



Musembi v Kyengo; Musembi (Applicant) (Environment & Land Case 32 of 2003) [2023] KEELC 19903 (KLR) (18 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 32 OF 2003
CA OCHIENG, J
SEPTEMBER 18, 2023**

BETWEEN

JOHN MUSYOKA MUSEMBI PLAINTIFF

AND

JOSEPH KYANYA KYENGO DEFENDANT

AND

PRISCILLA MUSYOKA MUSEMBI APPLICANT

RULING

1. What is before Court for determination is the Applicant’s Notice of Motion Application dated the October 7, 2022 where she seeks the following orders:

1. Spent.
2. That this Honourable Court be pleased to reinstate and/or revive the Plaintiff’s suit.
3. That this Court’s order dated November 23, 2021 closing the file herein be set aside.
4. That this Honourable Court be pleased to enlarge time within which to substitute the deceased Plaintiff (John Musyoka Musembi).
5. That the deceased Plaintiff be substituted by Priscilla Musyoka Musembi.

SUBPARA 6.

That cost of this Application be provided for.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Priscilla Musyoka Musembi where she confirms that the Plaintiff died on March 8, 2019. She explains the proceedings culminating in the Court file being marked as closed. Further, that through her advocates



on record she filed an Application for substitution dated the February 17, 2021, on February 25, 2021 but she had challenges in having the said Application placed before court's records as the Court file was said to be missing. She states that through her advocates, they have made several attempts to trace the file but to no avail. Further, on November 24, 2021, her advocates on record received a copy of the notice for directions from the Court dated the November 15, 2021 which indicated this matter was fixed for directions on November 23, 2021. She insists the notice was received a day late by her Advocates and hence they failed to attend court when the court file was marked as closed. She avers that she filed an Application dated the November 30, 2021 seeking to set aside orders issued on November 23, 2021 closing the Court file but the said Application was struck out on June 14, 2022 on the ground that this suit had abated. She is still desirous of prosecuting the suit. Further, that since the subject matter being land, she should be allowed to prosecute the suit on merit. She reiterates that she stands to suffer irreparably if the orders sought are not granted.

3. The Defendant Joseph Kyanya Kyengo opposed the instant Application by filing a Replying Affidavit where he deposes that the said Application is incompetent, fatally defective and inadmissible. He contends that the Applicant has filed numerous applications seeking similar orders. Further, that the Application dated the November 29, 2019, was dismissed on February 12, 2021 for being incompetent. He avers that the Applicant never took steps to prosecute the alleged Application dated the February 17, 2021, while the Application dated the November 30, 2021 was struck off on June 14, 2022. He argues that it has taken the Applicant four (4) months to prosecute the instant Application. He claims the Court declared this suit to have abated on November 23, 2021 and approximately one (1) year later, the Applicant did not take any steps to file an Application for revival or substitution of the Plaintiff. Further, that the Applicant has not demonstrated sufficient reasons in support of the instant Application. He avers that the Applicant has not tendered any evidence to confirm court file was missing. Further, that she filed an Application dated the February 17, 2021 which was scheduled for hearing on March 18, 2021. He reiterates that since the Court noted the suit abated on March 20, 2020, the Court became *functus officio* and cannot therefore issue any further orders. Further, that this suit has been ongoing since 2003 and the Applicant has not been keen in prosecuting it. He further contends that he had initially lodged an Appeal against a Ruling of this Court but failed to file a Memorandum of Appeal due to the deceased demise and will hence be prejudiced if the suit is reinstated.
4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the Notice of Motion Application dated the October 7, 2022 including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the abated suit should be reinstated and if the Applicant should substitute the deceased Plaintiff.
6. The Applicant in her submissions reiterated her averments as per the Supporting Affidavit and argues that the abated suit should be reinstated as she did not act in a negligent manner. Further, that striking out of her previous Applications did not bar her from filing subsequent Applications. She further submitted that she should be substituted in place of the deceased Plaintiff as she was prevented by sufficient cause to do so earlier. To buttress her averments, she relied on the following decisions: *Wachira Karani v Bildad Wachira* [2016] eKLR; *Enock Kirao Mubanyi v Hamid Abdalla Mbarak* [2013] eKLR; *Vue Taure Vue & Another v Felix Tsori Chivatsi & Another* [2020] eKLR and *Rukwaro Waweru v Kinyutho Ritho & Another* [2015] eKLR.
7. The Defendant in his submissions insists that the abated suit should not be reinstated. Further, that the plethora of reasons given by the Applicant are not sufficient to persuade the Court that they



were not deliberate attempts to obstruct or delay justice. He reiterates that the instant Application does not demonstrate the sufficient cause for the delay in filing the Application for substitution. He challenges the Applicant's explanation for the delay and insists that parties who are indolent cannot expect equity to come to their aid. To support his arguments, he relied on the following decisions: *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR; *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR; *Attorney General v Law Society of Kenya & Another* [2017] eKLR; *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & Another* [2014] eKLR; *Mae Properties Limited v Joseph Kibe & Another* [2017] eKLR and *Kenya Farmers' Cooperative Union Ltd v Charles Murgor (deceased) t/a Kiptabei Coffee Estate* [2005] eKLR.

8. The Applicant has sought for the reinstatement of the abated suit as well as substitution with the deceased Plaintiff. It is not in dispute that the Plaintiff died on March 8, 2019 and by the time the court issued its orders on November 23, 2021, the deceased was yet to be substituted by his personal representative.

9. On substitution of a deceased Plaintiff, Order 24 Rule 3(2) of the *Civil Procedure Rules* stipulates thus:

(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.”

10. The legal provisions are explicit that once a Plaintiff is not substituted within one (1) year, the suit stands abated. In the current scenario the Plaintiff died on 8th March, 2019 which in essence means that since he was not substituted, this suit automatically abated on 8th March, 2020 by operation of the law.

11. In the case of *Muriithi Ngwenya v Gikonyo Macharia Mwangi & 2 others* [2018] eKLR, the Court observed that:

The Application must be made within one year in default of which the suit shall abate as against the deceased Defendant.”

12. While in the case of *Kenya Farmers' Cooperative Union Ltd v Charles Murgor (deceased) t/a Kiptabei Coffee Estate* [2005] eKLR, it was observed that:

A Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.”

13. Based on the facts before me, noting that the Applicant has not explained why she took so long to apply for Letters of Administration Intestate and also only applied to substitute the deceased Plaintiff when the suit was already abated, I opine that she was indolent. To my mind she has failed to demonstrate sufficient cause for the delay in applying to substitute the deceased within the requisite time. She seems to blame the court but has not provided sufficient proof that she indeed followed up on the missing file. Insofar as this is a land matter, noting that the Applicant has filed a myriad of Application which



have been struck off, at this juncture, I am of the view that the Applicant has come to court too late in the day. It is trite that equity aids the vigilant and not the indolent.

14. In the circumstance, I will decline to reinstate the abated suit.
15. The import is that the instant Application is unmerited and will proceed to dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2023

CHRISTINE OCHIENG

JUDGE

