



Gathambo v HFC Limited & 2 others; Kuria (Suing as Personal Representative of the Estate of Geoffrey Kuria Githambo) (Applicant) (Commercial Case 34 of 2006) [2023] KEHC 24596 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 24596 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 34 OF 2006
MN MWANGI, J
SEPTEMBER 22, 2023

BETWEEN

GEOFFREY KURIA GATHAMBO PLAINTIFF

AND

HFC LIMITED 1ST DEFENDANT

REUBEN WARUI MWANGI 2ND DEFENDANT

MERCY WANJIRU WARUI 3RD DEFENDANT

AND

MARY NDUTA KURIA (SUING AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GEOFFREY KURIA GITHAMBO) APPLICANT

RULING

1. This is a ruling for two applications. The first application is a Notice of Motion dated 28th October, 2022 filed by the 2nd and 3rd defendants under the provisions of Order 17 Rule 2(5), Order 2 Rule 15(1) (b), (c) & (d) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following orders –
 - i. The document titled “Notice of Change of Advocates” by the plaintiff dated 16th September, 2022 be and is hereby struck out; and
 - ii. The costs of the application be borne by the plaintiff/respondent.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Reuben Warui Mwangi, the 2nd defendant herein. In opposition thereto,



Alala C. Sigoma, learned Counsel for the plaintiff filed a replying affidavit sworn on 23rd November, 2022.

3. The second application is a Notice of Motion dated 23rd November, 2022 filed by the plaintiff pursuant to the provisions of Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya, Order 17 Rule 2(6), Order 24 Rules 1, 3(1) & (2) and 7(2) of the Civil Procedure Rules, 2010 as amended by the Civil Procedure (Amendment) Rules 2020. The intended substitute plaintiff seeks the following orders–
 1. That this Honourable Court be pleased to revive the suit herein;
 2. That upon granting order (1) above, this Honourable Court be pleased to extend the time for an application to enjoin the legal representative of the deceased plaintiff herein to be made a party to this suit and upon doing so, consider this application filed within the time so extended;
 3. That upon extending time as prayed in (2) above, this Honourable Court be pleased to cause the applicant as the legal representative of the deceased plaintiff herein to be made a party to this suit in substitution of the deceased plaintiff; and
 4. That costs of this application be provided for.
4. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mary Nduta Kuria, the intended substitute. In opposition thereto, the 2nd and 3rd defendants filed a replying affidavit sworn on 8th March, 2023, by Reuben Warui Mwangi, the 2nd defendant herein.
5. Directions were given that both applications would be canvassed by way of written submissions. The 2nd and 3rd defendants' submissions were filed on 18th May, 2023 by the law firm of Walker Kontos Advocates, whereas the intended substitute's submissions were filed on 30th May, 2023 by the law firm of Njoroge O. Kimani and Company Advocates.
6. Mr. Otieno, learned Counsel for the 2nd and 3rd defendants relied on the case of Kihara v Thumbi [2022] KE ELC 3333 (KLR) and submitted that between 23rd June, 2020 and 16th September, 2022, no Court activity was carried out by any of the parties in this matter, therefore pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, this matter stood dismissed as at 23rd June, 2022 by operation of the law hence a notice of change of Advocates could not be filed. He cited the case of Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR and stated that the said notice of change of Advocates was filed long after the plaintiff was deceased, which means that the said notice was filed without authority since the deceased person could not have issued instructions.
7. He referred to the provisions of Order 24 Rule 3 of the Civil Procedure Rules and the Court of Appeal decision in Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through the Attorney General) & 5 others [2015] eKLR and stated that since the plaintiff herein passed away on 23rd March, 2021, this suit abated on 23rd March, 2022, one year after the plaintiff's death. He submitted that for the said reason, the purported notice of change of Advocates could not be filed in a suit that had abated, before revival of the said suit.
8. Mr. Otieno relied on the case of Anthony Kaburi Kario & 2 others v Ragati Tea Factory Company Limited & 10 others [2014] eKLR and stated that the plaintiff's application for revival and substitution was filed approximately eight (8) months after this suit abated which delay was inordinate, meaning that the intended substitute is guilty of laches, thus the application dated 23rd November, 2022 should be dismissed with costs.



9. He submitted that Order 24 Rules 3 & 7 of the Civil Procedure Rules require an applicant to demonstrate good reason and sufficient cause as to why an application such as the one dated 23rd November, 2022 should be allowed. Counsel cited the case of Kipkoech Korir & another v Shiyotor Holdings Limited [2021] eKLR and stated that the intended substitute had given two main reasons for the delay in bringing the application dated 23rd November, 2022. The first reason being that she was not aware of this matter and she did not know the firm of Advocates that was on record for her deceased husband. Mr. Otieno contended that the reasons given are not only false but are an act of perjury since in a separate petition to this Court dated 23rd September, 2021, being HCFP&A No. E1786 of 2021; In the estate of Geoffrey Kuria Githambo, the intended substitute applied for grant of letters of administration ad colligenda bona in order to settle legal fees in Civil Case No. 34 of 2006. Secondly, she alleged that the delay in filing the application dated 23rd November, 2022 was occasioned by a delay in obtaining grant of letters of administration ad litem which was issued on 4th March, 2022. Mr. Otieno however stated that the period between 23rd March, 2021 and 4th March, 2022 was less than one year, given that the plaintiff passed away on 23rd March, 2021. He submitted that based on the foregoing, the intended substitute had not demonstrated sufficient reason why her application for substitution should be allowed.
10. Mr. Sigoma, learned Counsel for the plaintiff submitted that the application dated 28th October, 2022 has no legal basis and effect since it was filed against a deceased plaintiff and abatement or dismissal of a case does not bar the filing of a document in Court. He further submitted that the said application has been filed pursuant to the wrong provisions of the law. He stated that the plaintiff passed away on 23rd March, 2021, and assuming that the last action in this suit was on 23rd June, 2020, two years had not elapsed by the time the plaintiff died, thus an argument pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, cannot be maintained as time stops running upon the death of the plaintiff. In addition, he stated that Order 17 Rule 2(5) of the Civil Procedure Rules, 2010 does not provide a basis to strike out the plaintiff's notice of change of Advocates or any other document for that matter.
11. It was stated by Counsel that Order 2 of the Civil Procedure Rules, 2010, deals with striking out of pleadings. He relied on the case of Vijay Kumar Davalji Kanji Gohil v Suresh Mohanlal Fatania & 8 others [2006] eKLR, where the Court stated that pleadings are the documents that originate the action or the claim and those that respond to such a claim. He stated that the notice of change of Advocates filed by the plaintiff's Advocates on record cannot be regarded as a pleading hence it cannot be struck out under Order 2 of the Civil Procedure Rules, 2010. Mr. Sigoma contended that even if this suit was dismissed pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, the intended substitute would still be allowed under Rule 2(6) of the said provisions to make an application to this Court to reinstate the suit; and she would be entitled to do so by instructing a different Advocate pursuant to the provisions of Order 9 Rule 5 of the Civil Procedure Rules, 2010.
12. Mr. Sigoma submitted that following the death of the plaintiff, this suit abated under Order 24 Rule 3(2) of the Civil Procedure Rules, 2010, but Order 24 Rule 3(2) also provides that the Court may extend time to file the application contemplated under Order 24 Rule 3(1) of the Civil Procedure Rules, 2010 for good reasons. He cited the provisions of Order 24 Rule 7(2) of the said Rules and submitted that this Court should reinstate this suit because after the plaintiff passed away, it took time for the intended substitute to discover that this suit had survived him. Counsel indicated that at the time of his death, the plaintiff was represented in this matter by the firm of Otieno, Okeyo & Co. Advocates, a fact which the intended substitute was not privy to, immediately after the plaintiff's death.



13. Mr. Sigoma submitted that the grant of letters ad litem was issued on 4th March, 2022, by which time the period within which to apply for substitution of the plaintiff had already expired. It was stated by Counsel that based on the foregoing, it is evident that the delay in filing an application for substitution was not deliberate. He contended that the defendants had not demonstrated that they would suffer any prejudice in the event that the application dated 23rd November, 2022 is allowed. He opined that failure to comply with the rules of procedure should not be the basis on which a litigant should be denied substantial justice, especially where the delay in complying is not inordinate as is in this case. Mr. Sigoma relied on the case of Timothy Limo & 2 others v Joel Kinyanjui Muchiri (Suing as the legal representative of the late Jacob Muchiri Kinyanjui) [2020] eKLR.

Analysis And Determination.

14. I have considered the two applications herein, the affidavits filed in support thereof, the replying affidavits in opposition, as well as the written submissions by Counsel for the parties. The issues that arise for determination are –
- i. Whether the Notice of Change of Advocates dated 16th September, 2022 should be struck out; and
 - ii. If the suit should be revived and the intended substitute be joined to this suit as the plaintiff.
15. In the affidavit filed by the 2nd & 3rd defendants in support of the application dated 28th October, 2022, they deposed that their Advocates on record were served with a notice of change of Advocates and a mention notice on 20th September, 2022. That prior to the filing and service of the said notice of change of Advocates and mention notice, the last activity in this matter was on 23rd June, 2020, when their Advocates on record filed and served their statement of defence.
16. The 2nd & 3rd defendants averred that no activity had taken place between 23rd June, 2020 and 16th September, 2022, which period is equivalent to 2 years, 2 months and 25 days and as such, this suit stood dismissed as at 23rd June, 2020 by operation of the law, pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010. The said defendants further averred that in view of the foregoing, the purported notice of change of Advocates is a nullity and ought to be struck out.
17. In the replying affidavit by the learned Counsel for the intended substitute, he deposed that when they received instructions from the plaintiff's brother to take over the conduct of this matter, they mistakenly believed that he was the plaintiff and filed a notice of change of Advocates.
18. He averred that vide a letter dated 2nd November, 2022, he wrote to the plaintiff's former Advocates on record requesting them to release the file to them, but the said letter was received under protest noting that they had not been served with a notice of change of Advocates, and that the said error was immediately rectified with a copy of the said notice being sent to them.
19. It was stated by Counsel for the intended substitute that their letter dated 2nd November, 2022 elicited no response from the plaintiff's former Advocates on record thus prompting him to send another letter dated 3rd November, 2022, in which they made an urgent request for the plaintiff's file. Counsel stated that the said firm responded to the plaintiff's letter dated 3rd November, 2022 via e-mail and it was through the said response that they realized that the plaintiff was deceased by the time they filed a notice of change of Advocates.
20. Mr. Sigoma expressed the view that the notice of change of Advocates they filed is null and any step that they took in this cause based on it would have also become null, hence this Court has no reason for striking out the said notice of change of Advocates. He submitted that the dismissal of a matter



- does not bar a party from filing a document in the matter, and when a document is filed, it can only be challenged if it goes to the roots or touches on the cause of action underlying the suit, which is not the case with the filing of a notice of change of Advocates.
21. He stated that the plaintiff died on 23rd March, 2021 hence this suit abated on 23rd March, 2022 by virtue of Order 24 Rule 3(2) of the Civil Procedure Rules, 2010. He stated that the best the 2nd & 3rd defendants could have done was to make an application to be awarded costs, if any.
 22. The intended substitute in her application dated 23rd November, 2022 deposed that the plaintiff died on 23rd March, 2021 at Kenyatta University Teaching and Referral Hospital, and after his burial, she realized that this cause had survived him and she filed a petition for grant of letters of administration ad litem on 13th September, 2021, limited for purposes of proceeding with this suit, which was granted to her on 4th March, 2022. She deposed that by that time, the one-year period within which she was to file an application to be joined in this suit as the legal representative of the deceased plaintiff had already passed, with the consequence that the suit abated.
 23. The intended substitute averred that she had not yet known the Advocates who were on record for the deceased in this matter, thus as a family, they instructed their current Advocates on record to check on the status of the file, find out the Advocates on record and take over the matter.
 24. She further averred that the delay in making an application for substitution was not deliberate as the same was occasioned by the delay in obtaining a grant of letters of administration ad litem, which she needed in order to have the requisite locus standi to make the current application.
 25. It was stated by the intended substitute that allowing the application dated 23rd November, 2022 is crucial in terms of accessing and achieving substantive justice on behalf of the estate of the deceased plaintiff.
 26. The 2nd & 3rd defendants in their replying affidavit to the application dated 23rd November, 2022 deposed that given that the plaintiff passed away on 23rd March, 2021, the intended substitute had up to 23rd March, 2022 to file an application for substitution. That the period between 23rd March, 2021 and 4th March, 2022 was less than one year thus the intended substitute's allegations to the contrary are not only false but also an act of perjury.
 27. They averred that as a matter of fact, as at 4th March, 2022, the intended substitute had approximately 19 days within which to file an application for substitution. They asserted that the application dated 23rd November, 2022 is an afterthought having been filed one month after the 2nd and 3rd defendants filed the application dated 28th October, 2022, seeking to strike out the notice of change of Advocates filed by the intended substitute's Advocates on record.

Whether the Notice of Change of Advocates dated 16th September, 2022 should be struck out.

28. In the application dated 28th October, 2022, the 2nd & 3rd defendants seek to have the notice of change of Advocates dated 16th September, 2022 filed by the plaintiff's Advocates on record struck out on the ground that it was filed after this suit was dismissed by operation of the law pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010, and after the plaintiff's suit abated since the plaintiff passed away on 23rd March, 2021, and also on the ground that the said notice of change of Advocates was filed without authority since a deceased person could not have issued instructions.
29. The 2nd & 3rd defendants contended that prior to the filing of the notice of change of Advocates dated 16th September, 2022, the last activity in this matter was carried out on 23rd June, 2020 when their Advocates on record filed and served their statement of defence, a fact which is not disputed by the



plaintiff. They took the position that this suit stood dismissed by operation of the law as at 23rd June, 2022 pursuant to the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010.

30. Counsel for the intended substitute on the other hand stated that since the plaintiff passed away on 23rd March, 2021, this suit abated on 23rd March, 2022, hence the provisions of Order 17 Rule 2(5) of the Civil Procedure Rules, 2010 cannot apply.
31. He submitted that the notice of change of Advocates dated 16th September, 2022 is not a pleading thus it cannot be struck out pursuant to the provisions of Order 2 of the Civil Procedure Rules, 2010. He admitted that in view of the fact that this suit abated on 23rd March, 2022, the notice of change of Advocates is null. He argued that any step they have taken in the case based on the said notice of change of Advocates would have also become null, thus this Court has no reason for striking out the said notice.
32. It is not in dispute that the plaintiff passed away on 23rd March, 2021 and as at 23rd March, 2022, no application for his substitution had been filed as provided for under Order 24 Rule 3(1) of the Civil Procedure Rules, 2010, for consideration by the Court. Order 24 Rule 3 of the Civil Procedure Rules 2010 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;

Provided the court may, for good reason on application, extend the time.”

33. The Court of Appeal in the case of Said Sweilem Gheithan Saanum vs. Commissioner of Lands (being sued through the Attorney General) & 5 others (supra) explained the provisions of Order 24 of the Civil Procedure Rules as follows-

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which



flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

34. Based on foregoing cited decision and the provisions of Order 24 Rule 3 of the Civil Procedure Rules, this Court finds that this suit abated by operation of the law on 23rd March, 2022, hence the provisions of Order 17 Rule 2 of the Civil Procedure Rules, 2010, cited by Counsel for the 2nd and 3rd defendants do not apply in the circumstances of this case. I agree with Mr. Sigoma that abatement or dismissal of a suit for want of prosecution does not preclude a litigant from instructing another Advocate to file a notice of change of Advocates. This is because, in the event a party intends to instruct a different Advocate from the Advocate who was on record at the time the suit was dismissed or abated, to make an application for reinstatement of suit, the said Advocate will still be required to file and serve a notice of change of Advocates to be deemed to be properly on record.
35. The circumstances of this case are however peculiar since after the plaintiff passed away on 23rd March, 2021, no order for substitution was prayed for and granted within one year of his demise. As such, the suit abated by operation of the law. The notice of change of Advocates was filed on 16th September, 2022, when there was no suit in existence. The said notice of change of Advocates was therefore filed in a vacuum as the suit had not been reinstated by the Court. As a result, this Court finds that the notice of change of Advocates dated 16th September, 2022 is null and void as it was filed in a non-existent suit. Having found that the notice of change of Advocates filed on 16th September, 2022 is null and void, the said notice of change of Advocates is hereby struck out with costs to the 2nd and 3rd defendants.

If the suit should be revived and the intended substitute be joined to this suit as the plaintiff.

36. The intended substitute is seeking for an order of reinstatement of this suit since it abated on 23rd March, 2022, an order for extension of time within which to make an application for substitution and an order that she be made a party to this suit in substitution of the plaintiff. Reinstatement of suits that abate by operation of the law is provided for under Order 24 Rule 7(2) of the Civil Procedure Rules, 2010 which states 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.”

37. As explained earlier, this suit abated on 23rd March, 2022 and the notice of change of Advocates filed on 16th September, 2022, is null and void, having been filed in a vacuum. Having so found, it inevitably follows that the application dated 23rd November, 2022 filed on behalf of the intended substitute, was filed by a law firm that was not properly on record. The said application was therefore filed irregularly and the same cannot be considered on merits. The application dated 23rd November, 2022, is hereby struck out with costs to the 2nd and 3rd defendants.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

