



**Ali v Bakari (Environment & Land Case 23 of 2011)  
[2024] KEELC 308 (KLR) (30 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 308 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 23 OF 2011  
NA MATHEKA, J  
JANUARY 30, 2024**

**BETWEEN**

**ALI ABDALLA ALI ..... PLAINTIFF**

**AND**

**FATUMA BAKARI ..... DEFENDANT**

**RULING**

1. The application is dated 24<sup>th</sup> September 2022 and is brought under Order 24 Rule 4 (1), (2), (3), Rule 7 of the Civil Procedure Rules 2010, Sections 1A, 1B, 3 and 3A of Civil Procedure Act seeking the following orders;
  1. That this Honourable Court be pleased to revive this suit which has abated in respect of the Plaintiff who is deceased.
  2. That Fatuma Abdulrahim Abdula and Abdalla Ali Abdalla be made parties to this suit in place of the Plaintiff who is deceased.
  3. That costs of this application be in the cause.
2. It is based on the grounds that the Plaintiff, Ali Abdalla Ali died on 16<sup>th</sup> July 2020. The cause of action in this suit has survived the death of the Plaintiff hence the need to substitute the deceased with the legal representatives so as to continue with this suit. Fatuma Abdulrahim Abdula and Abdalla Ali Abdalla the legal representatives of the Estate of the deceased Plaintiff obtained a grant of letters of administration intestate on 2<sup>nd</sup> August 2022. The grant of letters of administration intestate was issued by the court on 2<sup>nd</sup> August 2022 by which time this suit had abated as more than one year had lapsed since the Plaintiff died. The suit in respect of the Plaintiff who is deceased abated on 16<sup>th</sup> July 2021. The omission in filing the application for substitution before the suit abated was due to the fact that the grant of letters of administration intestate had not been issued despite the Petitioners having filed their petition in court on 21<sup>st</sup> May 2021. Sufficient cause has been shown as to why it was not possible for



the legal representation of the estate of the deceased Plaintiff to continue with this suit before it abated. No prejudice shall be occasioned to the Defendant if the orders sought herein are granted as prayed.

3. I have considered the application and the affidavit therein. The applicants seeks the revival of this suit and that they be substituted with the plaintiff. There is no dispute that the plaintiff passed away on 16<sup>th</sup> July 2020 and that the applicant obtained letters of administration intestate in respect of his estate on 2<sup>nd</sup> August 2022. in CMCC Succession Cause No. 172 of 2021 (Mombasa).
4. The application is brought *inter alia* under Order 24 Rules of the *Civil Procedure Rules* 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.”

5. There is equally no dispute that this suit abated Order 24 Rule 7(2) of the *Civil Procedure Rules* provides;
  - (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
  - (2) 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.”
6. The plaintiff commenced this suit through plaint stating that the plaintiff was the registered owner of the parcel of land known as plot No. 9091/1/MN. That the defendant without consent has built a Swahili house on the suit plot and has refused to vacate and hand over vacant possession. The suit was marked as abated on 16<sup>th</sup> July 2021. The foregoing makes it clear that the cause of action survived the plaintiff and if an application for substitution was made prior to abatement, the legal representative would have been made a party to enable them proceed with the suit. Consequently, the provisions of Order 24 Rule 7(2) of the *Civil Procedure Rules* come into operation. Having made the present application, the applicants must prove that they were prevented by any sufficient cause from continuing the suit.
7. The principles applicable while considering an application such as the present one were stated by the Court of Appeal in *Said Sweilem Gheithan Saanum v Commissioner of Lands* (*supra*) as follows;
8. 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 one year of the death of the plaintiff or 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.



9. 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.
10. 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. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See *M'mboroki Marangacha v Land Adjudication Officer, Nyambene and 2 others*, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in *KFC Union v Charles Murgor (Deceased)* NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in *MacFoy v United Africa Co. Limited* (1961) 3 All ER 1169, that

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.”

11. The applicants stated that the omission in filing the application for substitution before the suit abated was due to the fact that the grant of letters of administration intestate had not been issued despite the Petitioners having filed their petition in court on 21<sup>st</sup> May 2021. I find that it is sufficient for purposes of Order 24 Rule 7(2) of the *Civil Procedure Rules* for the applicants to demonstrate they have done, that the delay was in the issuance of the letters of administration. The application is unopposed. In my view this is not inordinate delay. I am therefore satisfied that the applicant has demonstrated that they were prevented by sufficient cause from continuing the suit. I further consider that in view of the nature of relief sought in the suit, it is in the interest of justice that the suit be determined on the merits. That however it is not an excuse for the parties not to be proactive. The applicants are warned to actively prosecute the suit. For those reasons I find this application is merited and I grant the following orders;

- a) This suit is hereby revived.
- b) The deceased plaintiff is hereby substituted with Fatuma Abdulrahim Abdula and Abdalla Ali Abdalla.
- c) The plaintiff to file and serve an amended plaint to reflect the substitution within 30 days of delivery of this ruling.
- d) Costs in the cause.

12. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY 2024.**

**N.A. MATHEKA**

**JUDGE**

