



**Kenya African National Traders & Farmers Union (Suing through its office bearers Kimani Wanyoike (Chairman), Peter Mugeka Maina (Secretary General) and Ibrahim Wanene (Treasurer)) v Kilonzo (Sued as the administrator of the Estate of Zephania Kilungu Kilonzo) & 9 others (Environment & Land Case 18 of 2017) [2024] KEELC 1557 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1557 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 18 OF 2017**

**BM EBOSO, J  
FEBRUARY 29, 2024**

**BETWEEN**

**KENYA AFRICAN NATIONAL TRADERS & FARMERS UNION .... PLAINTIFF  
SUING THROUGH ITS OFFICE BEARERS KIMANI WANYOIKE  
(CHAIRMAN), PETER MUGEKA MAINA (SECRETARY GENERAL) AND  
IBRAHIM WANENE (TREASURER)**

**AND**

**DAVID MUTHAMA KILONZO (SUED AS THE ADMINISTRATOR OF THE  
ESTATE OF ZEPHANIA KILUNGU KILONZO) ..... 1<sup>ST</sup> DEFENDANT  
JOPHICK NJUGUNA KIBUNGA ..... 2<sup>ND</sup> DEFENDANT  
MOSES NGOTHO MWATHA ..... 3<sup>RD</sup> DEFENDANT  
BETH WAMBUI KANJA ..... 4<sup>TH</sup> DEFENDANT  
KWANZA GROUP LIMITED ..... 5<sup>TH</sup> DEFENDANT  
JOSEPH MWAURA KANYUGI ..... 6<sup>TH</sup> DEFENDANT  
MICHAEL GICHUHI NGARI ..... 7<sup>TH</sup> DEFENDANT  
BERNARD WANJOHI MURIUKI ..... 8<sup>TH</sup> DEFENDANT  
HARMAR VENTURES CO. LIMITED ..... 9<sup>TH</sup> DEFENDANT  
BERNARD WANJOHI MURIUKI ..... 10<sup>TH</sup> DEFENDANT**



## RULING

1. This suit was initiated at the Milimani [Nairobi] ELC Registry on 25/10/2012 through an originating summons dated 25/10/2023. On 5/8/2016, the plaintiff filed an amended originating summons dated 4/8/2016. Through the amended original summons, the plaintiff sought orders of adverse possession against the defendants in the following verbatim terms:
  - a. That the Kenya African National Traders & Farmers Union be declared to have acquired title by adverse possession to the suit premises previously known as Plots Nos Kakuzi/ Ithanga/ Gituamba Block 1/862, and any of the subdivisions to Gituamba Blocks 1/1562 -1601 inclusive now registered in the name of Harmar Ventures Company Limited – the 9th Defendant, 863 and 864.
  - b. That the registration of Zephania Kilungu Kilonzo as proprietor of L.R Nos Kakuzi/ Ithanga/ Gituamba Block 1/862, and any other subdivisions to the original parcel now subdivided into 40 titles being Kakuzi/ Ithanga/ Gituamba Blocks 1/1562-1601 inclusive now registered in the name of Harmar Ventures Company Limited – the 9th defendant, 863 and 864 and any other persons deriving title from Zephania Kilungu Kilonzo based on the land previously known as Plots Nos 1969, 1970 and 1971 at Mavoloni Company Limited and now known as L.R Nos Kakuzi/ Ithanga/ Gituamba Blocks 1/1562 -1601 inclusive now registered in the name of Harmar Venturs company Limited – the 9th defendant, 863 and 864 e cancelled and the Land Registrar Thika do rectify the register to enter the name of he plaintiff as registered proprietor of the said parcels of land and any titles issues out of the subdivision of any of the original parcels – 862, 863 and 864 do revert to the name of the Plaintiff.
  - c. The costs of these proceedings be borne by the defendants
2. The suit was subsequently transferred to Thika Environment and Land Court on 23/1/2017.
3. On 12/3/2019, counsel for the plaintiff informed the court that she had been informed that the 1st defendant had died. Subsequently, on or about 15/2/2021, the plaintiff brought a notice of motion dated 8/2/2021, seeking the following verbatim orders:
  - a. That the time for applying for the substitution of the deceased 1st defendant, Zephania Kilungu Kilonzo, in this suit be extended and this suit be reinstated as against the said defendant.
  - b. That the legal representatives of Zephania Kilungu Kilonzo, be substituted for the said 1st defendant, Zephania Kilungu Kilonzo for the purposes of this suit;
  - c. That the costs of this application be in the cause.
4. The court considered the above application and rendered a ruling dated 9/12/2021 rejecting it on the ground that the plaintiff had failed to identify the personal representative of the deceased.
5. Subsequent to that, the plaintiff brought fresh a notice of motion dated 3/10/2022 seeking orders of substitution and revival in relation to the claim against the 1st defendant. David Muthama Kilonzo was identified in the said application as the personal representative who was to be substituted in place of Zephania Kihingu Kilonzo. When the application came up for interpartes hearing, there was no opposition against it. Consequently, the application was allowed. By dint of the substitution and



revival, David Muthama Kilonzo was substituted in place of Zephania Kilungu Kilonzo and the suit against the 1st defendant was revived.

6. Subsequent to that, on 19/1/2023, David Muthama Kilonzo brought a notice of motion dated 14/12/2022 seeking an order setting aside the orders of substitution and revival on the ground that he had not been served with the application dated 3/10/2022. This court disposed the said application dated 14/12/2022 through a ruling rendered on 2/10/2023. The court set aside the order of substitution and revival and directed that the application dated 3/10/2022 be heard a fresh. The application dated 3/10/2022 is the subject of this ruling.
7. The application is supported by an affidavit sworn on 3/10/2022 by Ibrahim Wanene, the Secretary General of the applicant. He deposes that their previous advocates contacted the deceased defendant's advocates requesting for information relating to the deceased defendant's legal representative and a copy of his death certificate. The said advocates did not provide the information. He adds that their previous advocates did not advise them on the status of the matter, contending that it was only on 25/7/2022 when their advocates informed them that they had been granted leave by the Court to cease acting for them. He adds that they did not know who the legal representative of the deceased defendant was until their current advocates on record came across the petition filed at Kangundo Magistrate Court when they discovered that David Muthama Kilonzo was appointed as administrator of the deceased defendant's estate on 25/8/2020 and the Grant was confirmed on 9/6/2022.
8. He further contends that the delay in bringing the application for substitution and revival was occasioned by lack of information on the deceased defendant's personal representatives and by the fact that their previous advocates recused themselves from representing them in the suit without letting them know about the status of the matter. He adds that the Court has discretion to grant the orders sought. He urges the Court to exercise discretion in their favour by granting the orders sought in the application.
9. David Muthama Kilonzo [hereinafter referred to as "the administrator"] opposes the application through his replying affidavit sworn on 17/10/2023. He deposes that he is the administrator of the estate of Zephania Kilungu Kilonzo, the deceased 1st defendant. The administrator contends that the suit land is not part of the deceased's estate. He adds that his advocate informed the parties to the suit via a letter dated 12/11/2018 that the deceased defendant had died on 16/5/2018. The administrator contends that the Grant relating to the estate of the deceased defendant was confirmed on 9/6/2022 and the deceased's estate was fully distributed prior to the filing of the present application.
10. The administrator states that on 15/11/2018, parties to the suit appeared before the Honorable Deputy Registrar and the Court was informed that the 1st defendant had passed away. The applicant was subsequently granted sixty (60) days within which to substitute the deceased defendant. He adds that on 12/5/2019, when the suit came up for mention before the Court, the applicant was granted a further 60 days within which to substitute the deceased defendant. The administrator contends that the applicant is misleading the Court by claiming that the delay was occasioned by the fact that their previous advocate withdrew from acting for them. The administrator states that the applicant's former advocate ceased acting vide an application dated 8/7/2020 on the grounds that the applicant failed to give them instructions.
11. The administrator argues that he will be prejudiced if the orders sought are granted because he will be litigating on an issue that is not within his personal knowledge. The administrator contends that the application is misconceived, scandalous, vexatious and a total abuse of the court process. The application was canvassed through oral submissions tendered in the virtual court on 20/11/2023.



12. I have considered the application; the response to the application; and the parties' respective oral submissions. I have also considered the legal frameworks and jurisprudence relevant to the key issue that falls for determination in the application. The single issue to be determined in this ruling is whether the application meets the criteria upon which our trial courts exercise the discretionary jurisdiction to grant orders of substitution and revival of an abated claim.
13. The general jurisdiction to grant an order of substitution in respect of a deceased defendant is exercised within the framework of Order 24 rule 4(i) of the Civil Procedure Rules, 2010 which 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.”
14. Under Order 24 rule 4(3), when the legal representative is not substituted in place of a deceased defendant within 12 months, the claim against the deceased defendant abates. Jurisdiction to revive an abated suit or claim is donated by Order 24 rule 7 of the Civil Procedure Rules which provides as follows:
  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.
15. The Court of Appeal in Joseph Gachuhi Muthanji V Mary Wambui Njuguna [2014] eKLR discussed the import of Order 24 rule 7(2) of the Civil Procedure Rules. The prevailing principle is that, a party inviting the court to exercise discretionary jurisdiction under Order 24 rule 7(2) of the Civil Procedure Rules is required to demonstrate that there was sufficient cause which prevented him from initiating substitution proceedings to procure the necessary orders within the prescribed period of 12 months.
16. In the present application, the applicant has explained that the delay in making the application for substitution was occasioned by the fact that they did not know the 1st defendant's personal representative, adding that they were not aware that a grant had been issued to David Muthama Kilonzo. They have further explained that their previous advocates did not advise them on the status of the case. The first limb of the explanation has not been controverted in any way.
17. The substitution and revival orders that are sought in the present application relate to the claim against the 1st defendant. The application was brought on or about 4/10/2022. Prior to bringing the application dated 3/10/2022, the plaintiff brought a similar application dated 8/2/2021 in February 2021. The application dated 8/2/2021 was rejected by the court without the court venturing into its merits because the personal representative of the deceased defendant had not been identified by name in the said application.
18. A perusal of the materials presented to the court in relation to the application under consideration indicates that Zephania Kilungu Kilonzo died on 16/5/2018. The beneficiaries of his estate did not



take out a grant until 2020 when they filed Kangundo SPMC Succession Cause No 17 of 2020. At that point, the suit against the 1st defendant had already abated. On 25/8/2020, a grant was issued to David Muthama Kilonzo in the said succession cause. It is therefore clear from the above evidence that by the time David Muthama Kilonzo applied for a grant, the 12 months period had already lapsed. Secondly, there is no evidence placed before this court suggesting that the plaintiff company was aware of the appointment of David Muthama Kilonzo as the administrator of the estate of the late Zephania Kilonzo and elected to do nothing about substitution and revival of the claim against the estate of Zephaniah Kilonzo. Thirdly, it is clear that a prior abortive attempt was made by the plaintiff to procure substitution and revival orders.

19. Taking the above factors into account, the court is of the view that, notwithstanding the alleged certificate of confirmation of grant, the claim against the 1st defendant can still be effectually adjudicated.
20. For the above reasons, this court is satisfied that sufficient cause has been demonstrated to warrant grant of orders of substitution and revival of the claim against the 1st defendant. Put differently this court is satisfied that the criteria for grant of orders of substitution and revival of an abated suit has been met.
21. The result is that the notice of motion dated 3/10/2022 is allowed in terms of prayers 2 and 3. Costs of the application shall be in the cause. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF FEBRUARY 2024**

**B M EBOSO**

**JUDGE**

**In the presence of: -**

Ms Moraa for the 1st Defendant

Ms Ngure for the 2nd Defendant

Ms Rungare for the 6th, 7th and 8th Defendant

Ms Pepela for the 9th Defendant

Court Assistant: Hinga

