on 25th July, 2021 and no good reason has been put forward to Court to consider and hold anything else to the contrary;
 - (2) That the application is unprocedural, one year late and is intended to delay the conclusion of this suit;
 - (3) That the Defendant was not a party to the Plaintiff's claim at the Nyeri District land Disputes Tribunal in 1990, or the Central Province Land Dispute Tribunal appeal in 2007, for an award application (sic) to have been made against him before Chief Magistrate in 2005 (circa) and this suit, as put in his Defence in 2014, is bad in law, he being only one of the 5 registered owners of the land owned by 34 others;
 - (4) That L.R No. Aguthi/Gatitu/3446 does not exist and the title was closed by the Nyeri Land Registrar on 16th June, 2014 and 3447 was acquired compulsorily; and
 - (5) That the Grounds filed herein apply seriatim to any application for substitution, as previously indicated, made by Joseph Wambugu Kiratu, the proposed 5th above (sic), with whom Bernard Chege John (proposed 1st Plaintiff above (sic)) jointly hold a Limited Grant of the Letters of Administration ad litem in the estate of Catherine Waigumo Kiratu deceased on 26th August, 2020.
8. I have carefully perused and considered the two applications as well as the Grounds of Opposition filed thereto by the Defendant. I have similarly perused and considered the oral submissions made before me by the Parties.
9. The two applications before me seek to substitute Catherine Waigumo Kiratu who was the 1st Plaintiff herein. It is the Applicants' case that Catherine passed away on 26th August, 2020 and that the cause of action against the Defendant continues to subsist.
10. Order 24 Rule 3 of the Civil Procedure Rules provides for the procedure in case of death of one of several Plaintiffs or of the sole Plaintiff 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 Sub-rule (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.”

11. As to the effect of abatement or dismissal of a suit, Order 24 Rule 7 provides as follows:

“(1)7 Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) 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 the costs or otherwise as it thinks fit.”

12. In the matter before me, it is apparent that the three Applicants herein seeking to substitute Catherine Waigumo Kiratu are her children and that they are all eager to proceed with their mother’s claim for the suit property against the Defendant herein.

13. By the Second Application dated 1st August 2022, Bernard Chege John asserts that he was Catherine’s first born son and that the deceased had granted him a Power of Attorney to prosecute the case on her behalf. He also asserts that he had been granted Letters of Administration *ad litem* to proceed with the case.

14. Unfortunately for Bernard, his application cannot succeed. He assumes the fact that the suit had already abated and makes no application for its revival. He does not explain why he did not apply for the substitution within one year as provided under Order 24 Rule 3(2) of the Civil Procedure Rules. While he claims to have obtained a Power of Attorney and a Grant of Letters of Administration *ad litem*, none of them are exhibited in his application. For those reasons I did not find any merit in the second application.

15. As to the First Application filed by Edward Maina Kiratu and Jane Nyambura Kiunge, they have explained that the delay in applying to substitute the deceased was due to an error on the part of the previous Advocate who failed to file the application within time. While the Defendant insists that that is not a good enough reason to explain the delay, I did not think it would be right for this Court to visit the error of the Advocate on the two Applicants. They have clearly explained that they instructed the said Advocate to apply for substitution and that the Advocate had committed to do so.

16. The two Applicants have also exhibited a Grant of Letters of Administration issued to them on 16th March, 2022 in Nyeri Chief Magistrates Court Probate and Administration Cause No. 87 of 2022 allowing them to take over the conduct of this case.

17. In the premises herein I allow the First Application dated 1st August, 2022.

18. Given the circumstances herein, the Defendant shall have the costs of the two applications.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MARCH, 2023.

In the presence of:



Ms Maina for the 1st Plaintiff

Mr. Wanyiri Kihoro for the Defendant

Mr. Bernard Chege – Applicant present in person

Court assistant – Kendi

J. O. OLOLA

JUDGE

