



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 725 OF 2014

MONICA MUTHONI MWANGI.....PLAINTIFF

=VERSUS=

NZAU MWALUMU NZAU.....1ST DEFENDANT

FRANCIS KIRIMA M'IKUNYUA.....2ND DEFENDANT

ZIMMERMAN SETTLEMENT SCHEME.....3RD DEFENDANT

JOHN WAINAINA.....4TH DEFENDANT

JOHN GATHIMU.....5TH DEFENDANT

RULING

1. When this matter came up for hearing, the advocate for the Plaintiff notified the court that the 1st defendant is deceased. The counsel for the plaintiff then made an oral application for substitution of the deceased.
2. At the same time the counsel for the 2nd, 3rd and 4th defendants made an application to stay the proceedings.
3. The Court considered the two oral applications made by both Counsels. The law is clear on the procedure to be followed in substitution of a deceased party to a suit. Order 24 Rule 4 has provided clear directions on this matter.
4. Order 24 Rule 4 of the Civil Procedure Rules (formerly Order XXIII Rule 4) for the substitution of the Legal Representatives of a deceased defendant provides as follows:

Procedure in case of death of one of several defendants or of sole defendant.

(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 sub rule (1), the suit shall abate as against the deceased defendant.

5. The power of the Court under Order 24 Rule 4 is to cause, an application made in that behalf, “*the Legal Representatives of the deceased defendant to be made a party....*”

6. The person to join as a party to the suit must be “*the Legal Representatives of the deceased defendant*”. It has long been held as the correct position since the Court of Appeal decision in *Trouistik Union International & Anor. v. Jane Mbeyu & Anor Civil Appeal No. 145 of*

1990 [1993] KLR 230 that the Legal Representative of the deceased is the person appointed as such by a Succession Court in accordance of the Law of Succession Act.

7 With respect, the power of the Court under Order 24 Rule 5 of the Civil Procedure Rules to determine a question to whether any person is or is not the Legal Representative of a deceased plaintiff or defendant must be exercised in accordance with the law and the Court cannot be at liberty to appoint a person who is not a Legal Representative in accordance of the Law of Succession Act.

8 Notably there is no conflict between the position of the Law of Succession Act as regards to personal representative and the provision of the procedure for substitution of the Legal Representative upon the death of party to a suit. It only means that the person appointed to substitute the deceased plaintiff or defendant must be legally appointed "*Legal Representative of the deceased*", who can only so legally appointed when appointed in accordance with the law enacted for that purpose under the Law of Succession Act.

9. On the second oral application for stay of proceedings, **Order 42, Rule 6(1)** of the Civil Procedure Rules enables the courts to stay proceedings subject to Rule 6(2), under which no order for stay of execution shall be made unless: the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without undue delay.

10. Counsel for the 2nd, 3rd and 4th defendants made an oral application in court for stay of proceedings noting that there is another matter in another court whose subject matter is what is before this Honorable Court. There was no evidence presented whether by citing the case number or even stating the court before whom this matter is. Even if there was the matter this Honorable Court has not been served with any Order staying the current proceedings before this court. Any time a court is called upon to stay proceedings one has to consider whether this is in the interest of justice and weigh the pros and the cons. One of the factors to consider should relate to the need for expeditious disposal of the case, secondly, the scarcity and optimum utilization of judicial time. And thirdly, whether the application has been brought expeditiously.

11. Further the procedure of stay of proceedings is also elaborated in law the procedure is that a formal application must be made to the court. A grant of stay of proceedings is discretionary and the court must consider whether this will be in the interest of justice.

12. The Court has inherent powers under 3A of the Civil Procedure Act to grant orders of stay of proceedings to ensure justice is done to the parties in the suit. Article 159 of the Constitution is very clear that Courts must not focus too much on procedural technicalities the Constitution mandates the Court to make such orders as shall ensure that justice is served to all.

13. In **Kenya Wildlife Service vs James Mutembei 2019 eKLR** it was noted that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. This goes against Article 159(2)(a)(b)(c) and (d) of the Constitution.

14. In the case of **Chairman Co-operative Tribunal & 8 Others Ex-parte Management Committee Konza Ranching & Farming Co-operative Society Ltd (2014) EKLR**, the Honourable Justice Odunga referred to the words of his brother Judge the Honourable Justice Kimaru in the precedent setting case of **Stephen Somek Takwenyi & Another -Vs- David Mbutia Githare & 2 Others Nairobi (Milimani) Hcc No. 363 Of 2009**, where it was stated thus on the present issue:-

“..... The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilized legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused.

An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract res judicata rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it.”

15. Finally, one has to consider if there is an arguable case and that if the stay of proceedings is not granted the ELC No. 346 will be rendered nugatory.

16. On the issue of service of pleadings to the plaintiff, though this is unacceptable practice, the court however is persuaded by the fact that the role of the judiciary is to advance the cause of justice. A party should therefore not be condemned unheard. Untimely service of pleadings causes undue delays leading to unnecessary prolonging of court matters, the parties must always be given opportunity to be heard despite the prolonged processes that result from late service of pleading.

Orders

14. Accordingly, for the reasons set out above, the Court makes the following Orders:

i) As in accordance with Order 24 Rule 4 (2) of the Civil Procedure Rules "*any person so made a party may make any defence appropriate to this character as Legal Representative of the deceased defendant*" "*any validly appointed Legal Representatives may file a defence and proceed with the suit as he may be advised.*

ii) For this reason, the matter shall in exercise of the power of the Court under section 78 (b) of the Civil Procedure Act be remanded

for hearing of the suit until the Legal Representative files a defence

iii) Needless to the state the Plaintiff is at liberty to move the Court for substitution of lawful Legal Representatives and for the deceased defendant in accordance with Order 24 Rule 7 (2) of the Civil Procedure Rules.

iv) I disallow the application for stay of proceedings

DATED, SIGNED AND DELIVERED THROUGH VIRTUAL COURT AT NAIROBI THIS 30TH SEPTEMBER, 2021.

.....

JACQUELINE MOGENI

JUDGE

In the presence of:-

Mr. Ondima for the Plaintiff

Mr. Kenyatta for the 2nd, 3rd and 4th Defendants

Vincent - Court Assistant