



**Limuru Hills Limited (In Receivership) v Muriithi (Environment & Land
Case E120 of 2023) [2024] KEELC 1154 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1154 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E120 OF 2023**

JA MOGENI, J

FEBRUARY 29, 2024

BETWEEN

LIMURU HILLS LIMITED (IN RECEIVERSHIP) PLAINTIFF

AND

MARTHA WANGU MURIITHI DEFENDANT

RULING

1. I have before me two applications the first Notice of Motion Application dated 24/03/2023 and the second Notice of Motion Application dated 16/05/2023.
2. The application dated 24/05/2023 is brought under Order 1 Rule 10(2), Order 2 Rule 15(1) b, c and d, order 3 rule 2, order 4 rule 1 (6) and Order 51 Rule 1 of *Civil Procedure Rules* and section 1A, 3 and 3A of the *Civil Procedure Act*. Seeking the following orders:
 - i. That the Interested parties be enjoined in this suit being the administrators of the estate of the defendant who is deceased
 - ii. That the entire suit (Plaint dated 27/03/2023) and Application (Notice of Motion dated 27/03/2024) be and are hereby struck out having been commenced against a dead person and therefore is a Nullity Ab Initio and cannot even be amended.
 - iii. That the costs of the Suit and the Application be awarded to the Interested Parties in any event.
3. The application is based on the grounds on it and is further supported by the affidavit sworn by Anne Wangechi Murithi the 1st Interested Party.
4. When the parties appeared in court on 12/06/2023 the plaintiff had already filed a Notice of Withdrawal of Suit which the plaintiff's counsel Mr. Kongere brought to the attention of the court. On their part, Counsel for the defendant Ms Akoth notified the court that they had filed a preliminary objection on the basis that the defendant in the suit is a deceased. She however stated that since they



had filed their notice of appointment on 24/05/2023 they were then entitled to costs. The court had in a brief ruling adopted the notice of withdrawal of suit with no order as to costs.

5. With this withdrawal, neither the Preliminary Objection nor the Notice of Motion Application dated 24/05/2023 could be canvassed having been overtaken by events and therefore I will only address the Notice of Motion dated 16/06/2023.
6. The Notice of Motion Application dated 16/06/2023 is brought under order 45 rule 1 and 2 and order 51 rule 1 and sections 1A and 3A of the Civil Procedure Act. Seeking the following the following prayers:
 - a. That the Honorable Court be pleased to review and set aside the orders granted on 12/06/2023 allowing the plaintiff to withdraw the suit herein with no Orders as to Costs in terms of Withdrawal of Suit dated 24/05/2023.
 - b. That this Honorable Court be pleased to hear the advocates of the Administrators of the Deceased defendant on the issue of costs and an award of costs of the withdrawn suit to the advocates of the administrators of the Deceased defendant
 - c. That the costs of this application be provided for and paid by the plaintiff in any event.
7. The application is filed by K'opere and Co. Advocates on behalf of administrators of the estate of the defendant as interested parties.
8. The application is based on the grounds inter alia that the defendant herein were served with the plaint and notice of motion application and they filed a preliminary objection stating that the defendant to the suit was dead. That it is upon being served with the preliminary objection that they filed a notice of withdrawal of instant suit. The supporting affidavit is sworn by Tom O. K'Opere
9. The applicants seek orders that this court review and or set aside its orders made on 12/06/2023 allowing the suit to be withdrawn with no order as to costs. They also seek to have this court hear the advocates of the administrators of the defendant in this suit and award costs of the withdrawn suit to the advocates of the administrators of the deceased defendant.
10. The application is opposed by the plaintiff who through its receiver manager Mr Madhav Bandari swore on 25/09/2023 a replying affidavit. He has deposed inter alia that the administrators are not party to the suit and therefore cannot seek the orders they are seeking.
11. That the only recourse available to the applicants is to appeal since both Counsels were heard by the court. Further that the Notice of Withdrawal of Suit was filed on 25/05/2023 at 11:00:31 a.m and the administrator's application for joinder was filed on 25/05/2023 at 01:02:15 pm and he annexed an extract from the court's CTS marked as MB-1.
12. He averred that the court reconsidered all the matters on 12/06/2023 and made a decision and therefore the party aggrieved should go on appeal but not apply for review of the court's decision.
13. I have considered the application alongside the submissions made by T.O. K'Opere Advocates, for the applicants, and Muriu Mungai Advocates for the plaintiff.

Analysis and Determination

14. From my reading of the pleadings, affidavits and submissions, I find that the only issue for determination is whether the court should proceed to review its order dated the 12/06/2023 allowing this suit to be withdrawn with no order as to costs. The Applicant in its submissions dated 5/10/2023



relied on the cases of *Nation Media Group & Another vs Awale Transporters Limited* [2022] eKLR and *Joseph Oduor Anonde vs Kenya Red Cross Society* [2012] eKLR.

15. On their part, the plaintiff respondent filed their submissions dated 04/10/2023, and opposed the application. They relied on the cases of *Sammy M. Makove, Commissioner of Insurance & others v. Kiragu Holdings Limited* [2013] eKLR, *Juma Khamis & 4 others vs Mukesh Shah & 2 others* [2021]eKLR, and *National Bank of Kenya Ltd vs Ndungu Njau* [1997]eKLR.
16. In the current case, it is instructive to note that the Plaintiff's case against the defendant was a nullity ab initio. The action of withdrawal of the suit was an action in futility. A suit against a deceased person is a nullity and amounts to nothing. Infact the withdrawal of the suit was an action in futility too because the defendant is deceased and therefore no cause of action can arise against them. In the case of *Macfoy-vs-United Africa Co. Ltd.*(1961) 3 All E.R 1169, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.
17. It is clear from the foregoing that you cannot put something on nothing. It will surely come to nothing. It therefore follows that the action. Now the instant application for review is therefore about a non-existent action. At this point, I would wish to pose a question that has also disturbed my mind as I pondered over the novel arguments by counsel namely, what is the remedy available to the interested parties in this case?.
18. The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. It is however important to note that even if the interested parties wanted to take over the suit against the defendant, the same does not exist. The action of bringing a suit against a dead person was a nullity from the start of the process of initiating the action and further the action of withdrawing a non-existent suit was also a nullity.
19. Technically, the case was non-suited ab initio, for one cannot sue a dead person. Whether or not such suit can be cured by a substitution was one of the issues that the court looked at in the case of *Viktar Maina Ngunjiri & 4 others vs Attorney General & 6 others* (2018) eKLR. In that case, Mbogholi Msagha J (as he then was), cited with approval various Indian cases. In the Indian case of *C. Muttu vs. Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”



20. In yet another Indian Case of *Pratap Chand Mehta vs Chrisna Devi Meuta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 rule 10 or order 6 rule 17 cannot be availed of to bring about amendment.”

21. From a perusal of the pleadings filed herein, I note the interested parties were not parties to the suit that was withdrawn on 12/06/2023. The application filed by the interested parties is one dated 24/05/2023 the same date the Notice of Withdrawal of Suit was filed and a Notice of Motion dated 24/05/2023 and Preliminary Objection dated 24/05/2023. The Notice of Motion was seeking joinder but was not canvassed. The Suit was withdrawn before the two applications were canvassed. The instant application is the one dated 16/06/2023 as already stated hereinabove.

22. I see no need of delving into the provisions of Section 80 of the *Civil Procedure Act* and order 45 rule 1 (1) of the *Civil Procedure Rules* which make provisions on review of court orders since the suit against which the application is brought is a nullity.

23. Therefore, on the issue of costs sought the Court finds that there are various factors that would guide a court while deciding whether a party should be granted costs when the suit has been withdrawn or discontinued and the Court should consider the matters that led to the litigation, the conduct of the parties and the manner in which the suit was terminated and therefore appreciating the trouble that had been taken by the parties. See the case of *Cecilia Karuru Ngayu ...Vs... Barclays Bank of Kenya & another* [2016] eKLR, where the Court held that;

“To my mind, in determining the issue of costs, the court is entitled to look at inter alia (i) the conduct of the parties, (ii) the subject of litigation, (iii) the circumstances which led to the institution of the proceedings, (iv) the events which eventually led to their termination,(v) the stage at which the proceedings were terminated, (vi) the manner in which they were terminated, (vii) the relationship between the parties and (viii) the need to promote reconciliation amongst the disputing parties pursuant to Article 159 (2) (c) of *the Constitution*.^[11] In other wards the court may not only consider the conduct of the party in the actual litigation, but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”

24. For the instant suit withdrawn suit any steps taken were in futility since the defendant was deceased anyway and in fact the defendants had not been enjoined to the suit which in itself was a nullity ab initio despite the action of the defendants of filing the application.

25. Given the foregoing, I note without a shadow of doubt that the suit was instituted against a dead person and was thus a nullity. The representative of the deceased cannot take over a nullity. The only order I can make in the circumstances is that this suit having been withdrawn, I will make no orders as to costs save for the costs of this application which I assess at Kshs. 10,000/= payable to the applicant by the plaintiff.

Orders accordingly.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY FEBRUARY 2024.

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Cheruiyot holding brief for Mr. Konyere the for Plaintiff/Respondent

Mr. Ongochi holding brief for Mr. K'Opere for the Defendant/Applicant

Ms. C. Sagina : Court Assistant

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MOGENI J

JUDGE

