Kithinji & 8 others v County Government of Meru (Environment and Land Appeal 150 of 2011) [2023] KEELC 18501 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18501 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL 150 OF 2011

CK YANO, J

JULY 5, 2023

BETWEEN

MOSES KITHINJI ..... 1ST APPELLANT

DAVID THURANIRA ..... 2ND APPELLANT

KITHURE MBITI ..... 3RD APPELLANT

DAVID MUTABARI ..... 4TH APPELLANT

BAIGWETA ENTRPRISES ..... 5TH APPELLANT

JACKSON K. IKIUGU ..... 6TH APPELLANT

FRANCIS M'NKOROI ..... 7TH APPELLANT

FESTUS MUGAMBI ..... 8TH APPELLANT

STEPHEN CHOKERA ..... 9TH APPELLANT

AND

COUNTY GOVERNMENT OF MERU ..... RESPONDENT

RULING

1. Before me for determination is the notice of motion dated February 7, 2023 by the 1st and 4th appellants seeking for orders-;

   i. That this honourable court be pleased to revive the 1st appellant's appeal and do substitute the 1st appellant with Margaret Makena Kithinji

   ii. That this honourable court be pleased to order that the lower court file in Meru CMCC No 485 of 1997 be reconstructed and the matter be heard *de novo*.

iii. That the costs of this application and appeal do abide the outcome in Meru CMCC No 485 of 1997.

2. The application is supported by the affidavit of David Mutabari and Margaret Makena Kithinji and is premised on the grounds-;

   a. That the 1st appellant died while the appeal was pending but he has not been substituted which means his appeal has abated.

   b. That Margaret Makena Kithinji, the 1st appellant's widow is desirous of proceeding with the appeal and therefore needs to have it revived.

   c. That no prejudice will be suffered by the respondent if the 1st appellant's appeal is revived.

   d. That the lower court file cannot be traced.

   e. That it is in the interest of justice that the court orders that the lower court file be reconstructed and the matter proceeds de novo.

3. In his supporting affidavit, David Mutabari the 4th appellant herein avers that together with is co-appellants, they filed an appeal in the year 2011 and that along the way the Lower court file disappeared. That on May 2, 2018 Lady Justice L. Mbugua directed the Deputy Registrar of this court to investigate the whereabouts of the lower court file and the matter was subsequently mentioned on numerous occasions for an update on whether the file had been traced.

4. The 4th appellant states that to date the lower court file has not been traced and as a consequence, he has not been able to prepare and file a complete record of appeal and that he is advised by his advocate on record that without the lower court record, the court will not be able to carry out its duty which is to re-evaluate the evidence on record and arrive at its own conclusion.

5. The 4th appellant further states that as a litigant, he has absolutely nothing to do with the disappearance of the lower court file and that it would therefore be a grave injustice were his appeal to fail on that ground alone. It is his contention that the ends of justice in the matter will be met if the matter is remitted to the lower court for the reconstruction of the court file and re-hearing de-novo.

6. In her affidavit Margaret Makena Kithinji, the widow of the 1st appellant avers that in the year 2011, her late husband and other appellants filed this appeal and along the way, her husband passed on. She has annexed a copy of the death certificate. That she is the administrator of the estate of the 1st appellant and has annexed a copy of the grant. She avers that her former advocates did not advise her that there was need to apply for the substitution of the deceased and therefore the same has to-date not been done. That as a consequence of failure to apply for substitution the 1st appellant's appeal has abated. She states that she is still interested in pursuing the appeal on behalf of the estate of the 1st appellant and therefore prays that the said appeal be revived and she be made the 1st appellant. It is her contention that no prejudice will be suffered by the respondent if the appeal is revived. She avers that she is aware that the lower court file cannot be traced. She also repeats the averments made by the 4th appellant.

7. The application is opposed by the respondent who filed a replying affidavit sworn by its advocates, Danson Mukono Kiruai on February 21, 2023. It is the respondent's contention that the applicants are not serious about prosecuting this appeal which has been pending in court for well over 12 years and are therefore guilty of laches.

8. It is further contended that the applicants cannot be heard to seek orders of constructing a skeleton file without demonstrating that the original file is lost and without demonstrating to court what material

they will use to construct the sought skeleton file by at least annexing the same to their application. That more importantly, no letter to the Deputy Registrar or otherwise complaining about the loss of the original trial court file or otherwise. That besides, the purported appeal by the 1st appellant is a non – starter because the death certificate shows that the deceased died on March 7, 2006 yet he purported to instruct counsel to file the appeal on December 21, 2011 over 5 years after his demise. It is the respondent's contention that there is no appeal to revive nor existence of any appeal for which Margaret Makena Kithinji can be substituted. That the grant annexed was also confirmed on June 4, 2014 a period of over 3 years since the appeal was filed. The respondent prays that the application be dismissed

9. The application was canvassed by way of written submissions. The applicants filed their submissions dated March 2, 2023 on March 3, 2023 while the respondent filed theirs dated March 14, 2023 on March 15, 2023.

Analysis And Determination

10. I have considered the application, the affidavits in support and against as well as the rival submissions. The issue for determination is whether the applicants have shown sufficient cause for granting of the orders sought.

11. Order 24 of the *Civil Procedure Rules* provides as follows-;

> "1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
>
> 2. Where there are more plaintiffs or plaintiffs alone or against the surviving defendant or defendants alone, the court will cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or defendant or defendants.
>
> 3.
>
> (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 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 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.
>
> 4. ...
>
> 5. Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased defendant, such questions shall be determined by the court.
>
> 6. –
>
> 7(1) 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 to costs or otherwise as it thinks fit.

8. –

9. In the application for this order to appeals, so far as may be, the word "plaintiff" shall be held to include an appellant, the word "defendant" a respondent, and the word "suit" an appeal.

10. - :

12. From the foregoing, it is clear that a suit abates by operation of law. That means that no order is required to declare the suit abated. All that one needs to determine whether or not the suit has abated is evidence of death of the plaintiff (or appellant as the case may be) and that the plaintiff (or appellant) was not substituted within the time stipulated in law.

13. In the case of *Titus Kiragu v Jackson Mugo Mathai* (2015) eKLR it was held that-;

> " It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law."

14. In *Kaboi Mucheru v Gakua Mucheru Mbugi* (2015) eKLR it was held;

> " As indicated earlier, this suit abated and the court did declare so. It is indeed clear from the provisions of order 23 rule 3 (2) of the Civil Procedure Rules that in the case of a deceased plaintiff as is the position in this case, abatement is by operation of the law unless substitution of the plaintiff is made within one year of the plaintiff's death. There is therefore no requirement that a court should make a declaration to that effect."

15. In the case of *Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 others* (2015) eKLR, the Court of Appeal explained the provisions of order 24 of the *Civil Procedure* as follows-:

> " There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
>
> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
>
> Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law.

The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff."

16. Rule 9 of order 24 is expressly clear that the order applies to appeals. The issue herein is whether the appeal by the 1st appellant who is deceased and which has abated, may be revived.

17. The certificate of death annexed to the affidavit in support of the application herein indicates that the 1st appellant died on March 7, 2006. The court record shows that the appeal was filed on December 21, 2011, which is a period of over five years since the 1st appellant passed on. To constitute and prosecute (and also to defend) an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited grant or a full grant of letters of administration.

18. In the case of *Otieno v Ougo & another* (1986 – 1989) EALR 468, the Court of Appeal stated thus-;

> " … An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does the action is incompetent as at the date of inception…."
>
> … to say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to…"

19. In this case, Margaret Makena Kithinji is seeking to revive the 1st appellant's appeal and to be substituted in place of the 1st appellant. As already stated, the 1st appellant died on March 7, 2006 while the appeal was filed on December 21, 2011. The certificate of confirmation of a grant was issued to Margaret Makena Kithinji on June 4, 2014. It follows therefore that the appeal allegedly filed by the 1st appellant was incompetent, a non- starter, and null and void ab initio since the same was filed by a deceased person. Even though it was said that the appeal against the 1st appellant had abated, and now the applicants wish to revive it, it is clear that that appeal was a nullity because a deceased person could not institute a suit. Therefore I am in agreement with the respondent's submission that there is no appeal to revive and which Margaret Makena Kithinji can be substituted as an appellant.

20. In the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR, it was held that-;

> " The estate of deceased person cannot take over proceedings against when the deceased died before the suit was filed and the representative of the estate has not been identified, and even if the representatives were identified it is not possible to take over a nullity."

21. Regarding the prayer for the reconstruction of the lower court file in Meru CMCC No 485 of 1997, there is no certificate to confirm the loss and or recommendation for the reconstruction of the file. I however note from the court file that the issue regarding the loss of the lower court file has been raised before this court on numerous occasions. Indeed on May 2, 2018, the court directed that investigations regarding the said file be carried out. It is however not clear what became of the investigations if at all the same were carried out. I also note that the appellants have filed a record of appeal which contains copies of the proceedings and judgment of the lower court. Therefore, I am not persuaded that the material presented herein is sufficient for me to order for the construction of the file as requested by the applicants. Instead, I direct the Deputy Registrar to follow up with the directions made by the court on May 2, 2018 and report back to this court as soon as possible to enable the court give further directions in the matter.

22. Consequently, I make the following orders-;

a. Prayer (1) of the notice of motion dated February 7, 2023 is dismissed.

b. The Deputy Registrar to follow up on the directions made by this court on May 2, 2018 and report back within 30 days.

c. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT MERU THIS 5TH DAY OF JULY, 2023

IN THE PRESENCE OF

Court Assistant – V. Kiragu

Kaberia for 4th appellant

Nyaga for respondent

1st applicant present in person

No appearance for 2nd appellant

No appearance for 3rd appellant

No appearance for 5th - 9th appellants

C.K YANO

JUDGE