



Kariuki (Legal Representative of Rebecca Wangui Chege) & another v Mwangi (Environment and Land Appeal 18 of 2023) [2024] KEELC 214 (KLR) (25 January 2024) (Ruling)

Neutral citation: [2024] KEELC 214 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL 18 OF 2023
LN GACHERU, J
JANUARY 25, 2024**

BETWEEN

ALICE WANJA KARIUKI (LEGAL REPRESENTATIVE OF REBECCA WANGUI CHEGE) 1ST APPLICANT

LUCY NJAMBI MWANGI (LEGAL REPRESENTATIVE OF SAMUEL MWANGI) 2ND APPLICANT

AND

BENARD KIIRU MWANGI RESPONDENT

RULING

1. Vide a Notice of Motion Application dated 12th August 2021, anchored on Sections 1A, 1B, 3A and 63 (E) of the *Civil Procedure Act*, and all other enabling Provisions of the Laws of Kenya, the Applicants herein, Alice Wanja Kariuki and Lucy Njambi Mwangi, sought for the following Orders:
 - i. That this Honorable Court be pleased to set aside the orders made on 27th day of July 2021, dismissing this matter and/or appeal and the same be reinstated back for hearing and determination on merit.
 - ii. That the Court be pleased to make such further or other orders as it deems fit and just.
 - iii. That the costs of this application be provided for.
2. The said Application is premised on the grounds stated at the foot thereof, and also by the Supporting Affidavit sworn jointly by Alice Wanja Kariuki and Lucy Njambi Mwangi dated 12th August 2021.
3. The Applicants are seeking for the reinstatement of the Appeal that was dismissed by this Court on 27th July 2021, for want of prosecution by the Appellants (now deceased) and for failure to show cause as per Notice to Show Cause why the Appeal should not be dismissed for want of prosecution contained in the Court file.



4. As per the Supporting Affidavit, the 2nd Appellant, Samuel Mwangi died on 1st August 2012, and the 1st Appellant, Rebecca Wangui, died on 28th November 2017, Letters of limited grant ad litem were issued on 11th and 13th of March 2019, respectively.
5. That the instant Appeal, which was dismissed by this Court for want of prosecution was filed on 14th December 2011, in the High Court of Kenya at Nyeri, pursuant to the leave of Court granted on 5th December 2011.
6. Thereafter, the Appellants filed a Record of Appeal dated 23rd May 2015, though the Appeal was admitted on 26th September 2012.
7. Following the establishment of a High Court Station in Murang'a County, the Appeal was transferred from Nyeri High Court to Murang'a High Court on 26th June 2015.
8. After the transfer of the Appeal to Murang'a High Court, the next action was hearing of an Application by counsel for the Appellants then, dated 26th May 2017, to ceasing acting for the Appellants. The same was allowed.
9. Later on 29th July 2019, the Appellants were represented by a different counsel, a Mr. Kirubi of Kirubi, Mwangi Ben & Co Advocates, who informed the court that both Appellants were deceased and he sought time to substitute the two Appellants, and the matter was stood over generally.
10. The next action was on 27th July 2021, when the Notice to Show Cause, came up for hearing. The Respondent was represented by a Ms Gaki, while the Appellants were not represented.
11. Consequently, without any representation for the Appellants to explain why the Appeal should not be dismissed for want of prosecution, the court dismissed it vide the Court order dated 27th July 2021.
12. It is instructive to note that by then 1st Appellant had been deceased from 28th November 2017, which was more than 3 years since her demise, and the 2nd Appellant had been deceased from 1st August 2012, which was more than 9 years since his demise.
13. Order 24 Rule 3(2) states that “where within one year no application is made under sub rule 1, the suit shall abate so far as the deceased Plaintiff is concerned....”
14. It is therefore apparent that the Appellants herein having died in the years 2012 and 2017, respectively, then by the time the matter came for N.T.S.C on 27th July 2021, the suit and/or the Appeal herein had abated by operation of the law.
15. The instant Application was canvassed by way of written submissions. The Applicants filed their submissions on 5th September 2023, through the Law Firm of Armon Legacy Advocates & Associates, and urged the court to allow the Application.
16. On his part, the Respondent filed his submissions on 1st August 2023, and urged the court to dismiss the application as the Appeal had abated by the time the suit was dismissed and time had not been extended.
17. The parties relied on various provisions of the Law like Section 3 of the *Civil Procedure Act*, Order 51 Rule 15 of the *Civil Procedure Rules* and Order 24 rule 3(2) Of the Civil Procedure Rules. They also relied on several decided cases as their authorities.
18. This Court has carefully considered the instant Application, the Affidavits in support and opposition of the same, the annexures thereto and the court records, together with the relevant provisions and law and cited authorities and finds the issues for determination are as follows: -



- i Whether as Legal Representative seeking for reinstatement of a dismissed which had abated, they must have first sought and obtained leave to revive the suit.
- ii Whether instant application is incompetent for failure by the applicants to seek leave of Court to revive the suit and thereafter be made parties to the suit.

(i) Whether as Legal Representative seeking for reinstatement of a dismissed which had abated they must first have sought and obtained leave to revive the abated suit.

19. It is averred by the Applicants that their previous Advocates on record are solely responsible for the dismissal of the Applicants' appeal for want of prosecution by this Court on 27th July 2021.
20. As averred by the Applicants and noted by the Court, the 2nd Appellant died in 2017, surviving the 1st Appellant, who had passed on, in 2012. The Applicants contend that, following the death of the 1st and 2nd Appellants in 2012 and 2017 respectively, the Advocates on record for the two Appellants now deceased, failed to appraise the administrators of the estate of both Appellants regarding the status of the appeal dated 14th December 2011.
21. The Applicants further contended that the previous Advocates on record failed to inform the administrators of the estates for both Appellants, and the Applicants herein that a Notice to Show Cause pursuant to Order 42 Rule 35(2) of the Civil Procedure Rules had been issued by this Court in respect of the Appellants Record of Appeal dated 23rd May 2015.
22. The Applicants have submitted that the mistake of their previous counsel on record, should not be visited on them, as they honestly believed in their Advocates on record to diligently prosecute the matter on their behalf.
23. The Applicants had further averred and submitted that the present matter and or Appeal, involves land; and in the circumstances, they contended that it is fair and just that their appeal be reinstated and be heard on the merit.
24. The Respondent resisted the instant Application, averred and submitted that by their past conduct, the Applicants have not been honest or truthful with the Court; having told the Court during the hearing of 29th July 2019, that both Appellants were deceased, and no instructions had been received on applying for Letters of Administration, whereas the Administrators of the estates of both Appellants had obtained Letters of Administration in March 2019.
25. The Respondent further contended that as early as 26th June, 2015, the Appeal was listed by the Court for dismissal for failure to take steps to have the same heard. The Respondent further submitted that the only reason the suit was not dismissed in 2015, was due to transfer of the file from Nyeri High Court to the then recently-established Murang'a High Court.
26. The Respondent further averred that the Applicants are required by law to apply to this Court for an extension of time to apply for joinder or substitution of the deceased Appellants.
27. The Respondent averred that the instant appeal abated in 2018, prior to its dismissal by this Court for want of prosecution on 27th July 2021. Relying on the provisions of Order 24 Rule 3(2) of the [Civil Procedure Rules](#), the Respondent submitted that the instant Appeal having abated in year 2018, a year following the death of the 2nd Appellant, then before anything else the administrators of the estate of the 1st and 2nd Appellants needed to apply to this Court to revive the said suit and then be substituted as the Appellants Legal Representatives in the proceedings, before seeking for orders to set aside the



dismissal order. Thus is because the suit abated in 2018 and by 27th July 2021, there was no suit as it had abated by operation of law.

28. Reliance was placed on Order 24 Rule 3(1) of the [Civil Procedure Rules](#), which provides as follows:

“Where one of two or more plaintiffs dies and the cause of action does not survive 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.”

29. Further, Order 24 Rule 3(2) of the [Civil Procedure Rules](#) provides as follows:

“Where within one year no application is made under sub-rule (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.

30. For the avoidance of doubt, Order 24 Rule 7(1) of the [Civil Procedure Rules](#) provides as follows:

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

31. It is the finding and holding of this Court that Order 24 Rule 3(2) of the [Civil Procedure Rules](#) and Order 24 Rule 7(1) of the [Civil Procedure Rules](#) are self-executing provisions; meaning that they take effect within a year of the death of the surviving plaintiff and or Appellant, if no application is made in the suit. Consequently, this court concurs with the Respondent’s submissions that the suit abated in 2018. For the Applicants to bring this Application, they needed first to have the suit revived and then they be made parties to the suit as the Legal Representatives before seeking to set aside an order of dismissal of an abated suit.

32. It was mandatory for the Legal Representatives of the deceased Appellants’ to seek leave of the Court to become parties to the suit. The Applicants could simply not file an Application for reinstatement of a dismissed suit which suit had abated without having it revived and they being made parties to the suit, just because they have letters of Administration of the estates of the deceased.

(i) Whether instant application is incompetent for failure by Applicants to seek leave of Court to be joined or made parties to the suit.

33. Relying on the holding of the Court in Civil Appeal No. 283 of 2015: [Rebecca Mijide Mungole & Another v KPLC Ltd & 2 Others](#), the Respondent submitted that in an application for reinstatement of an abated suit, failure by an Applicant to seek leave of Court to be joined in the suit is a fatal omission.

34. The Respondent relied upon and cited the holding of the Court in the case of [Florence Nafula Ayodi & Others v. John Tabalya Mukite & Another](#) (2021) eKLR, where the Court held as follows:

“Without going to the merits or otherwise of the prayer, this court needs first to determine whether or not the prayer is competently before it. This is because once the competency of a party to move the court is established, it gives the basis for the court to exercise the jurisdiction that both [the Constitution](#) and statute give it. It is upon that the merits will be



the next issue to go into. The prayer was made at the same time the proposed interested parties sought to be given leave to be enjoined in the suit. That is un-procedural. No legal cure, including Articles 40, 48 and 50 of *the Constitution* that the Applicants called to their aid, and 159 (2) (d) which parties often resort to when they grasp for breath in the weakness of their cases and arguments, or Sections 1A, 1B, 3A and 100 of the *Civil Procedure Act* can be of any avail. Praying for anything more than seeking leave to be enjoined is putting the cart before the horse. Before leave is granted to a party to be enjoined, one has no more to say or pray to a court than that “I need leave”.

35. For the avoidance of doubt, Order 24 Rule 7(2) of the *Civil Procedure Rules* provides as follows:

“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 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, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit”.

36. In the present case, it was first necessary for the proposed Appellants who are the Applicants herein to seek revival of the suit and also to seek for and obtain this Court’s leave to be joined in the suit as well as seeking for setting aside or reinstatement of the suit. The Applicants have not procured leave of Court to revive the suit and to be joined in the suit or to have the deceased Appellants substituted. The Applicants are thus not parties to the suit. Therefore, the Applicants lacks the locus standi to implore the Court to reinstate the suit or grant any other orders. The orders cannot be made in a vacuum. There is no suit as the same abated in 2018.

37. On the question of locus standi, the Court of Appeal in the case of *Alfred Njau vs City council of Nairobi* [1982-88] 1 KAR 229, stated as follows:

“to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to”.

38. The Court has perused the Notice of Motion Application dated 12th August 2021, and finds that there is no prayer by the proposed Applicants seeking to revive abated suit to be made parties to the suit or seeking to have the Appellants (now deceased) to be substituted. Consequently, it is the holding and finding of this Court that the proposed Applicants have not moved the Court to revive the suit and for leave to be made parties to the suit as contemplated under the provisions of Order 24 Rule 3(1) of the *Civil Procedure Rules*.

39. Having held as the above, this Court finds and holds that the Applicants herein have failed to approach the court properly in this matter where they are seeking to represent the interests of deceased parties.

The issue of locus standi is a primary point of law which goes to the root of any suit. The absence of locus standi, therefore, renders the Application fatally defective.

40. Having found that the proposed Applicants lacks locus standi, the Court finds and holds that the Notice of Motion Application dated 12th August 2021, is not meritorious. Therefore, the instant Application be and is hereby dismissed entirely with costs to the Respondent.

It is so ordered.



DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 25TH DAY OF
JANUARY 2024

L. GACHERU

JUDGE

Delivered online in the presence of:

Mr Ian NkomeJimana for the Applicants

Respondent - Absent

Joel Njonjo – Court Assistant.

L. Gacheru

Judge

25/01/2024.

