



**Zebedee Mmata Injera v Benson Anubi Luhongo; Koanne C. K. Luhongo (Interested Party)
(Environment & Land Case 27 of 2021) [2022] KEELC 3703 (KLR) (12 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3703 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 27 OF 2021
MN MWANYALE, J
JULY 12, 2022
(FORMERLY ELDORET ELC CASE NO 271 OF 2014)**

BETWEEN

ZEBEDEE MMATA INJERA APPLICANT

AND

BENSON ANUBI LUHONGO RESPONDENT

AND

KOANNE C.K. LUHONGO INTERESTED PARTY

RULING

1. This ruling is in respect to a question raised suo moto by this Court on May 25, 2022 at 2.30pm. The issue raised by the Court concerned whether this suit can proceed against the interested party, noting that the case against the deceased Defendant was withdrawn and marked as abated on December 15, 2021.
2. The Court invited parties to submit on the issue vide directions given on May 25, 2022. However, upon perusal of the Court's record, none of the parties had filed submissions. Nevertheless, I shall proceed to render my ruling.
3. On December 15, 2021, Mr. Osango Counsel for the Plaintiff, made on oral application to withdraw suit against the deceased Defendant. Pursuant to that application, this Court made an order that the suit against the Defendant is marked as abated. Further, it was ordered that the suit against interest party proceeds. This formed the basis of the issue raised by this Court suo moto on May 25, 2022at 2.30pm.



4. Order 24 rule 4 (4) of the Civil Procedure Rules provides as follows;

“ 4.

(1) where one of the two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant 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 Defendant to be made a party and shall proceed with the suit.

(2)

(3) where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.”

5. In view of the provision of Order 24 rule 4 (4), the suit against the deceased Defendant in this case abated and any application to revive suit against the deceased Defendant will not suffice since the Plaintiff's Counsel withdrew suit against the Defendant.

6. The effect of marking a suit against a party as abated was well articulated by Namweya J in *Wallace Kinuthia -vs- Anthony Ndung'u Muongi and 3 others* (2013) eKLR where she stated thus:

“ The effect of a suit that has abated is that it ceased to exist in law. Black's Law Dictionary defines abatement as “the suspension or defeat of a pending action for a reason unrelated to the merits of the claim.”

7. In the instant case therefore, the suit against the Defendant ceased to exist in law.

8. Having found that the suit against the deceased Defendant ceased to exist, the question that needs to be answered is whether the Plaintiff's case can proceed against the interested party. In answering this question I wish to quote Gikonyo J in the case *Leonard Mutua Muteru -vs- Benson Katela LE Kantai and Another* (2014) eKLR where he observed:

“ Now, the 1st Defendant died on 2/1/2010. From the facts of and pleadings in this case, the 1st Defendant is the principal party; the suit cannot be effectively proceeded with against the 2nd Defendant alone.”

9. It is thus vital for me to dissect the facts and pleadings to establish who the principal party is and whether this suit can effectively proceed as against interested party without participation of deceased Defendant's representative.

10. A brief, background of the facts from pleadings filed by parties herein confirm that the interest party is the principal party. I state so for the reason that the Defendant vide Defence, filed on 22nd September 2014 under paragraph 4 and 5 averred that the suit land Nandi/Kapkangani/380 was bought by his sister, the interested party herein, and she proceeded to build a house there. The Defendant, now deceased, further averred that he ought not to be a party to the suit as the land did, not belong to him but his sister, the Interest Party herein.



11. Accordingly, it is clear that the deceased Defendant participation or their legal representatives (if any) involvement was immaterial and inconsequential in this matter. However, the involvement of the interest party is relevant in determining the dispute herein.
12. That said, it is important to note that the Plaintiff's Counsel Application to withdraw suit against the Defendant did not affect the suit against interested party since she was already a party as at the time the application and orders of this Court were made.
13. The parties in this case have an opportunity to ventilate their case on merit despite the case against the deceased Defendant having been withdrawn and marked as abated. In the case of *Julius Musili Kyunga -vs- Kenya Commercial Bank Ltd and Another. James Muriuki Karaya* (Interested Party) (2021) eKLR the Court stated that;

“In addition, it is also the view of this Court that upholding the Preliminary Objection raised by the Plaintiff would deny the interested party an opportunity to ventilate his case, the Court having previously allowed him to be enjoined into the suit, even though the Plaintiff has since withdraw his case against the Defendants..... The Court having enjoined the Interested Party as an affected party to the suit has the mandate of ensuring that all matter in controversy between the parties should be completely and finally determined. This is to avoid instances where the parties file multiplicity of legal proceedings.”

14. Borrowing from the instant authority and Order 24 Rule 4 (4) of the Civil Procedure Rules, this Court answers the issue raised suo moto on May 25, 2022 at 2.30 pm in the affirmative. Consequently, the Plaintiff herein can proceed with this suit as against the Interested Party since the interest party had previously been enjoined. There will be no orders as to costs since this issue was raised suo moto by the Court.
15. It is so ordered.

DATED AT KAPSABET THIS 12TH DAY OF JULY 2022.

**HON. M. N. MWANYALE,
JUDGE.**

