



REPUBLIC OF KENYA



KENYA LAW
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**Kihumba v Hussein & 3 others (Environment & Land Case
4 of 2019) [2022] KEELC 14514 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14514 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 4 OF 2019
JO OLOLA, J
NOVEMBER 3, 2022**

BETWEEN

JOHN NJUGUNA KIHUMBA PLAINTIFF

AND

HUSSEIN HASSAN HUSSEIN 1ST DEFENDANT

LAND REGISTRAR NYERI COUNTY 2ND DEFENDANT

NYERI COUNTY GOVERNMENT 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. By the notice of motion dated December 1, 2021 as filed herein on December 10, 2021, the Nyeri County Government (the 3rd defendant) prays for orders:
 1. That this honourable court be pleased to declare the suit as having abated;
 2. That this honourable court be pleased to strike out the entire suit as against the 3rd defendant/ applicant; and
 3. That the costs of this application be in the cause.
2. The application is supported by an affidavit sworn by the 3rd defendant's Advocate Aamir Zahid on December 8, 2021 and a supplementary affidavit sworn on June 6, 2022 and is premised on the grounds:
 - (a) That on November 1, 2021, the 1st defendant's counsel informed the court that his client had passed away on November 16, 2019;
 - (b) That there having been no substitution as at November 17, 2020, the entire suit stands abated;



- (c) That a cursory glance at the amended plaint dated September 1, 2021 reveals no apparent cause of action and the suit is superfluous as against the 3rd defendant/applicant;
 - (d) That the suit is frivolous, vexatious and an abuse of the court process as the plaintiff has improperly enjoined the applicant; and
 - (e) That the suit is incurably defective having been filed beyond the statutory period of limitation.
3. John Njuguna Kihumba (the plaintiff) is opposed to the application. In his replying affidavit sworn on March 7, 2022 and filed herein on March 11, 2022, the plaintiff avers that the application as filed is legally defective for want of material regarding the alleged demise of the 1st defendant. The plaintiff asserts that the 3rd defendant has not demonstrated and/or proved that indeed the 1st defendant is deceased.
 4. I have carefully perused and considered both the application and the response thereto. The 3rd defendant herein urges the court to declare the suit herein as having abated and to strike out the same as against itself. It is the 3rd defendant's case that the 1st defendant passed away on November 16, 2021 and that the plaintiff has failed to substitute him to-date.
 5. On the other hand, the 3rd defendant asserts that it has been improperly enjoined as a party herein as the plaintiff makes no claim as against itself.
 6. While the plaintiff faulted the 3rd defendant's application on the basis that the 3rd defendant had failed to provide any evidence of the 1st defendant's death, the plaintiff did not make any reference to the 3rd defendant's contention that it had been improperly enjoined in this suit.
 7. As it were, by supplementary affidavits sworn by the 3rd defendant's counsel filed herein on June 6, 2022 and the 1st defendant's counsel filed on June 7, 2022, they both attached a certificate of death indicating that the 1st defendant – Hussein Hassan Husein indeed passed away on November 16, 2019 at Garissa.
 8. In respect of the death of a party to a suit, order 24 of the [Civil Procedure Rules](#) provides as follows:

“ 24.

1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
2. ...
3.
 - (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 made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the



defendant , 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.”

9. In the matter before me both the 1st and the 3rd defendant have presented clear evidence of the death of the 1st defendant which as per the certificate of death exhibited as evidence occurred on November 16, 2019. That would mean that by the time this application was filed the suit had clearly abated as the 1st defendant had died some two years earlier and was yet to be substituted.
10. In his plaint as further amended on September 7, 2021, the plaintiff urged the court to cancel the title deed for the suit property in the name of the 1st defendant and to have the same reverted to himself. He also prays for general damages for trespass and conversion of the suit properties. Other than the mention in passing at paragraph 11 of the further amended plaint to the effect that the 3rd defendant County Government wrote a letter intimating that there was no agreement between the 1st defendant and the plaintiff's father in respect of the suit land, there was no other claim or prayer made by the plaintiff as against the 3rd defendant.
11. Arising from the foregoing it was clear that those pleadings do not reveal any reasonable cause of action as against the 3rd defendant to warrant its being enjoined as the 3rd defendant herein.
12. The upshot is that I find merit in the motion dated December 1, 2021 and I allow the same.
13. As the 3rd defendant did not pray for costs, each party shall bear their own costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 3RD DAY OF NOVEMBER, 2022.

In the presence of:

Mr. Wamahiu for the 1st Defendant/Respondent

Ms Kimunyu holding brief for Ndichu for the Applicant

No appearance for Warutere for the Plaintiff

Court assistant - Kendi

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J. O. OLOLA

JUDGE

