



Musyoki & another (Suing as the legal representatives of the Estate of Joseph Musyoki King'oo (Deceased)) v Ndambuki & another (Environment & Land Case 353 of 2012) [2022] KEELC 13495 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13495 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 353 OF 2012
A NYUKURI, J
OCTOBER 5, 2022**

BETWEEN

**REDEMPTA SYOMBUA MUSYOKI 1ST PLAINTIFF
ROBERT WAMBUA MUSYOKI 2ND PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
MUSYOKI KING'OO (DECEASED)**

AND

**NGII NDAMBUKI 1ST DEFENDANT
ROSEMARY NGII NICODEMUS 2ND DEFENDANT**

RULING

1. This ruling is in respect of two applications, namely; the application dated 13th August 2019 filed by the 2nd Defendant (the first application) and the application dated 18th February 2020 filed by the Plaintiffs (the second application).

The application dated 13th August 2019

2. In the first Application, the 2nd Defendant/Applicant sought for the following orders;
 - a. That an order do issue marking the suit as abated as against the 1st Defendant.
 - b. That costs do abide the Application.
3. The application is premised on the affidavit of Mr. Stanley Nthiwa, counsel for the Defendants/Applicants, who deposed that the suit as against the 1st Defendant abated following the demise of the



- 1st Defendant on 25th October 2015; that no application for substitution of the 1st Defendant was filed in four years and that it is only fair that the suit as against the 1st Defendant be marked as abated.
4. The Plaintiffs filed grounds of opposition dated 19th November 2019 and the replying affidavit sworn on 12th January 2022, in opposition to the application. They stated that the application is misconceived, devoid of merit and is an abuse of the due process and that the suit survived the 1st Defendant's demise. They further averred that the 1st and 2nd Defendants are related as the 2nd Defendant is the granddaughter of the 1st Defendant and that the Plaintiffs are not related to the Defendants nor do they live within the same locality with the defendants and were not aware of the 1st Defendant's demise, having been made aware vide the defendant's application herein.
 5. The Plaintiffs further asserted that instead of marking the suit as abated, the court has power to order substitution of the deceased 1st Defendant with his legal representative. They contended that the suit property was transferred to the 2nd Defendant by the 1st Defendant despite there being a valid contract between the 1st Defendant and the Plaintiffs' father and therefore that they were apprehensive that the property could be further transferred to third parties. They urged the court to hear and determine the suit conclusively.

The application dated 18th February, 2022

6. In the second application, the Plaintiffs sought the following orders;
 - a. Spent
 - b. Spent
 - c. That the Plaintiff's suit against the 1st Defendant be revived
 - d. That the 1st Defendant, who has been shown by the 2nd Defendant to have died on 25/10/2015, be substituted with Rosemary Ngii, Nicodemus Kitavi (the 2nd Defendant herein), and the said Rosemary Ngii Nicodemus Kitavi, be deemed as being sued in her own behalf and as a legal representative of Ngii Ndambuki (The 1st Defendant)
 - e. That the Plaintiffs be granted leave to further amend their Plaint to reflect the character of the 2nd Defendant (Rosemary Ngii Nicodemus Kitavi) as being sued on her own behalf as the legal representative of Ngii Ndambuki (the 1st Defendant herein)
 - f. That costs of this Application be in the cause.
7. The application is anchored on the affidavit sworn by Robert Wambua Musyoki, the 2nd Plaintiff herein. He states that although the 1st defendant passed on, on 25th October 2015, they were not made aware until their counsel was served with the application dated 13th August 2019, as the said fact was concealed to them as well as to the court. He also deponed that this court has power to revive an abated suit and that the cause of action herein survived the 1st Defendant's demise, who fraudulently transferred the suit property to the 2nd Defendant while the dispute was alive. He further stated that the 1st Defendant is a close relative of the 2nd Defendant as the latter is a grandchild of the 1st Defendant.
8. Submissions were filed in respect of the two applications. Counsel for the 2nd Defendant filed their submissions on 14th January 2020 while counsel for the Plaintiffs filed their submissions on 8th March 2022.



Submissions

9. Counsel for the 2nd Defendant referred to Order 24 Rule 4 (3) of the Civil Procedure Rules, 2010 and submitted that where one of the defendants has passed on and no application for substitution is filed within one year, the suit shall abate as against the deceased Defendant. It was further submitted that since it is over four years since the demise of the 1st Defendant, the suit against him had abated by operation of law. Counsel relied on the case of Muriithi Ngwenya vs Gikonya Macharia Mwangi & 2 Others [2018] eKLR where the court dismissed an application for substitution of the deceased defendant as the suit had abated and no application to revive the suit had been sought.
10. In response, counsel for the Plaintiffs submitted that the Defendants were represented by one law firm and that there was no disclosure of the 1st Defendant's demise. Counsel relied on the case of Priscilla Ndubi & Another v Gerishon Gitobu Meru H.CC Succession Cause No. 720 of 2013 for the proposition that non-disclosure of material facts undermines justice. Further, that the Plaintiffs were unable to apply for substitution of the 1st Defendant for reasons beyond their control.
11. It was also argued that the 1st Defendant transferred the suit property to the 2nd Defendant despite the fact that the Plaintiffs were on the property having purchased the same.
12. Counsel relied on Order 24 Rule 4 of the Civil Procedure Rules to contend that this court has discretion to extent time for substitution. Counsel argued that the reasons for not making an application for substitution within one year was due to non-disclosure by the 2nd defendant of material facts. Counsel referred to the case of Sylvan Karimi Chabari & 3 Others vs John Muthuri (Administrator of the estate of M'Ananua M'Itere) (2019) eKLR for the proposition that a defence counsel is under obligation to inform court of the demise of a defendant as soon as they are made aware of that fact. It was their contention that the surviving Defendant acted mala fides and with the aim of defeating the suit against them, hence discretion should not be exercised in their favour as he who comes to equity must come with clean hands.
13. In conclusion, counsel submitted that in a land dispute, the suit survives the demise of either party, and therefore, justice will only be served if the suit is allowed to proceed and heard on merit.

Analysis and determination

14. The court has carefully considered both applications, responses thereto and submissions by the parties. The issues that arise for determination are as follows;
 - a. Whether the suit against the 1st Defendant has abated;
 - b. Whether the suit against the 1st Defendant can be revived; and,
 - c. whether the deceased 1st defendant ought to be substituted by the 2nd Defendant.
15. Order 24 Rule 4 of the Civil Procedure Act provides for the procedure to be taken in the event of the death of a defendant, as follows;
 4. (1) Where one of two or more defendants dies and the cause of action does not 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) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.

Order 24, rule 5 provides for Determination of question as to legal representative as follows;

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 question shall be determined by the court.

16. It is clear therefore that where a defendant dies and the cause of action survives his demise, an application for his substitution by the legal representative of his estate ought to be filed within one year, in default, the suit will abate. However, the court has discretion to revive a suit that has abated, where sufficient cause is shown to have prevented the continuance of such suit.
17. In the instant suit, it is not disputed that the 1st Defendant passed on, on 15th October 2015. As at the time the 2nd Defendant filed the application dated 13th August 2019, no application for substitution had been filed. The Plaintiff's application for substitution was filed on 18th February 2020. In the premises, as there was no application filed for substitution within one year of the 1st Defendant's demise, the suit herein abated on 15th October 2016 as against the 1st Defendant.
18. Having found that the suit against the 1st Defendant abated on 15/10/2016, the court will interrogate whether there was a sufficient cause that prevented the Plaintiffs from applying for substitution, for purposes of determining whether the suit ought to be revived, and secondly whether the 2nd Defendant has the legal capacity to be substituted in the place of the deceased 1st Defendant.
19. Where a suit has abated, the same may be revived as provided for in Order 24 Rule 7 (2) as follows;
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.
20. What then amounts to 'sufficient cause' to warrant an application for revival of a suit? In the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, the Court of Appeal held that;
A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.
21. In the instant application, the Applicants' sole argument was that they were prevented by circumstances beyond their control in that they only learnt of the death of the deceased upon being



served with the 1st Application herein dated 13th August 2019. They also stated that there was no disclosure made by counsel for the defendants of the demise of the 1st defendant, and therefore they could not be blamed for failure to seek substitution within one year. No evidence was given by the 2nd Defendant to rebut or challenge this assertion. I agree with the Plaintiffs that a party cannot move the court for substitution unless they are aware of the demise of the other party. I therefore find and hold that the Plaintiffs have given sufficient cause for the delay in seeking revival of the suit and substitution of the 1st Defendant.

22. Under Order 24 Rule 4 (1), substitution of a deceased defendant can only be done by the legal representative of their estate. A legal representative is defined under section 2 of the *Civil Procedure Act* to mean;

A person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued.

23. Under the *law of succession Act*, a person can only represent the estate of a deceased person in a suit when such person has obtained grant of letters of administration. (See section 82 of the *Law of Succession Act*) In the instant matter, the only reason the applicants gave for seeking the substitution of the deceased 1st Defendant with Rosemary Ngii Nicodemus- Kitavi, the 2nd Defendant herein, is that the deceased and the 2nd Defendant were related as the 2nd Defendant was the deceased's granddaughter. There is no evidence produced by the Applicants to show that the 2nd Defendant is the legal representative of the estate of the deceased 1st Defendant. I therefore find that the mere fact that the 2nd Defendant is a close relative of the deceased 1st Defendant, does not clothe the 2nd Defendant with the requisite legal capacity to warrant his substitution with the deceased 1st Defendant.

24. The upshot of the above is that the application dated 13th August 2019 is allowed and this suit is marked as abated as against the deceased 1st Defendant. The application dated 18th February 2020 lacks merit and it is hereby dismissed. There is no order as to cost on both applications.

257. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 5TH DAY OF OCTOBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Nzili holding brief for Mr. Muumbi for 2nd Defendant.

Ms. Kwamboka holding brief for Mr. Nzei for the Plaintiff.

C/A - Ashley

