



REPUBLIC OF KENYA



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**Mwamghunda v Nassir; Ariri & another (Applicant) (Environment & Land
Case 22 of 2020) [2024] KEELC 1238 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1238 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 22 OF 2020
LL NAIKUNI, J
FEBRUARY 22, 2024**

BETWEEN

SOPHI MWAMGHUNDA PLAINTIFF

AND

ABDULLAH NASSIR DEFENDANT

AND

SOLOMON MOSE ARIRI APPLICANT

JOCKTAN MAKISAGHU APPLICANT

RULING

I. Introduction

1. The Application for determination by this Honourable Court is the Notice of Motion dated 18th May 2023. It was filed by 1st and 2nd Applicants herein – ‘Solomon Mose Ariri and Jocktan Makisaghu. The application was brought under the provision of Sections 1A, 3A and 3B of the *Civil Procedure Act*, Cap. 21 and Order 24 Rules 1, 2 and 3 of the *Civil Procedure Rules*, 2010 and Article 159 (b) of the *Constitution* of Kenya, 2010.
2. Upon service of the Defendants/Respondents filed Grounds of Opposition dated 13th May, 2023. The Honourable Court shall be dealing with the issues raised in the replies at a later stage of this Ruling. It is instructive to note for information sake that initially there had been another similarly related matter to this case herein being ‘ELC No. 152 of 2015 – *Abdullah Ali Nassir – Versus – Sophi Mwamghunda* whereby Judgement was delivered on 14th June, 2014. The Honourable Court regards this information to be significant in that the said case has been frequently referred to by parties herein. Hence there should not be any confusion whatsoever.



II. The 1st and 2nd Applicants Case

3. The 1st and 2nd Applicants seek for the following orders:-
 - a. That the Plaintiff - Sophi Mwamghunda (deceased) be substituted with Solomon Mose Ariri and Jocktan Makisaghu Mkajuma as the Legal administrators to be on record as the Plaintiffs.
 - b. That costs of the application be in the cause.
4. The application is premised on the grounds, testimonial facts and the averments made out under the 13 Paragraph of Solomon Mose Ariri and three annexures marked as “SMA – 1 to 3” annexed thereto and a further 9 Paragraphed Supported Affidavit of Jocktan Makisaghu Mkajuma and three (3) annexures marked as “JMM – 1 to 3” annexed thereto respectively. Both the deponents being son and Widower to the Plaintiff herein. Mr. Ariri the 1st Applicant herein averred as follows:-
 - a. He was the biological and a Co - Legal Administrator to the estate of Sophi Mwamghunda (Hereinafter referred to as “The Deceased”). The Deceased passed away on 1st May 2021 after which this suit had already been commenced.
 - b. Following the demise of the Deceased, the 1st and 2nd applied through filing of Petition for the Ad Litem Letters of Administration to participate in this suit on behalf of the estate of the Plaintiff;
 - c. They are now seeking for the leave of this court to be substituted in her place in the suit herein. He was keen to have the matter heard and determined on merit.
 - d. The Respondent would not in any way be prejudiced if the orders sought herein were granted. He prayed for the application to be allowed.
5. Additionally, Mr. Mkajuma averred that:-
 - a. He was the Widower and a Co - Legal Administrator to the estate of Sophi Mwamghunda (Hereinafter referred to as “The Deceased”). The Deceased passed away on 1st May 2021 after which this suit had already been commenced.
 - b. Following the demise of the Deceased, the Applicants applied through filing a Petition for the Ad Litem Letters of Administration to participate in this suit on behalf of the estate of the Plaintiff.
 - c. They are now seeking for the leave of this court to be substituted in her place in the suit herein. The suit to be heard on merit.
 - d. The Defendant/Respondent would not in any way be prejudiced if the orders sought herein were granted.

III. The Grounds of Opposition by the Defendant/Respondent

6. The Defendant/Respondent opposed the application vide grounds of opposition dated 30th May 2023. The Defendant/Respondent in objection held that the application was misconceived, vexatious, unmerited and bad in law as the suit had abated in accordance with the provision of Order 24 Rule 3 (2) of the *Civil Procedure Rules*, 2010. In saying so, the Defendant contended that the Plaintiff died in the year 2021, thus the suit abated a year later in year 2022. Further, it was his argument that the 1st and 2nd Applicants lacked “the locus standi” to proceed as they were not the duly appointed Legal Administrators of the estate of the deceased. It was argued that since year the 2021 the 1st and 2nd



Applicants had made no attempt to substitute the Plaintiff and as such are guilty of the doctrine of laches as this application had been made two (2) years since the suit abated. The court was urged to find the application was unsustainable and dismiss it with costs to the Defendant/Respondent.

IV. Submissions

7. On 3rd July, 2023 in the presence of all parties, directions were taken that the Notice of Motion application dated 18th May, 2023 be canvassed way of written submissions. Pursuant to that the Defendant/Respondent obliged and the Honourable Court reserved a date for the delivery of the Ruling accordingly.

V. The Written Submission by the Defendant.

8. While opposing the application by the 1st and 2nd Applicants the Learned Counsel for the Defendant the Law firm of Messrs. Sherman, Nyongesa and Mutubia Advocates filed their written submission dated 24th June, 2023. Mr. Mutubia Advocate commenced his submission by stating from the onset that the Defendant contended that the Application dated 18th May, 2023 by the 1st and 2nd Applicants was misconceived, vexatious, unmerited, bad in law, incompetent and otherwise a gross abuse of this Honourable Court's process and the same ought to be dismissed with costs.
9. The Learned Counsel posited that the Defendant (as a Plaintiff then) filed suit against the Plaintiff (as a Defendant then) by way of a Plaint dated 9th July, 2015 being Civil Suit - ELC Case No. 152 of 2015. Through the said suit, the Defendant sought for Judgment to be entered against the Plaintiff herein for a mandatory injunction to compel the Plaintiff to pull down to the ground the structures she had illegally erected on the Defendant's Plot No. 12519 Section I Mainland North situated at Nyali within Mombasa County, an order compelling the Plaintiff to vacate from the suit property, an order restraining the Plaintiff from alienating, wasting and trespassing on the suit property and seeking for damages for trespass together with costs of the suit.
10. Subsequently, the Plaintiff (now Deceased) filed the instant suit vide the Originating Summons dated 12th February, 2020 seeking for Orders for the Land Adverse Possession against the Defendant in respect to Plot No. 12519 Section I Mainland North.
11. The Plaintiff died on 1st May, 2021 before the suit was heard and determined. Therefore, the suit abated on 1st May, 2022 by virtue of the provision of Order 24 Rule 3 (2) of the Civil Procedure Rules, 2010.
12. Eventually, the Applicants filed the Application herein seeking to be substituted as the Legal Representatives of the Estate of the Deceased and to be enjoyed in the suit. The Defendant in opposing the Application filed Grounds of Opposition dated 30th May, 2023 and filed in Court on the same date.
13. From this submission herein, the Defendant based its arguments around the following three (3) issues for the determination by this Honourable Court. These were namely:-

Firstly, whether the suit herein had abated. The Learned Counsel averred that the provision of Order 24 Rule 3 (2) of the Civil Procedure Rules, 2010 states as follows:-

“ Procedure in case of death of one of several Plaintiffs or of sole Plaintiff.

- (2) 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 shall award to him



the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.

14. It was not disputed that the Plaintiff died on 1st May, 2021 and therefore ideally the suit abated on 1st May, 2022 after no action was taken to substitute the Plaintiff. According to the Learned Counsel, it was trite that the effect of the provision Order 24 Rule 3 (2) was that the abatement of the suit was automatic and same accrued upon the lapse of one year [12 Months] from the date of death of the deceased.
15. The Learned Counsel asserted that the effect of an abated suit was that it ceased to exist in the eyes of the law. The abatement took place on its own force by effluxion of time, a legal consequence which flowed from the omission to take the necessary steps within one year to implead the legal representative of the deceased Plaintiff. Therefore, Defendant submitted that the suit herein abated on 1st May, 2022 and the application by the Applicants had been defeated by time.
16. Secondly, whether the application was merited. The Learned Counsel contended that the Application was misconceived, unmerited, incompetent and bad in law since the suit had abated by virtue of the provision Order 24 Rule 3 (2) of the Civil Procedure Rules, 2010 since the Deceased Plaintiff passed on in the provision 2021. Therefore, there was no valid suit before this Honourable Court for the proposed Plaintiffs to be substituted as sought and the same ought to be dismissed with costs to the Defendant.
17. To buttress the point, they relied on the case of:- “Union of Kenya Civil Servant – Versus - John Silas Nyamato & 2 others; Isaac Gathungu Wanjohi & 4 others (Proposed Interested Parties) /2021]eKLR where the Court stated as follows:-

“In respect of the subject matter, its sufficient to observe that suit the against the 1st Defendant abated more than four and a half years before the filing of the Application dated 8th July 2020. Nevertheless, it is also important to note that despite the Plaintiff being aware of the abatement of the suit against the 1st Defendant, by operation of the law, same has not found it fit to seek for the reinstatement and/or revival of the suit. In the premises, is my finding and holding that no substitution can arise and/or it be allowed against and/or on behalf of the 1st Defendant either sought or at all. Consequently, the limb of the Application seeking for substitution must fail.”
18. The Defendant/Respondent further submitted that the 1st and 2nd Applicants lacked ‘locus standi’ to proceed with the suit as they were not legal Representatives of the Deceased Plaintiff’s estate since they had not obtained Grant of Letters of Administration and the same had not been produced before this Honourable Court. In any event the 1st and 2nd Applicants made no attempt to be substituted as parties since the year 2021 and they was therefore guilty of laches and inordinate delay as the application had been brought more than two (2) years since the suit abated.
19. Thirdly, who bears the costs of this Application. The Learned Counsel posited that on the basis of the law, facts and authorities cited above, the Application before Court was fatally defective, unmerited, and incompetent and an outright abuse of this Honourable Courts process and as such ought to be dismissed with costs.



VI. Analysis and Determination

20. I have considered the Notice of Motion application dated 18th May, 2023 by the 1st and 2nd Applicants herein, the responses and the Submissions together with the cited authorities by the Defendant/ Respondent herein, the relevant provision of the Constitution of Kenya and the statutes.
21. The main issues for determination are two. These are:
- a. Whether the Notice of Motion application dated 18th May, 2023 by the 1st and 2nd Applicants has any merit.
 - b. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion application dated 18th May, 2023 by the 1st and 2nd Applicants has any merit.

22. Under this Sub heading, the main issues are on the substitution of a party upon demise and the abatement of a suit. Legally speaking, an application to substitute a deceased Plaintiff, by a personal representative is governed by the provisions of Order 24 Rule 3 of the Civil Procedure Rules, 2010. It provides thus:-

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 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.

23. In the instant case, the Plaintiff herein, Sophie Wawuda Mwamghunda died on 1st May 2021 as per the Certificate of Death dated 9th June 2021. The 1st and 2nd Applicants herein have petitioned the “Mombasa Chief Magistrate Succession Cause No. E072 of 2023 for Letters of Administration Ad litem for the Estate of Sophie Wawuda Mwamghunda as the widower and son respectively. The affidavit in support of the Petition was sworn on 17th May 2023. However, the 1st and 2nd Applicants have not demonstrated that the Petition has been allowed as there are no Letters of Administration attached to the application to establish that they have been appointed the legal representatives of the estate of the Plaintiff.
24. Applying the provision of Order 24 Rule 3 of the Civil Procedure Rules, 2010 to the facts before the court, the suit abated on 1st May 2022 a year after the death of the Plaintiff which occurred on 1st May 2021. This application was filed on 18th May 2023, two years after the abatement of the suit. The abatement of a suit is an operation of the law and was automatic. Once it takes effect, there is no third



way - the suit becomes non – existent. However, all hope is not lost, the Court has powers under Rule 7 (1) of Order 24 to revive an abated suit. It provides:-

“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.

25. After the suit has been revived by the court, the legal representatives can then proceed under Rule 3 (2) and apply for the court to extend the time for making an application for substitution outside the one-year period. The proper way is for all these orders to be sought in the same application, the first prayer would be to revive the application, the second prayer to seek for extension of time to seek substitution and the other prayer would be to seek substitution and lastly, an amendment of the Plaint to reflect the new Plaintiffs.
26. This was what the 1st and 2nd Applicants and their Counsel ought to have done but unfortunately they had not. Clearly, from the annexed documents, they were merely application to be granted the Ad Litem and not the Grant itself. The application was never processed in the ordinary manner was obtained as a result no Grant Letters of Administration ad Litem was issued to them for the application for revival of an abated suit to take effect as suggested by the Court. Evidently, they lacked the “locus standi” to make the application in the first place, as the provision of Order 24 talks of ‘the legal representatives of the deceased Plaintiff’ which they were not as they had not been granted letters of administration ad litem. The court could not see it as a technicality that could be wished away by applying the Overriding Objective of the court in administering justice nor could the provision of Article 159 (2) (d) of the *Constitution* of Kenya, 2010 can not come to their rescue in the given circumstances. I saying so, I have sought refuge from the case of: “*John Muthee Matumo Versus - Thomas Gerishon & 4 others* [2022] eKLR where Sila J held “Inter alia”:-

“It will be noted that a Plaintiff is at liberty to apply to court for revival of an abated suit. That is what the Plaintiff seeks in prayer (i) of this application. However, I do not see how I can revive an abated suit where there is no legal representative appointed for the deceased Defendant. The procedure should first be to have a person appointed to represent the estate of the deceased before an application for revival of an abated suit can be made. The Applicant appears to have commenced citation proceedings in respect of the estate of the deceased. It is upon completion of those proceedings, and upon appointment of a person to represent the estate of the deceased, that he can then come to court to seek the revival of the abated suit and substitution of the deceased Defendant. My view is that this application is premature.”

27. Being guided by the findings in the above-named case, I do conclude that the suit herein is premature as it has been brought by the Applicants before they could secure Letters of administration ad litem. For these reasons, therefore the application by the 1st and 2nd Applicants must fail.

Issue No. c). Who bears the Cost for the application

28. The issue of costs is at the discretion of the Court. Costs mean the award which a party is awarded at the conclusion of legal action and/or proceedings in any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 hold that Costs follow the event. By event it means the result or outcome of the legal action.



29. In the instant case, the application by the 1st and 2nd Applicants herein has not been successful. Thus, the costs will be awarded to the Defendant/Respondent.

VII. Conclusion & Disposition

30. Having caused an analysis to all the framed issues, the Honourable Court now makes the following orders:-

- a. That the Notice of application dated 18th May 2023 be and is hereby dismissed.
- b. That an order made That the suit instituted by the Plaintiff against the Defendant abated on 1st May 2022 a year after the death of the Plaintiff which occurred on 1st May 2021 pursuant to the provision of Order 24 Rules, 1 and 2 of the Civil Procedure Rules, 2010.
- c. That costs for the application to be borne by the 1st and 2nd Applicants and awarded to the Defendant.

It is ordered accordingly

RULING DELIVERED THROUGH MICRO – SOFT TEAM VIRUAL MEANS SIGNED AND DATED AT MOMBASA THIS.....22ND FEBRUARY.....2024

HON. JUSTICE MR. L.L. NAIKUNI

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Onduso Advocate for the 1st and 2nd Applicants.
- c. M/s. Asewe Advocate holding brief for Mr. Mutubia Advocate for the Defendant

