



**Kikaya v Mango & 2 others (Civil Suit 51 of 1984)
[2023] KEHC 23205 (KLR) (Civ) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 51 OF 1984

CW MEOLI, J

OCTOBER 5, 2023

BETWEEN

PATRICK LUGATSI KIKAYA APPLICANT

AND

FRANCIS JUMA MANGO 1ST RESPONDENT

BENJAMIN SIKUKU OTEU 2ND RESPONDENT

GODFREY WANJALA RECHA 3RD RESPONDENT

RULING

1. William Kikaya (hereafter the deceased Plaintiff) filed the present suit against Mangoli Kingoli, Silvester Oteu Kongoli, Boniface Becha Kongoli, David Mukwana and Khama Kongoli (hereafter the 1st, 2nd, 3rd, 4th and 5th Defendants) by way of the plaint dated 31.12.1983, the subject of the dispute being the parcel of land known as E. Bukusu/S. Kanduyi/631 (the subject property).
2. In due course, the dispute was referred to arbitration, culminating in an arbitral award granting ownership of the subject property to the deceased Plaintiff. The arbitral award was read on 18.12.1986. Unfortunately, the deceased Plaintiff died before the arbitral award could be adopted as a judgment of the court. As a result, Patrick Lugatsi Kikaya (hereafter the Applicant) upon obtaining letters of administration ad litem, filed an application for substitution and which application was allowed by the court vide the orders made on 4.10.2022.
3. In the said orders, the court further noted that some of the Defendants (namely the 1st, 2nd and 3rd Defendants) are similarly deceased and therefore gave a mention date to obtain the status regarding the substitution of the deceased Defendants.



4. When the parties attended court on 28.2.2023 the court was notified that Francis Juma Mango, Benjamin Sikuku Oteu and Godfrey Wanjala Becha (hereafter the 1st, 2nd, and 3rd Respondents) had indicated that they would be representing the families of the deceased Defendants. In the meantime, the court was also made aware of the existence of an application dated 8.12.2022 previously filed by the Applicant and seeking to have the Respondents compelled to avail the requisite succession documents to enable the substitution process.
5. The said application was withdrawn by the Applicant on 28.2.2023 the court directing counsel for the Respondents to take appropriate steps in applying for substitution of the deceased Defendants. Subsequently, the Applicant moved the court by way of the instant Notice of Motion dated 6.3.2023 (the Motion) seeking an order to the effect that the Respondents be enjoined as Defendants in the suit. The Motion is expressed to be brought inter alia under Order 24, Rule 4 of the Civil Procedure Rules (CPR); and Sections 1A and 3A of the Civil Procedure Act (CPA).
6. The grounds on the face of the Motion are amplified in the supporting affidavit sworn by the Applicant, averring that the Respondents have not filed applications seeking substitution of some of the Defendants in the suit, who are now deceased. The Applicant averred that unless the order sought is granted, the Respondents will continue to frustrate the hearing of the suit, adding that the Respondents will not suffer any prejudice.
7. In opposing the Motion, the Respondents filed Grounds of Opposition dated 17.4.2023 containing the grounds hereunder:
 1. The Respondents have not been appointed as the administrators of the Estates of the deceased's and thus lack the legal capacity to be joined in the proceedings in the manner proposed in the application.
 2. The suit against the 1st, 2nd and 3rd Defendants abated by operation of the law on 10th February 1998, 29th July 1995 and 5th September 2006 and is therefore non-existent.
 3. The Plaintiff is guilty of laches and inordinate delay in bringing the application.
 4. The application is an abuse of the Court process.
 5. The said application should be dismissed with costs to the Respondents." sic.
8. The Motion was canvassed through oral arguments. In urging the court to allow the Motion, counsel for the Applicant argued inter alia that on 13.12.2022 the court granted the parties leave to apply for substitution of parties but that the Respondents did not comply with the said order. The advocate further argued that the matter has essentially concluded and what is pending is the reading of the arbitral award and hence the need to enjoin the Respondents as Defendants in the suit, in their capacity as sons of the deceased Defendants.
9. It was noted that the 4th and 5th Defendants who are still alive, support the Motion. Counsel for the Respondents largely echoed the Grounds of Opposition regarding abatement of the suit as against the 1st, 2nd and 3rd Defendants, now deceased, asserting that no letters of administration have been issued in favour of the Respondents and hence they cannot be enjoined in the suit. The court was therefore urged to dismiss the Motion with costs.
10. In rejoinder, the Applicant's counsel contended that given their participation in the proceedings at the time of reinstatement of the suit, the Respondents cannot be heard to reprobate. That the court is entitled to exercise its discretion by granting the orders sought, in the interest of justice. Counsel



further contended that no prejudice will be suffered by the Respondents since the matter has essentially concluded and all that remains is the reading of the arbitral award.

11. The court has considered the material canvassed in respect of the Motion. The events leading up to the instant Motion have been set out elsewhere in this ruling. Before delving into the merits, the court will first address the pertinent preliminary issue whether the suit has abated by operation of the law, upon the death of the 1st, 2nd and 3rd Defendants.
12. Based on the contents of the Limited Grant of Letters of Administration Ad Litem issued on 12.01.2017 and on record, it is apparent that the deceased Plaintiff herein died on 9.11.1988. Order 24, Rules 1 and 3 of the CPR stipulates that:

“Rule 1

The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

...

Rule 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 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.”

13. In the present case and as mentioned earlier, the substitution of the deceased Plaintiff with the Applicant was allowed pursuant to the Applicant’s earlier application. From a study of the pleadings on record, it is apparent that the nature of the dispute is tied to breach of trust/breach of contract in respect to the subject property. While it may be plausible that in the absence of any prompt application following the death of the deceased back in 1988, the suit abated pursuant to Order 24, Rule 3 (supra), the record shows that the suit was reinstated by the court on 1.7.2019 and has been alive since. Consequently, the court is not convinced that the arguments raised by the Respondents at this stage are sustainable.
14. The substantive order sought is the joinder of the Respondents as Defendants in the matter. Order 24, rule 4 Provides as follows:
 - (1) 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”.
15. Although Order 1 Rule 10 of the Civil Procedure Rules provides for the joinder of necessary parties, some pronouncements thereon may illuminate the issue of joinder of necessary parties. It was held as follows in *Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55:
- “A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown.
- Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”
16. In *Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR the court stated:
- “Again, the power given under the Rules is discretionary, which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings.
- Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”
17. Thus far there is no doubt that joinder of necessary parties as defendants is allowed in appropriate cases. The difficulty attendant to the present motion is that what is sought here is essentially the substitution of deceased Defendants. Order 24 Rule 4 (1) envisages the joinder or substitution of a legal representative of the estate of the deceased defendant in place of such deceased defendant.
18. The reasons presented by the Applicant to support the prayer for joinder are inter alia that the Respondents have not filed any application for substitution of the 1st, 2nd and 3rd Defendants,



- thereby frustrating the hearing and conclusion of the suit. The Applicant’s counsel added during oral arguments that what remains pending is the reading of the arbitral award. The record shows that the arbitral award was read in 1986.
19. On their part, the Respondents took the position, and quite correctly, that they lack the locus standi in the suit, in the absence of any letters of administration granting them authority to come into the suit on behalf of the deceased Defendants.
 20. Upon perusal of the record, the court noted that orders had previously been given for the parties to pursue their respective substitution applications upon obtaining the requisite documentation before the appropriate court for Court. It is apparent from the record that only the Applicant complied with the aforementioned order, but on all accounts the Respondents for whatever reason seem unwilling to take any steps in this regard to facilitate an application for substitution. However, nothing prevents the Applicant from identifying persons appointed as administrators of the estates of the deceased or moving the appropriate court to obtain orders in that regard.
 21. Citations against the apparent successors of the deceased Defendants could have been taken out under the *Law of Succession Act*, if they proved unwilling to apply for letters of administration. Moreover, paragraph 14 of the Fifth Schedule to the *Law of Succession Act* which states that:

“When it is necessary that the representative of a deceased person be made a party to a pending suit, and the executor or person entitled to administration is unable or unwilling to act, letters of administration may be granted to the nominee of a party in such suit, limited for the purpose of representing the deceased in the said suit, or in any other cause or suit which may commence in the same or in any other court between parties, or any other parties, touching the matter at issue in the cause or suit, and until a final decree shall be made therein, and caused into complete execution.”
 22. Under Section 54 of the *Law of Succession Act*, the court is empowered, according to the circumstances of each case, to limit any grant of representation which it has jurisdiction to make. In the case of *Agripina Mary Aya v Nyambura (widow of the deceased John Njuguna Kigaragari)* Nairobi Civil Appeal No. 11 of 1981 the Court of Appeal while considering the provisions of Section 38 of the Probate and Administration Act (now repealed) whose current equivalent is paragraph 14 of the Fifth Schedule to the *Law of Succession Act*, held that the widow who had been shown to have intermeddled with the estate of the deceased therein was by that reason an administrator de son tort and stated that the powers of the court under the section were wide.
 23. Superior Courts have demonstrated similar latitude in subsequent decisions, finding for instance that, where a party to proceedings relies on a type of limited grant which despite its title is worded in a manner that allows him to step into the place of a deceased person as his representative, the court will consider the said grant to be valid for the stated purpose. See *Morjaria v Abdallah* (1984) KLR 490; *Peter Owade Ogwang v Jared Obiero Ouya* (2014) eKLR; and *Martha Ndivo Otero (suing as the administrator and personal representative of the estate of Willy Patrick Ochieng Ndivo (deceased)) v Comecons Africa Ltd* [2015] eKLR.
 24. The Applicant must be understandably anxious to bring this suit to a conclusion, and possibly, the Respondents herein hope to forestall such eventuality by not taking out letters of administration or suppressing the identity of any existing legal representative of the deceased Defendants. Whatever the case, without evidence of compliance with the legal requirements under the *Law of Succession Act* in respect of the estates of the deceased Defendants, there appears to be no legal basis or grounds to warrant joinder of the Respondents as Defendants in the matter.



25. Although this is an extremely old matter relating to land, it seems to me that the Applicant by the instant motion has put the cart before the horse, so to speak. In the interest of justice, and considering the nature of the dispute at hand, the Court will order that the application dated 6.3.2023 be struck out for being incompetent. This means that the Applicant shall be at liberty upon complying accordingly, to move the Court with an appropriate substitution application in respect of the deceased Defendants. In these circumstances, parties shall bear their own costs.

DELIVERED AND SIGNED AT NAIROBI ON THIS 5TH DAY OF OCTOBER 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Musya

For the Respondents: Mr Okelo

