



Okumu (Suing as the legal rep. of Patrick Okumu Juma) v Makanga (Environment & Land Case 25 of 2020) [2023] KEELC 21458 (KLR) (14 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21458 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 25 OF 2020
BN OLAO, J
NOVEMBER 14, 2023**

BETWEEN

JACKLINE OJIAMBO OKUMU (SUING AS THE LEGAL REP. OF PATRICK OKUMU JUMA) PLAINTIFF

AND

AMOS ODUOR MAKANGA DEFENDANT

RULING

1. Order 24 Rule 3(1) and (2) of the [Civil Procedure Rules](#) provides that:

- “ 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.”

Patrick Okumu Juma (the deceased) moved to this Court vide his Originating summons dated 15th July 2020 and filed on 17th July 2020 seeking the substantive prayer against Amos Oduor Makanga (the Respondent) that he had acquired by way of adverse possession a portion of land measuring 1.01 hectares being land parcel No Samia-Bukhulungu/1281. I notice from the Originating Summons and the supporting affidavit that neither the copy of the title deed nor the certificate of search in respect of the said parcel of land nor the original land parcel No Samia/Bukhulungu/866 have been annexed.



Should Jackline Ojiambo Okumu (the Applicant herein and who has approached this Court as the legal representative of the deceased) succeed in the application now before me, she and her counsel will have to annex those documents to the Originating Summons as that is crucial in a case of adverse possession.

2. The Respondent filed a replying affidavit dated 24th May 2022 in opposition to the said Originating Summons.
3. This Court is not required at this stage to delve fully into the Originating Summons or the replying affidavit in details.
4. What is important for purposes of this ruling on the Applicant's Notice of Motion dated 27th March 2023 is that on 23rd June 2022, Omollo J marked the deceased's suit as being abated.
5. The Applicant has now approached this Court by the aforesaid Notice of Motion premised under the provisions of Order 10 Rule 11, Order 22 Rule 25 and Order 51 Rule 3 of the Civil Procedure Rules seeking the following orders:
 - “ 1: That this Honourable Court be pleased to review and/or set aside the orders of Hon Justice Amollo made on 22nd June 2022 dismissing the Plaintiff's (deceased's) suit on account of his death.”
 - 2: “That the Applicant be and is hereby substituted as the Plaintiff in the place of Patrick Okumu Juma (deceased).”
 - 3: “That the Plaintiff's case be and is hereby reinstated and fixed for hearing inter-par-te.”
 - 4: “That costs of this application be provided for.”
6. The application is based on the grounds set out therein and supported by the affidavit of the Applicant also dated 27th March 2023.
7. The gravamen of the application is that the Applicant is the widow and administratrix of the Estate of the deceased who filed this suit but passed away before it was heard and determined. That following the demise of the deceased, the Applicant went into a depression, became ill and suffered economically. She was therefore unable to take up this matter immediately. It was only later that she discovered that this suit had been dismissed. The dismissal of the suit has exposed her and her children to threats of eviction. The suit should be reinstated together with the interim orders so that it can be determined on merit.
8. Annexed to the application is a copy of a Limited Grant of Letters of Administration issued to the Applicant on 8th March 2023 in Busia CM Succession Application NO E007 of 2023 for purposes of meeting the necessities of the Estate of the deceased.
9. The application is opposed and the Respondent has filed grounds of opposition dated 17th July 2023 raising the following:
 1. That the Applicant has no locus standi to institute this application.
 2. That the application has been overtaken by events and is otherwise moot.
 3. That this Court is functus officio and cannot therefore hear the application.
 4. That the suit was dismissed on merit.



5. That the application is an abuse of the Court process.
10. When the application was placed before me on 28th March 2023, I directed that it be canvassed by way of written submissions.
11. Submissions were subsequently filed both by Mr Omeri instructed by the firm of Omeri & Associates Advocates for the Applicant and by Mr Onsongo instructed by the firm of Obwoye Onsongo & Company Advocates for the Respondent.
12. I have considered the application, the supporting affidavit and annexures thereto, the grounds of opposition and the submissions by counsel.
13. Counsel for the Respondent has commence his submissions by drawing this Court’s attention to the fact that as at the time he was drafting his submission on 7th September 2023, the Applicant’s counsel had not yet filed his.
14. It is true that when the application was placed before me on 28th March 2023, I directed the Applicant to file and serve his submissions within 7 days and the Respondent would have 14 days from the date of service. The application would then be mentioned before me on 24th April 2023 for purpose of confirming compliance and taking a date for ruling. The record shows, however, that it was not until 13th June 2023 that this file was placed before the Deputy Registrar and even then, none of the parties had filed their submissions. That lapse notwithstanding, the matter continued to be mentioned before the Deputy Registrar, without compliance, and it was not until 2nd October 2023 that the Applicant’s counsel filed his submission long after the Respondent’s counsel had filed his submission on 12th September 2023. It is therefore clear that the first submissions were filed by the Respondent 5 months after the due date and by the Applicant 6 months late.
15. Section 1(A) 3 of the [Civil Procedure Act](#) provides that:

“A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

Emphasis mine.

Section 3(1) of the [Environment and Land Court Act](#) emphasizes that this Court shall facilitate, inter alia, the “expeditious” resolution of the disputes governed by this Act. That is, of course, in keeping with [Article 159\(2\) \(b\)](#) which states that:

“Justice shall not be delayed.”

The parties herein, and more so the Applicant, went into a deep slumber from 28th March 2023 when directions were first issued on the application. Unfortunately, and that is regrettable, the registry staff and Deputy Registrar joined them. It is not clear where this file was between 24th April 2023 when it was supposed to have been placed before me and 13th June 2023 when it finally turned up before the Deputy Registrar. The fact, however, is that whether or not the Applicant filed his submissions within 7 days from 27th March 2023 and the Respondent 21 days after service, this file ought to have been placed before me on 24th April 2023 without fail. Hopefully the Registry will take note of that because the Court is not supposed to abate the flouting of directions by the parties and their counsel.

16. Back to the application itself.



17. The Applicant has averred in his supporting affidavit, that following the demise of the deceased who was her husband, she went into a depression and also suffered economically. She was therefore unable to follow up on this case. Although she has not directly deposed as to when exactly the deceased passed away, she has annexed to her application a copy of the Limited Grant of Letters of Administration issued on 8th March 2023 in respect to the deceased's Estate. It shows that the deceased died on 17th September 2021. That has not been rebutted by the Respondent and neither have the other facts deposed to by the Applicant in her supporting affidavit. This is because the Respondent chose to respond to the application by way of grounds of opposition. Such grounds of opposition cannot controvert what has been sworn in an affidavit – *Daniel Kibet Mutai -v- AG* 2019 eKLR.
18. Since the deceased passed away on 17th September 2021 as per the Limited Grant of Letters of Administration, his suit could not have abated, by operation of the law, before 17th September 2022. However, as per the record herein, Omollo J marked this suit as having abated on 22nd June 2022 almost 3 months before the expiration of the one year period set out in Order 24 Rule 3(2) of the *Civil Procedure Rules* when the suit should have abated by effluxion of time. It follows therefore that the order by Omollo J marking the suit to have abated was premature. That was “a mistake or error apparent on the face of the record” and which, under the provisions of Order 45 Rule 1(1)(b) of *Civil Procedure Rules* as read with Section 80 of the *Civil Procedure Act* entitles the Applicant to an order of review. The Applicant did not, of course, cite the provisions of Section 80 of the *Civil Procedure Act* or Order 45 Rule 1 of the *Civil Procedure Rules*. However, as is clear from his Notice of Motion, the first prayer which she has sought is:

“That this Honourable Court be pleased to review and/or set aside the orders of Hon. Justice Amollo (sic) made on 22nd June 2022 dismissing the Plaintiff's case on account of the Plaintiff's death.”

It is Justice Omollo not Amollo.

19. There can be no doubt that the Applicant had in mind the above provisions of the law and the failure to cite them is not fatal to her application.
20. Having said so, even though the order by Omollo J dismissing the deceased's suit on 22nd June 2022 was an error or mistake, the suit eventually abated by operation of the law on 17th September 2022. Therefore, the error or mistake of 22nd June 2022 does not aid the Applicant at all.
21. However, the Applicant has also sought the revival of the abated suit. Although she did not expressly refer to revival of the abated suit, there is no doubt in my mind that that is what she meant when under prayer NO 3 she said:

“That the Plaintiff's case be and is hereby reinstated and fixed for hearing inter-parties.”

Counsel for the Respondent has submitted, inter alia, that the Applicant has no locus standi to apply for review, that Order 11 and 22 of the *Civil Procedure Rules* do not apply, that there is no suit pending and that the Applicant ought to have substituted the deceased Plaintiff first. This is what counsel has submitted at page 3:

“All the orders sought have therefore been overtaken by events. The Applicant is not the Plaintiff herein. She therefore does not have locus standi to apply for review and/or setting aside of the orders of 22nd June 2022. The Applicant ought to have substituted the deceased



Plaintiff before moving the Court for orders of setting aside and/or review. Her application for review or setting aside is premature.”

The Court’s response to all the above is that firstly, failure to cite Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act* is not fatal. It is curable under Article 159 (2) (d) of the *Constitution*, Section 19 of the *Environment and Land Court Act* and Order 51 Rule 10(1) of the *Civil Procedure Rules*.

22. On the issue of locus standi, as I have already stated above, the Applicant has already obtained Limited Grant of Letters of Administration authorizing her to prosecute these proceedings. And with regard to the objection that the Applicant ought to have substituted the deceased Plaintiff first, she has in prayer NO 2 applied:

2:

“That the Applicant be and is hereby substituted as the Plaintiff in place of Patrick Oumumu Juma (deceased).”

There is nothing wrong in combining the prayer for revival of the abated suit and substitution of the deceased Plaintiff at the same time. That is what the Applicant has done in this case. In *Rebecca Mijide Mungole & Another –v- Kenya Power & Lighting Company Ltd* C.a. CIVIL APPEAL NO 283 of 2015 [2017 eKLR], the Court said:

“The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers.”

The Applicant has explained, without rebuttal, that she was unable to move the Court earlier due to illness, depression and economic circumstances. I am satisfied that those reasons are sufficient cause to justify the revival of this suit. And although the Applicant has adopted the word reinstate, that term is defined in *Black’s Law Dictionary 10TH Edition* as:

“To place again in a former state or position; to restore.”

In the Concise *Oxford English Dictionary*, it is defined thus:

“Restore to a former position or state”

The same Dictionary defines the term revive as:

“Restore to or regain life ...”

To try and distinguish between the terms reinstate and revive is, in my view, tantamount to splitting hairs. They mean one and the same thing in the context of this application.

23. I am persuaded from the circumstances of this case that the Applicant has met the criteria set out in Order 24 Rule 3(2) of the *Civil Procedure Rules* for the revival of this suit and her joinder as the legal representative of the deceased Plaintiff’s Estate. In any event, I may add that having read the deceased’s



Plaintiff's supporting affidavit filed together with the Originating Summons, the Applicant need not approach this Court as a legal representative because, in paragraph 6 of the said affidavit the deceased Plaintiff deposed that he has been living with his family on the land in dispute from 1993 upto 2019 when the Respondent started interfering with his quiet enjoyment thereof. The Applicant, as part of the deceased Plaintiff's family can therefore seek the same orders in her own right as a person in possession and occupation.

24. The up-shot of all the above is that the Notice of Motion dated 27th March 2023 is hereby allowed. Costs shall be in the cause.
25. Since the parties have filed their respective proceedings with respect to the main Originating Summons dated 15th July 2020, leave is granted that any further documents, if need be, be filed and exchanged within 14 days from today. Pre-trial shall be before the Deputy Registrar on 30th November 2023 who shall give the parties a date for hearing.

RULING DATED, SIGNED AND DELIVERED ON THIS 14TH DAY OF NOVEMBER 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

