



REPUBLIC OF KENYA



**Mohammed (Deceased) v Abdalla & another; Sketty (Applicant) (Environment & Land Case 194 of 2014) [2024] KEELC 79 (KLR) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 79 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 194 OF 2014  
SM KIBUNJA, J  
JANUARY 24, 2024**

**BETWEEN**

**NASSOR MOHAMMED (DECEASED) ..... PLAINTIFF**

**AND**

**MOHAMED SAID ABDALLA ..... 1<sup>ST</sup> DEFENDANT**

**THE COUNTY GOVERNMENT OF MOMBASA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**MUNIR MOHAMED SKETTY ..... APPLICANT**

**RULING**

1. The applicant brought the application dated 21<sup>st</sup> August 2023 seeking for *inter alia*:
  - a. “Spent.
  - b. That the honourable court be pleased to extend the time for filing an application for amendment of pleadings.
  - c. That the application for amendment of pleadings be deemed to have been filed in proper time.
  - d. That costs of this application be provided for.”

The application is premised on the six (6) grounds on its face and supported by the affidavit of Munir Mohamed Sketty, personal representative of the estate of the plaintiff, sworn on the 21<sup>st</sup> August 2023, deposing inter alia that the plaintiff died on 19<sup>th</sup> December 2015; that the Munir Mohamed Sketty, applicant, was appointed an administrator of the deceased’s estate on 20<sup>th</sup> September 2016 vide HCC Succ. Cause No. 91 of 2016; that the applicant recently got to know of this suit and instructed counsel who filed the notice of appointment on the 14<sup>th</sup> January 2020; that due to the Covid 19 challenges, the estate managed to give proper instructions to their counsel in September 2020; that an application



for amendment of pleadings and joinder of the applicant was done by the said firm but the period for filing such application had expired which necessitated the filing of this instant application.

2. The application is opposed by the 2<sup>nd</sup> defendant through the four (4) grounds of opposition dated the 4<sup>th</sup> October 2023, that the application is res judicata in view of the previous application dated the 6<sup>th</sup> June 2022 that was dismissed; that no appeal or review has been preferred against the dismissal order; that the suit abated on the 19<sup>th</sup> December 2016 and the court is without jurisdiction to grant the orders sought; that the application is fatally defective and an abuse of the court process.
3. The court issued directions on filing and exchanging submissions on the 5<sup>th</sup> October 2023. The learned counsel for the Applicant and 2<sup>nd</sup> respondent filed their submissions dated the 26<sup>th</sup> October 2023 and 11<sup>th</sup> November 2023 respectively, which the court has considered.
4. The issues for the court's determinations are as follows:
  - a. Whether the Applicant has made out a reasonable case for the extension of time to file an application for amendment of pleadings, and for the application for amended pleadings to be deemed as properly filed within time.
  - b. Who pays for the costs of the application?
5. The court has carefully considered the grounds on the application, affidavit evidence, grounds of opposition, submissions by the learned counsel and come to the following determinations:
  - a. A suit according to Order 24 Rule 3 of the Civil Procedure Rules abates where at the expiry of one year from the time a party died, no application to substitute the deceased had been made. That Order 24 Rule 3 of the Civil Procedure Rules provides as follows:

“ 3

(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.”

In this matter, it is not disputed that the plaintiff died on the 19<sup>th</sup> December 2015 as per the certificate of death number 0527122 attached to the supporting affidavit. That one year from the date of death of the plaintiff lapsed on or about the 18<sup>th</sup> December 2016. I have perused the record and confirmed that no application to substitute the plaintiff was filed and or allowed



within that period. That accordingly, the court finds that the plaintiff's suit abated on or about the 18<sup>th</sup> December 2016 by operations of the law.

- b. The record confirms that the court on the 27<sup>th</sup> April 2017 marked the suit as abated. Thereafter, the applicant filed the application dated the 1<sup>st</sup> October 2020 that was dismissed on the 8<sup>th</sup> February 2021 for failure to prosecute. By then the applicant had then filed another application dated the 2<sup>nd</sup> December 2020 that was marked withdrawn on the 3<sup>rd</sup> November 2021. The applicant then filed the application dated the 6<sup>th</sup> June 2022 seeking inter alia to be allowed to substitute the plaintiff; leave to amend the plaint and attached amended plaint to be deemed as duly filed and served upon fees being paid. The application was canvassed through written submissions, and dismissed with costs through the ruling delivered on the 7<sup>th</sup> December 2022. Consequently, the instant application was filed.
- c. The learned Counsel for the 2<sup>nd</sup> defendant has submitted that the application for extension of the time has been made three times at different periods and were all rejected by the court. That as the suit has abated, it no longer exists for counsel for the applicant to make applications in. Further, that this application is res judicata as the three previous applications dated 1<sup>st</sup> October 2020, 2<sup>nd</sup> December 2020 and 6<sup>th</sup> June 2020 that had raised similar prayers had been dismissed by the court. That consequently, the instant application is an abuse of the court process. I have perused the records in the court file and I have confirmed that the aforesaid applications exist although it is only the application dated 2<sup>nd</sup> December 2020 which is similar to the instant application. The fate of that application is that Mr. Birir advocate withdrew the application and the court marked it as withdrawn on 3<sup>rd</sup> November 2021. The said application had sought leave to amend the pleadings as annexed as draft amended pleadings in the application of 1<sup>st</sup> October 2020 which was dismissed by court for want of prosecution. Upon withdrawal, Mr. Birir filed the application dated 6<sup>th</sup> June 2020 seeking leave to amend the plaint but was dismissed on the 7<sup>th</sup> December 2020 for reason that leave to extend time to apply for substitution had not been sought and that the suit had not been revived as provided under Order 24 rule 7 (2) of the *Civil Procedure Rules*.
- d. In the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR the Court of Appeal on abatement of suits stated as follows:

“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. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a



party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (*supra*) was therefore right in dealing with that aspect of the application in the manner he did.”

In the case cited in the above judgment of *Gachuhi Muthanji v Mary Wambui*, the Court of Appeal stated inter alia as follows:

“That the learned judge of the High Court had misdirected himself in this case by allowing the application for substitution. The Respondent in the said Court of Appeal case also conceded that an application for extension of time to revive the abated suit had never in fact been made.”

However, the extension being sought in this instance is for the purposes of “filing an application for amendment of pleadings.” The pleadings herein cannot be amended by the applicant as he has not been made a party to the suit. Similarly, and for the same reason, the applicant cannot also apply for revival of the suit under Order 24 Rule 7 [2] of the *Civil Procedure Rules*, before being joined in the suit in place of the deceased.

e. In the *Rebecca Mijide Mungole case* (*supra*) the Court of Appeal further stated that;

“After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived.”

It is only after the substitution of the deceased plaintiff, followed by revival of the suit, that the Applicant can then have the locus to seek leave to amend pleadings as provided by Order 8 Rule (3) of the *Civil Procedure Rules*. That as seen in Order 8 rule 3 (1) of the *Civil Procedure Rules*, the power to amend pleadings is subject to inter alia Order 24 Rule 3 of the said Rules being complied with.

f. At paragraph 8[d] of my ruling of 7<sup>th</sup> December 2022 herein, I opined that:

“A counsel knows the law, and should know what prayers, and in what order or sequence to seek where a suit has long abated....”

Unfortunately, as the suit herein remains abated, and time to file the substitution application has not been enlarged, and the applicant is yet to be joined in the suit in place of the deceased plaintiff, the application for extension of time to apply for leave to amend pleadings is not only premature, but also unavailable to a non-party. The application as phrased is incapable of being granted in a suit that abated over seven (7) years ago, and is therefore dismissed.

g. That under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, costs follow the events unless otherwise ordered by the court. I find no reasons not to allow the costs to follow the events in the instant case. The applicant will therefore pay the costs.

6. In the upshot of the foregoing determinations, the court finds and orders as follows:

a. That the application by Munir Mohamed Sketty, applicant, dated the 21<sup>st</sup> August 2023 is without merit.



b. The said application is dismissed with costs.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED ON THIS 24<sup>TH</sup> DAY OF JANUARY 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence of:

Applicant: Mr. Birir

Plaintiff : No Appearance.

Defendants: M/s Kinuva For 2<sup>nd</sup> Defendant.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

