



Harun v Mugambi (Sued as the Legal Representative and Administrator of the Estate of Mugambi Mburugu alias Mugambi M'mburugu – Deceased) (Environmental and Land Originating Summons 41 of 2019) [2023] KEELC 20553 (KLR) (11 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20553 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 41 OF 2019
CK NZILI, J
OCTOBER 11, 2023**

BETWEEN

PHARES KINOTI HARUN PLAINTIFF

AND

CYRUS GUANTAI MUGAMBI (SUED AS THE LEGAL REPRESENTATIVE AND ADMINISTRATOR OF THE ESTATE OF MUGAMBI MBURUGU ALIAS MUGAMBI M'MBURUGU – DECEASED) DEFENDANT

RULING

1. The court is asked by an application dated May 17, 2023 to set aside the dismissal order issued on May 9, 2023. The reasons are contained on the face of the application and the affidavit of John Muthomi advocate, sworn on May 17, 2023. The applicant avers that when the matter came up for hearing, the advocate on record appeared virtually, but the court was inaudible; therefore, he did not hear the case being called out.
2. Further, the applicant states that it took the intervention of the court assistant to set up the court's laptop; soon after that, a Mr Kimaita advocate notified the court. Therefore, the applicant avers that the situation should not be visited upon him as an innocent litigant.
3. The applicant maintains that the claim before the court is for adverse possession and that witnesses have testified, leaving only one witness, the area chief, and the defense witnesses. Therefore, he urges the court to reinstate the suit for hearing, and if there would be any prejudice to the other party, the same can be settled by way of costs.
4. After this suit was filed under a certificate of urgency on August 1, 2019, the application came up for hearing on September 25, 2019 when the parties compromised the two applications dated August 1, 2019 and September 13, 2019. On January 29, 2020, the plaintiff, by an application dated January 29,



- 2020, sought evidence of M'Muga Karuru to be taken de bene esse. So, DW 1 testified on February 10, 2020 on behalf of the defendant. On January 19, 2021, the plaintiff testified as PW 1 and called PW's 2 – 4. The plaintiff sought for an adjournment to call the area chief, to produce a letter marked PMFI (8) dated June 6, 2018.
5. The matter came up on April 12, 2021, but the witness was absent. On July 13, 2021, counsel for the plaintiff informed the court that the defendant had passed on. The court gave the plaintiff time to substitute the deceased defendant. An application dated June 13, 2022 was filed seeking the court to join Mary Karimi, the widow of the defendant, as a party.
 6. The applicant indicated that the suit would abate on July 9, 2022, given that the defendant's death had occurred on July 9, 2021, as per the death certificate attached to the application. The applicant had also attached a letter of limited grant ad litem issued under Section 54 of the *Law of Succession Act* (Cap 160) as a legal representative of the estate of Cyrus Guantai Mugambi, on June 10, 2022.
 7. When the application came up for hearing on September 27, 2022, the court directed that the substitution be effected within 30 days from the date thereof, in default of which the suit would be deemed to have abated. A mention date was fixed for November 29, 2022. No action was taken as ordered by the court.
 8. The matter was mentioned on January 17, 2023, and the defendant's counsel told the court that they wished to bring on board a substantive legal representative for the deceased defendant's estate. The plaintiff told the court that a substantive defendant was already joined as a party to the suit. So, the court directed that the matter proceed from where it had reached with the previous court.
 9. When the matter came up for hearing as directed on February 21, 2023, the counsel for the plaintiff changed tune and told the court that the defendant had not yet been substituted. The court directed that the defendant's counsel pursue the public trustee if no legal representative was available to replace the deceased defendant. The plaintiff was also required to file a copy of an official search for the suit land before the mention date on May 9, 2023. So, come May 9, 2023, none of the parties appeared before the court, and none had complied with the earlier orders or directives.
 10. Counsel for the plaintiff has sworn an affidavit that the court was inaudible but does not say what remedial actions he took soon after that to seek for the file to be revisited on that day by the court. It may very well be true that there were network hitches that day. That notwithstanding the record and the history of this matter shows, the court has given the plaintiff more than enough time to bring on board the defendant's legal representative. The limited grant ad litem issued on June 10, 2022, is in the name of the plaintiff as the defendant's legal representative.
 11. So, can a plaintiff, in his capacity, act as the legal representative of the deceased defendant's estate? Is it possible in law to proceed with the matter in such a scenario even if the court were to reinstate the suit for hearing? What about the aspect of the case having abated by July 9, 2022? All these are issues that the plaintiff has deliberately or otherwise failed to address in this application.
 12. While the court has the discretion to reinstate a suit dismissed for non-prosecution or non-compliance under Order 17 Rule 6 of the *Civil Procedure Rules*, the court has to act judiciously in the interest of justice. To my mind, the court merely struck out the suit for non-compliance. There is no evidence before the court that the anomalies before May 9, 2023 were cured per the directions issued on February 21, 2023. It would be academic to allow the prayers sought.
 13. Consequently, I find the application before the court lacking merits. The same is dismissed with no orders as to costs.



DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON
THIS 11TH DAY OF OCTOBER 2023

HON. CK NZILI

ELC JUDGE

