Katana & another (Legal Representative of Robert Katana - Deceased) v Kalama (Environment & Land Case 122 of 2018) [2024] KEELC 49 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEELC 49 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 122 OF 2018

EK MAKORI, J

JANUARY 17, 2024

BETWEEN

SIDI ROBERT KATANA ..... 1ST APPLICANT

KADZO KATANA KITSAO ..... 2ND APPLICANT

LEGAL REPRESENTATIVE OF ROBERT KATANA - DECEASED

AND

ALI OMAR KALAMA ..... RESPONDENT

RULING

1. Notice of Motion dated 9th May 2023 seeks the following reliefs:

    a. Spent.

    b. That leave be granted for an extension of time within the applicant would revive the abated suit herein.

    c. An order for an extension of time to substitute the defendant Robert Katana (deceased) with the Legal Representative Sidi Robert Katana.

    d. The Court to vary and set aside the judgment dated 22nd November 2019 and extend the time within which to file a defence,

    e. Leave be granted to the defendant/applicant to file documents and defence and counterclaim out of time.

    f. The law firm of Miller George & Gekonde Advocates is allowed to come on record for the applicant.

    g. Costs of the application be provided.

2. The application is supported by the annexed affidavit of Sidi Robert Katana sworn and filed on 9th May 2023.

3. The application is opposed there is a replying affidavit that has been sworn by Omar Kalama on 29th May 2023.

4. The application was canvassed by way of written submissions.

5. The applicant significantly deposed that albeit the suit was heard and determined ex-parte her husband (now deceased) did not participate in the proceedings the single reason being her former advocate did not inform the deceased of the progression of the case in court or at all.

6. The deceased was ready and willing to defend had it not been that there was no information about the progress of the suit.

7. The deceased died on 20th May 2020. No substitution had been made a year down the line and hence the suit abated.

8. The applicant is desirous of coming on record to defend and as such should be allowed to do so hence the prayers sought in this application.

9. On the merits, the land in question belonged to the deceased. He satisfied the conditions for settlement under the Settlement Fund Trustee Scheme (SFT). If the Court does not intervene, eviction of the applicant and her family is imminent.

10. The respondent on the other hand contended that the issues raised herein are either res judicata or sub judice at the same time by dint of application dated 19th September 2022, that dated 5th March 2022, and the one dated 4th November 2022 respectively. A ruling was duly delivered on 16th March 2023 settling the issues raised herein.

11. The respondent has given a chronology of events leading to the ex-parte judgment and what transpired thereafter and is of the view that the current application is an abuse of the Court process for manifest indolence on the part of the applicant or those claiming under his title for failure to prosecute pending applications similar to the current one, filed in the past and which are still on record unprosecuted.

12. The applicant submitted that the current application is not res judicata the issues raised are new and the Court has not delved into what has been raised in the present application. The applicant has quoted Section 7 of the *Civil Procedure Act* and the case law in Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR, on what constitutes res judicata.

13. On whether to revive the suit, the applicant stated that the suit already abated. There is a need to revive it and proceed to set aside the ex-parte judgment and hear the applicant on merit. The applicant contended that the Court has wide discretion to do so citing the following cases – Kenya Bus Services and Another v the AG [2005]1 KLR, Mbogo v Shah [1968] EA 93 and Ongom v Owota cited with approval by Mativo J. in Wachira Karani v Bildad Wachira [2016] eKLR.

14. The applicant cited Article 50(1) and Article 159(2) of *the Constitution* on the right to be heard and on justice to be accorded to all respectively. It was articulated that the applicant should be allowed to defend in this matter since there is a meritorious defence with a counterclaim with a high chance of success at the hearing.

15. The respondent submitted that the issues raised in the current application were heard and determined in the Notice of Motion dated 19th September 2022 and a ruling delivered by this Court on 16th March 2023 dismissing the same, hence the doctrine of res judicata comes into play. The respondent has

cited Section 7 of the *Civil Procedure Act*, the case of Henderson v Henderson [1843] 67 E.R 313 quoted with approval in Mburu Kinua v Gachini Tuti [1978] KLR 69 and Bidii Kenya Ltd v Benjoh Amalgamated Ltd & KCB Ltd [2017] eKLR.

16. The respondent faulted the applicant or his predecessors for the failure to be vigilant in the defence of this cause. He alleged that when the matter was actively being heard, the deceased father albeit serviced, failed to attend Court and the suit was heard on its merit ex-parte, and a regular judgment entered.

17. That even if the Court were to exercise its decision as held in Shah v Mbogo [1969] [E.A and Habo Agencies Ltd v Wilfred Odhiambho Musinga 2015] eKLR, the blame on the former

18. advocates will not work in favour of the applicant. The applicant or his predecessor were not productive in the defence of this matter. The application thus should collapse.

19. The issues that fall for the determination of this Court is whether to allow the current application. Resuscitate the suit, set aside the judgment in place, and allow the applicant to defend on merit and who should bear the costs of the application?

20. A Notice of Motion had been filed by the applicant herein dated 19th September 2022 seeking the following relief(s):

    i. Leave to change the Defendants advocates on record from the firm of Abdullatif Abdalla Aboud & Company Advocates to the firm of Ruttoh Erica & Associates Advocates,

    ii. Order of substitution of the Defendant with the applicants as legal representatives.

    iii. Stay of execution of decree.

    iv. Order to set aside the judgment and leave to file a defence to the plaintiff's claim.

21. After considering the averments placed by the parties and their submissions, the Court ruled as follows:

> " I have carefully considered the evidence, material, and submissions placed before me by the warring parties. It is not disputed that the defendant is deceased and needed to have been substituted. It is also not disputed that during his lifetime he was aware of this suit. He was served with summonses and suit papers. He entered appearance but did not file a defence. The matter proceeded ex parte before this court (Olola J.). After considering the materials placed before him, the learned judge decided for the plaintiff. A raft of orders were issued resulting in the decree from this court ordering for the cancellation of title in the name of the defendant to be replaced by the name of the plaintiff. The orders were duly executed and the matter ended there.
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> In his lifetime, the deceased attempted to set aside the orders of this court. It will seem from the record that the application was never prosecuted and remains pending. The successors of his estate attempted to reverse the orders of the court too. An application is pending similar to this one.
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> Advocate for the applicant has aptly and ably submitted for the need to have substitution done and the judgment herein set aside. Blame is placed squarely on the former counsel for the defendant – deceased. That he was not bringing up to speed the defendant on the progression of the suit to the detriment of the defendant – deceased and now his estate.
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> On the other hand, the plaintiff accuses the defence of laches, delays, and indolence on their part – failure to defend, and failure to have the deceased substituted a year after his demise

leading to the abatement of the suit. No application for resuscitation has been made nor have sufficient grounds been proposed to overturn an otherwise regular judgment in place.

Order 24 Rule 4 of the Civil Procedure Rules provides that:

"Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the 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 an application made in that behalf, shall cause the 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 a 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."

In the case of Aggrey Swaka Waswa v Patrick Omonge Khaemba; Thomas Meshack Omonge & 3 others (Proposed Respondents) [2020] eKLR the court held as follows on the procedure to follow when a suit has abated against a defendant:

> " 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. The deceased defendant died in 2018 and this application has been filed in 2020. 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. In the case of Said Sweilem Gheithan Saanum –v- Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:
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> "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 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.
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> 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.
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> 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."

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."

Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown."

This matter was concluded by this court. Title documents changed hands from the deceased – defendant to the plaintiff. No effort was made to have the deceased substituted within a year after his demise nor do I have an application to have the suit revived or resuscitated and reasons for the delay in bringing the necessary application thereto provided for the court to consider as required by law. This ground alone disposes of the application without discussing the other issues whether to admit the current advocate or set aside the ex parte judgment. The orders then sought in the current application cannot stand. I have no pending suit. I down my tools.

The instant application – dated 19th September 2022 fails in limine and is hereby dismissed with costs to the Respondents."

22. It will seem to me that this Court as correctly submitted by the respondent has in the past considered the issues raised herein, perhaps the only balance I can see is whether to resuscitate the suit and if so is it possible to allow the applicant to defend?

    a. This question in my view is resolved by the decision in in Mburu Kinua v Gachini Tuti[1978] KLR 69 affirming the decision in Henderson v Henderson [1843] 67 E.R 313 as follows:

> 'Where a given matter becomes the subject of litigation in and of adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies except in special cases not only to points upon which the Court was actually required by the parties to form an opinion and pronounce Judgment but to every point which properly belonged to the subject of litigation and which parties exercising reasonable diligence, might have brought forward at the time'.

23. This is the position taken in Bidii Kenya Limited v Benjoh Amalgamated Limited & Kenya Commercial Bank Limited Civil Appeal No.174 of 2010, the Court also held as follows;

> " But it may be that the same set of facts may give rise to two or more causes of action. If in such case a person is allowed to choose and sue upon one cause of action at one time and to reserve the other for subsequent litigation, that would aggravate the burden of litigation. Courts have therefore treated such a cause of action as an abuse of its process and it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide but that it covers issues which are so clearly part of the subject matter of the litigation and so clearly could have been best raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them. This is therefore another and equally necessary and efficacious aspect of the same principle for it helps in raising the bar of res judicata by suitably construing the general principle of subduing a cantankerous litigant. That is why this other rule has sometimes been referred to as constructive res judicata which in reality is an aspect or amplification of the general principle."

24. Going by those authorities, the applicant and his predecessor had all the time to raise the issues raised herein, particularly on the abatement of the suit and setting aside judgment. Constructive res judicata thus catches up with the applicant. This Court will not revisit issues the applicant or his predecessor had all the time to raise and failed to prosecute to finality. We are now entering the realm of fairy tales or musical chairs in this matter. We are moving in a circuitous manner, the only thing changing is advocates for the applicant. But the issues remain the same.

25. Let me pause here for a minute, even if I were to revive the suit, the record is clear the husband of the applicant (now deceased) had been granted the time to defend but totally failed to do so. The blame on former advocate(s), has been trending in all the applications before this Court, but it is not the main culprit, but shear indolence on the part of the applicant to defend. It cannot stand.

26. The upshot is that the application dated 9th May 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 17TH DAY OF JANUARY 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Amina for the Applicant

Mr. Shujaa for the Respondent