Ruiru v Kionge & another (Environment and Land Case 76 of 2013) [2025] KEELC 5423 (KLR) (16 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5423 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE 76 OF 2013

CK NZILI, J

JULY 16, 2025

BETWEEN

JACKSON RUIRU ..... PLAINTIFF

AND

JOSEPH KIONGE ..... 1ST DEFENDANT

ROSE WAMBUI KINYANJUI ..... 2ND DEFENDANT

RULING

1. The court is asked by the applicant, to set aside orders issued on 6/11/2024; grant leave to respond to the application dated 11/6/2024; hear the two applications contemporaneously; strike out the suit in limine, for it abated against the original defendants on 11/8/2018 and 14/10/2021, respectively, by operation of law and lastly; strike out the suit for want of taking out and serving of summons to enter appearance.

2. The applicant deposes that the setting aside of the orders was made without due notice or hearing. That the suit was initially instituted against Edwin Chege Mburu and Mary Wambui Kinyanjui as the 1st and 2nd defendants, who passed on, on 11/8/2017 and 14/10/2020, respectively, hence the suit abated by operation of the law. The applicant deposes that since there were no proper steps taken to revive the suit, it abated and that any subsequent actions have been procedurally and substantially defective.

3. The applicant deposes that the respondent irregularly sought and obtained orders for the revival of the suit without notifying or serving her, yet she is being treated as a defendant in an abated suit, which is legally untenable and a fundamental breach of natural justice. The applicant deposes that the advocate on record for the original defendants ceased acting upon their demise. That no proper substitution was made, yet the respondent continued engaging the said advocate creating an ambiguity in legal representation that led to procedural irregularities. She therefore asks the court to correct the

irregularities, otherwise, the law firm did not have any mandate to represent or receive court processes on her behalf.

4. Further, the applicant deposes that the record shows that the respondent did not take fresh summons or serve the same on either of the defendants. The applicant deposes that the suit proceeded against the original defendants, they were not represented in their capacity as the named defendants and did not participate in the proceedings and in this case as the new defendants, she has a right to defend herself after being served with summons to enter appearance and be accorded an opportunity to participate in the proceedings.

5. The applicant deposes that she was never served with summons after the plaint was amended, in total violation of Order 5 Rule 1(3) of the Civil Procedure Rules, besides other anomalies, such as not having been served with the application for the revival of the suit, the amended plaint, all which amount to evasion of due process and violation of Article 50 of the *Constitution*. The applicant deposes that had she been allowed to be heard on the application for the revival of a suit that had abated more than 6 years ago, she would have demonstrated that there was inordinate delay, no reasonable cause of action existed against her and the duplicity would embarrass the court, since there was a succession cause before the High Court Kitale.

6. The applicant deposes that the respondent's claim is faulted on an alleged transaction involving a party deprived of legal authority over the property, rendering the suit devoid of merits against her as the initial defendants were not the registered owners of the land, now subject to succession proceedings that have been concluded and the property distributed in Kitale High Court Succession Cause No. 17 of 2002, where the respondent also filed an application but is now forum shopping.

7. The application is opposed by a replying affidavit sworn by Jackson Ruiru on 13/6/2025.

8. It is deposed that the law firm of Karanigrey Advocates responded to the current defendants. It is deposed that when the 1st defendant passed on due to inaction of his estate, citation proceedings were filed on 9/9/2019 as per annexure JR-1, were heard, leading to an order attached as JR-2, whereupon the citor filed and obtained grant of letters ad litem attached as JR-3 and 4. The respondent deposes that based on the letters of administration, they applied for substitution as seen in the annexure marked as JR-5.

9. Again, it is deposed that after the initial 2nd defendant passed on, no member of the family was willing to take out letters of administration, leading to successful citation proceedings and later succession proceedings as per annexures marked JR-6, 7, 8, and 9. Based on the grant of letters of administration, the respondent deposes that he applied for the substitution of both defendants by an application dated 13/6/2023 annexed as JR-10, which, before it was heard, the 2nd defendant applied for revocation of the said grant as per annexure JR-11, but her application was allowed on 6/11/2024. The respondent deposes that given the history above, it then took a long time to seek the revival of the suit and also to substitute; otherwise, the applicant should have appealed against the said order.

10. Further, the respondent deposes that the law does not provide for service of fresh summons on a substituted party. The respondent deposes that the applicant was given adequate opportunity to be heard, but chose not to and hence cannot claim otherwise.

11. The issues calling for my determination are:

    a. If the applicant is entitled to leave to file a response to the application dated 11/6/2024.

    b. If the court should review the order issued on 3rd November 2024.

c. If the applicant was condemned unheard and against the rules of natural justice.

12. The applicant has asked the court to grant leave to respond to the application dated 11/6/2024, from the record it appears to have been compromised by the consent of Mr. Karani, advocate acting for the former defendants. The application sought to join Rose Wambui Kinyanjui and Joseph Kionge as defendants in the suit following the death of Edwin Chege Mburu and Mary Wambui Kinyanjui, the former defendants, on 11/8/2017 and 14/10/2021. The basis of the application was that a grant of letters of administration had been belatedly issued to the two proposed defendants on 11/4/2024, annexed as JR-2. The applicant had in paragraph 10 of the affidavit sought the amendment of the plaint to reflect the changes.

13. The applicant takes the view that she ought to have been served with the application in the first instance, she was condemned unheard and had she been given an opportunity, she could have pointed out to the court that the suit had already abated by operation of law, 6 years before it was sought to be revived. Equally, the applicant deposes that there was no service of summons to enter appearance extracted and served upon the new defendants to the suit. Further, the applicant avers that the advocate who purported to represent the two new parties to the suit had no authority to represent her and or receive court processes on her behalf.

14. The court record shows that by an application dated 19/6/2020, the plaintiff sought to join John Maina Machiri as a substitute for the 1st defendant and to have the suit revived. The application was served upon the applicant herein, as per an affidavit of Archibald Wekesa Nyukuri, sworn on 21/8/2020.

15. In the application dated 13/6/2023, the court had been asked to join the two defendants, revive the suit and for the plaint to be amended to reflect the substitution of the defendants.

16. The reason for the delay had been explained in the supporting affidavit dated 13/6/2023, by attaching JR-1, JR-2, and JR-3 to demonstrate how the succession proceedings had led to the abatement of the suit.

17. The applicant avers that she had not given any instructions to any advocate to represent them as the new defendants. In the notice of motion dated 5/3/2023, the former lawyer swore on oath explaining that the new defendants had refused, neglected and or ignored his phone calls, messages and or to give him adequate instructions. In the said affidavit at paragraphs *2* and *12*, the lawyer gave a history of his instructions to handle the matter even after the applicant's mother passed on. It is the same lawyer who consented to the revival of the suit on 30/11/2024 and for the substitution.

18. The court record shows that the court on 6/2/2023 and 22/2/2023, noted that the suit had abated. Mr. Karani advocate represented the estate on 22/2/2023, 17/5/2023, 28/9/2023, 1/2/2024, 20/5/2024, 11/6/2024, 17/7/2024 and 3/10/2024, when the application was allowed by consent. Equally, Mr. Karani advocate appeared on 16/12/2024 and by consent took over the hearing from where it had stopped, that is defence hearing on 5/3/2025.

19. The applicant in paragraph 5 of the supporting affidavit blames the plaintiff's counsel for engaging Mr. Karani advocate, hence creating ambiguity on legal representation. From the court record and the affidavit on oath by Mr. Karani advocate, I am unable to accept the explanation by the applicant, that counsel had no instructions to represent her.

20. It is Mr. Karani advocate, who, on many occasions, told the court that he was also in the succession causes, where he was representing the beneficiaries to the estate. A consent order is like a contract. It has a contractual effect as held in Flora N. Wasike -vs- Destino Wamboko [1988] eKLR. A consent

order can only be set aside on such grounds as would justify setting aside a contract. In Charles Muchiri Mainas -vs- Felix Ole Nkaru Civil Suit No. 6623 of 1992, the court held that such freedom to contract is so entrenched that it cannot be shaken by the mistakes of lawyers on the law, or negligence, collusion. Setting aside of a contract based on a mistake of fact, fraud, or coercion. See KCB Ltd -vs- Specialized Engineering Co. Ltd [1982] KLR 485. An advocate has an implied general authority to compromise and settle an action.

21. In Geoffrey M. Asanyo & Others -vs- Attorney General [2018] eKLR, the court observed that the grounds of setting aside a consent allegedly entered through coercion, mal-representation, or fraud had not been argued or established. The burden, therefore, was on the applicant to demonstrate that there was coercion, fraud, or mistake and on non-disclosure of material facts when the suit was alleged revived. See Board of Trustees National Social Security Fund -vs- Micheal Mwalo [2015] eKLR

22. Mr. Karani advocate, has sworn an affidavit on oath that he had both the implied and general authority in the suit. See Inter-counties Importers & Exporters Ltd -vs- Teleposta Pension Scheme Registered Trustees & Others [2019] eKLR.

23. Looking at the totality of the material presented before me and the court record, I find no error on the record. Similarly, I find no basis to set aside the consent entered by the parties reviving the abated suit, the application to substitute the deceased defendants and the amendments to the plaint.

24. Coming to whether the plaintiff ought to have sought, obtained a summons to enter appearance and served them upon the new defendants, the plaintiff has not addressed the court on this issue. Order 5 Rule 1 of the Civil Procedure Rules places the duty on the plaintiff to prepare the summons to enter appearance and present it before them court for endorsement without delay. See Francis Ndegwa Muhoro -vs- Ahmednassir M. Abdullahi [2019] eKLR.

25. The absence of the preparation of summons makes the suit abate under Order 5 Rule 1(6) of the Civil Procedure Rules. It matters not that the defendant may have had other means of knowing the existence of the suit. Service of court processes to a new defendant must be through a summons to enter an appearance.

26. It is through service of such summons that the jurisdiction of the court is properly invoked. In Law Society of Kenya v Martin Day & 3 others [2015] eKLR, the court said that it is not sufficient for a plaintiff to institute the suit. A party must be invited to submit to the authority of the court for the legal process of setting down the suit for trial to commence. Summons must be served in the manner provided by law. Without service of summons, one need not appear in court or file a defence. See Abdulbasit Mohamed Ahmed Dahman -vs- Fidelity Commercial Bank Limited (2016) eKLR. A summons to enter appearance is not a piece of paper without consequences. Issuance and service of summons, therefore, must be complied with for the pleadings to acquire legitimacy as held in Uday Kumar Chandulal Rajani -vs- Charles Thaithi Civil Appeal number 85 of 1996.

27. Guided by the foregoing, I find that the rights of the applicant under Article 50 of the *Constitution* must be upheld. Striking out a suit is a draconian step. It should only be exercised sparingly and on hopeless cases where no life can be breathed into the pleadings. See D.T. Dobie & Company (Kenya) Limited -vs- Joseph Mbaria Muchina & another [1980] KECA 3 (KLR). Therefore, in exercise of my discretion, the plaintiff is ordered to file, extract and serve the summons, together with the amended plaint, upon the defendants within 30 days from the date hereof.

28. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 16TH DAY OF JULY 2025.

In the presence of:

Court Assistant - Dennis

Miss Munialo for plaintiff present

Gitonga for the 2nd defendant /applicant

1st defendant absent

HON. C.K. NZILI

JUDGE, ELC KITALE.