



**Mbugua (Suing as the legal representative of the Estate of Tabitha Watiri Mbugua) v
Gathaiya (Sued as the administrator of the Estate of Rachael Wairimu Mbugua) & another
(Environment & Land Case 112 of 2010) [2024] KEELC 347 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 347 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 112 OF 2010**

**JA MOGENI, J
JANUARY 29, 2024**

BETWEEN

**CHARLES MUKORA MBUGUA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF TABITHA WATIRI MBUGUA) APPLICANT**

AND

**DAVID M GATHAIYA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF
RACHAEL WAIRIMU MBUGUA) 1ST RESPONDENT**

GEOFFREY MIKINYA MBUKU 2ND RESPONDENT

RULING

1. This Ruling is in respect to the preliminary objection dated 3/07/2023 filed by the 2nd Respondent which seeks to object to the mention or any other process of this case on the ground that this suit abated on 15/04/2022 for the following reasons: -
 1. The Respondent David Muoge Gathaiya died on 15/04/2021.
 2. The cause of action herein did not survive or continue against the 2nd Respondent alone.
 3. No substitution was made for the 1st Respondent by the 15/04/2022 or at all.
 4. There was no Application made to revive the suit by the 15/04/2023 or at all.
 5. This suit entirely abated and that there is no suit to warrant a mention or any other process at all.
2. On 6/11/2023, the parties with the concurrence of the Court elected to canvass the 2nd Respondent's preliminary objection *vide* written submissions which were duly filed. By the time of writing this Ruling, it is only the 2nd Respondent who had dully submitted.



Analysis and Determination

3. This court has considered the preliminary objection and the submissions herein. The ingredients of preliminary objections are well settled and the court cannot reinvent the wheel. Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 to mean: -

“..... a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.”

4. In the same case, Sir Charles Newbold said:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”.

5. J.B. Ojwang, J (as he then was) in the case of *Oraro vs. Mbajja* [2005] eKLR had the following to state regarding a ‘Preliminary Objection’.

“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”

6. The issue as to whether or not the suit has abated is therefore properly raised as a Preliminary Objection.

7. Abatement if suits is governed by order 24 of the *Civil Procedure Rules*. More specifically, order 24, rule 4 of the *Civil Procedure Rules* provides as follows:

1. Where 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.

8. This means that upon death of a defendant and on application the court has the discretion to substitute the deceased defendant and that after one year with no application the suit abates. In this matter it cannot be denied that the suit has abated. It has been contended that the deceased 1st Respondent died on 15/04/2021. It is clear from the said provisions that a suit abates by operation of the law when no



substitution is made within one year on the death of a Defendant. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.

9. In the case of *Titus Kiragu v Jackson Mugo Mathai* [2015] eKLR it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

The 2nd Respondent has contended that the 1st Respondent died on 15/04/2021 and has not been substituted. The subject matter in this case is land and therefore the cause of action survived the death of the 1st Respondent. I have perused the Court record and I confirm that there is no application to reinstate and/or substitute the 1st Respondent. This means that no substitution was done within 12 months as provided for under order 24 rule 4 (3). The suit as against the 1st Respondent therefore abated as at 15/04/2022. The procedural steps one must take is to move the Court for revival of the suit after satisfying the Court that he was prevented by sufficient reasons from continuing the suit. No such step was taken.

Black’s Law Dictionary defines abatement as “the suspension or defeat of a pending action for a reason unrelated to the merits of the claim”.

10. The Court in *Kenya Farmers’ Cooperative Union Limited v Charles Murgor (Deceased) T/A Kaptabei Coffee Estate*, [2005] eKLR held that a Court of law has no jurisdiction to order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.

11. In the same case, Waweru J. stated as follows in the cited case:

“But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.”

12. Unless revived, the effects of abatement of a suit are far reaching as provided under rule (1) of order 24. That Rule states that:

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

13. For the foregoing reasons, I find and hold that no suit exists against the 1st Respondent. An application to substitute the 1st Respondent should have been made within one year of the deceased’s death and it is this failure to apply to substitute the deceased defendant within the stipulated one year that the suit against him abated.

14. The suit having abated as against the 1st Respondent, the only remedy in law was for the parties to apply for revival of the same under rule 7(2) of order 24 of the *Civil Procedure Rules*. In my view, once a suit has abated, there is no suit and there is really nothing to base any further proceedings upon, unless



the suit itself be resuscitated to life first. It is not lost that a party can apply for leave under order 24 rule 7(2) to revive a suit which has abated and if he proves to the Court that he was prevented by any sufficient cause from continuing the suit, the Court may revive the suit upon such terms as to costs or otherwise as it thinks fit. See *Kenya Farmers' Cooperative Union Ltd* above.

15. In the end, it is the finding of the Court that the suit against the 1st respondent abated on the 15/04/2022 and no orders to revive it have been sought and obtained. Resultantly, the 2nd respondent's preliminary objection dated 3/07/2023 is upheld and for which reasons the suit is struck out in its entirety. Costs are awarded to the 2nd Respondent.

Orders accordingly. File Closed

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 29TH DAY OF JANUARY, 2024.

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MOGENI J.

JUDGE

In the virtual presence of:-

Mr. Okwaro for the 2nd Defendants

Mr. Mageto for the 1st Defendant

Mr. Gatumuta for the Plaintiff

Ms. Caroline Sagina: Court Assistant

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MOGENI J.

JUDGE

