



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CIVIL SUIT NO. E024 OF 2020

**GERALDINE GUDI NZIOKI (Suing as Administrator of the
estate of FREDRICK MWOSA NZIOKI)**
PLAINTIFF

VERSUS

**LUKENYA RANCHING & FARMING
CO-OPERATIVE
SOCIETY.....1ST**
DEFENDANT

**COSMAS MUALUKO & DAMIAN MUSYOKA
(defending in their capacity as the Administrators of the
Estate THERESIA NDUKU MUALUKO (Deceased).....2ND**
DEFENDANT

JAMES MUTISYA MUTUKU.....3RD
DEFENDANT **ALI**

MOHAMED.....4TH
DEFENDANT

RULING

1. The subject of this ruling is the notice of motion filed by the 3rd defendant dated 24/01/2025, in which he has moved the court pursuant to the provisions of **Orders 2 Rule 15(1)(d)** and **24 Rule 7(1)** of the **Civil Procedure Rules** and all other enabling provision of the law, and he prays as follows: -

a. That the plaintiff's suit against the 3rd defendant be struck out for being an abuse of the process of the court.

b. That the plaintiff be ordered to pay costs of this suit to the 3rd defendant.

c. That the plaintiff be ordered to pay the costs of this motion to the 3rd defendant.

2. The motion is premised on the grounds listed on its face and the supporting affidavit of the 3rd defendant, sworn on the date of this instant. In essence, he states that the dispute originally arose in **Nairobi Cooperative Tribunal Case No. 195 of 2008 between Frederick Mwosa Nzioki v. Lukenya Ranching & Farming Cooperative Society and Theresia Nduku Mualuko (“previous case”)**, with the same land subject to both cases, and he describes the land as **title no. Mavoko Town Block 3/3155, previously known as plot no. 483 Lukenya Ranching & Farming Cooperative Society Limited (“suit property”)**. He states

that the plaintiff in the current suit is the administrator of Frederick Mwosa Nzioki's estate, who was a claimant in the previous case.

3. He continues to state that at the same time, the defendants were all parties in the previous case, with the 1st defendant as a 1st respondent, the deceased 2nd defendant as a 2nd respondent, and the 3rd defendant as an interested party. He further maintains that the cause of action is the same in both cases and that the previous case was deemed abated on 4/12/2023. However, instead of pursuing a substitution application dated 06/06/2019 that was pending before the Nairobi Cooperative Tribunal (**"NCT"**), the plaintiff opted to file this suit, which he argues constitutes an abuse of court process.
4. On service, the deceased plaintiff's administratrix, Geraldine Gudi Nzioki, strenuously opposed the motion by her lengthy replying affidavit, sworn on 10/03/2025, where she chiefly states that the application at hand is clearly frivolous and represents a blatant abuse of the court's resources. She maintains that the deceased plaintiff rightfully held beneficial ownership of the suit property, which he inherited from his late mother. The asserts that on 6/06/2008, he initiated a suit in the NCT seeking a declaration of ownership and a permanent injunction, but this suit was ultimately dismissed on 4/12/2023.

5. Further, she states that crucially, she was never a party to that claim, and her substitution was never executed, rendering the dismissal legally ineffective against her. She avers that following the confirmation of her grant, she filed this suit to safeguard against any unlawful transfers of the suit property. She firmly asserts that she has properly invoked the jurisdiction of this honourable court. Moreover, she argues that the attempt by the 3rd defendant to dismiss this suit at a preliminary stage not only undermines the principles of justice but also seeks to restrict the plaintiff's right to access the courts.

6. Additionally, she maintains that if the defendants perceive the case as lacking merit, the appropriate course of action would be to submit a substantive defence, allowing the court to adjudicate the matter through due process. She further maintains that it is vital to recognise that the disputes in this case are substantially different from the previous case. Moreover, she pleads with the court to dismiss the motion.

7. Following the court's directions, various parties presented their submissions on the motion, with **Ms Nduva Kitonga & Co. Advocates** for the 3rd defendant filing theirs dated 2/4/2025, and **Ms CNK Advocates LLP** for the plaintiff submitting theirs date 23/05/2025. The court has considered these submissions and the arguments contained within, alongside the relevant legal provisions and judicial precedents cited, which will be considered in this court's analysis and decision. **Mr Mutua,**

counsel for the 2nd defendant, associated himself with the 3rd defendant, whereas the 1st defendant, despite being served, did not participate in these proceedings.

8. Consequently, after carefully examining the motion, its grounds, affidavits, and submissions, the key issues for determination are: a) **whether, by abatement of the previous case, it is permissible for the plaintiff to file the current suit.**

9. In addressing this issue, it is essential to set out the relevant legal provisions and prevailing judicial precedents. Respecting this, when filing the current motion, the 3rd defendant appropriately invoked this court's jurisdiction pursuant to the provisions of **Orders 2 Rule 15(1)(d)** and **24 Rule 7(1)** of the **Civil Procedure Rules**, with the former granting authority to this court to strike out suits for being an abuse of the court process, and the latter provision explicitly stating that: -

“Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.”

10. In Kenya, numerous judicial pronouncements have been issued regarding the filing of new suits in matters that had previously abated, and this court defers to these decisions, which it highlights as follows: -

In **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] KECA 544 (KLR)**, the Court of Appeal's binding decision stated: -

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented.”

A similar position was taken in the persuasive decision of **Laban Masinjila & 2 others v Joshua Andala Masinjila & 2 others [2021] KEELC 319 (KLR)**, which has been relied upon by the 3rd defendant. In this case, the court stated: -

“The effect of abatement of a suit is that it brings proceedings against the deceased party to a close in the same way that a judgment would. The finality is such that in terms of Order 24 Rule 7 (1) of the Civil Procedure Rules, no fresh suit can be brought on the same cause of action.”

11. In addressing this matter, the administratrix has attempted to dissociate herself from the previous case; however, such an argument cannot assist her, as she is the administratrix of the deceased plaintiff's estate, who was a claimant in the previous case. In the previous case, the deceased plaintiff sued not only

for his personal benefit but also on behalf of all interested parties, including his family members, notably his wife, the administratrix. In any event, she represents his estate in the current proceedings.

12. Besides, having examined the various documents submitted by the parties, including the amended complaint dated 5/12/2023, it becomes clear that all the parties involved in the two disputes are the same and have acted either in their personal capacities or through their legal representatives, except for the 4th defendant. However, the amended complaint indicates that no adverse facts have been alleged against him, and it appears that the deceased plaintiff herein conjured him for the purpose of avoiding being cited for abuse of court process. As evidenced by the claim in the previous case and this suit, the cause of action is identical.
13. Undisputed documents show that the administratrix filed a notice of motion before the NCT on 6/06/2019 for substitution of the deceased plaintiff, and she was allowed to pursue it, which she did not do. This led to the order made on 4/06/2023, stating that the administratrix, having been granted time to substitute the deceased and having failed to do so despite the passage of time, the matter be marked as abated. This order by the NCT was never made in vain.
14. Guided by the law and judicial precedents, it is clear to this court's mind that abatement definitively resolves disputes and

causes of action in accordance with **Order 24 Rule 7(1)** of the **Civil Procedure Rules**, and no new suit can be instituted on the same cause of action-the admission of such a suit before this court would be a nullity. Consequently, the only available recourse for the administratrix is to seek an extension of time, as well as the reinstatement or revival of the abated suit before the NCT under the legal framework of **Order 24** of the **Civil Procedure Rules**, which will then exercise its judicious discretion. Therefore, this court finds that the plaintiff's claim is an abuse of the court process and should be struck out.

15. Ultimately, based on the above reasoning and findings, this court finds the notice of motion dated 24/01/2025 meritorious and accordingly allows it. As is well-established law, costs follow the event, and hence, costs of the motion are awarded to the 3rd defendant. Accordingly, the final disposal orders issued are as follows: -

a. That the plaintiff's suit is hereby struck out.

b. That the costs of the suit are awarded to any defendant who had entered an appearance.

c. The costs of the notice of motion dated 24/01/2025 are awarded to the 3rd defendant.

Orders accordingly.

Delivered and Dated at Machakos this 8th day of December, 2025.

**HON. A. Y. KOROSS
JUDGE
8.12.2025**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Ms Kanja Court Assistant.

Mr Otto Nduva holding brief for Mr. Kitonga for 3rd defendant.

Mr. Torotwa for plaintiff.

Miss Mwanzia holding brief for Mr. Mutua for 2nd defendant.