



Philip Kimutai Langat p/a Kiplangat Arap Maina v Maina; Bet (Being the Legal Representative of the Estate of Kibet Arap Maina alias Job Kibet Maina - Deceased) (Interested Party) (Environment & Land Case 100 of 2005) [2024] KEELC 1525 (KLR) (21 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 100 OF 2005
MC OUNDO, J
MARCH 21, 2024**

BETWEEN

PHILIP KIMUTAI LANGAT P/A KIPLANGAT ARAP MAINA PLAINTIFF

AND

JOB KIBET MAINA DEFENDANT

AND

ZACHARIAH KIPKOECH BET (BEING THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIBET ARAP MAINA ALIAS JOB KIBET MAINA - DECEASED) INTERESTED PARTY

RULING

1. Vide Pursuant an ex-parte judgment of the 28th April 2022, the court cancelled the title to Land Parcel No. Kericho/Sosiot/1655 held by the Defendant and re-instated the name of Kiplangat Arap Maina as the registered proprietor of the original parcel No. Kericho/Sosiot/604. The interested party herein then filed an application by Notice of Motion dated 16th May, 2022 seeking that the court varies/ reviews and/or sets aside the said orders. He had also sought leave to be joined and/or substituted with the deceased Defendant who had passed on 3rd December 2013 and that the instant suit be declared as abated. However, the said application had been dismissed for failure by the interested party's Advocate on record to comply with the provisions of Order 9 rule 9 of the Civil Procedure Rules.
2. The Applicant has now filed an Application by way of Notice of Motion dated the 31st July, 2023, brought pursuant to the provisions of Order 24 Rule 4 (1) (3), Order 45 rule (1) (2) (sic) Order 10 rule 11, Order 51 rule 1 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya and other enabling provisions of the law, where he seeks to be joined as



a legal representative of the estate of the Deceased Defendant herein and thereafter, the court to vary, review and/or set aside its judgment delivered on 28th April, 2022 in the following terms: -

- i. That the instant suit be declared as abated since over one (1) year had lapsed without substitution of the deceased Plaintiff and the deceased Defendant as per directions given by the court on 3rd June, 2015.
 - ii. That an order of restoration and/or re-transfer of the suit property namely Kericho/Sosiot /604 which had been subdivided to two parcels of land known as Kericho/Sosiot/1655 and Kericho/Sosiot/1656.
3. The Applicant also sought for costs of the application.
 4. The Application was supported by the grounds on its face and the Supporting Affidavit of an equal date sworn by the Applicant Zachariah Kipkoech Bett, who had deponed that he was the legal representative of the estate of the deceased Defendant who died on 23rd December 2013. That the Respondent was the son of the deceased Plaintiff who had also died on 17th December, 2013 and who had during his lifetime issued the said Respondent with the Power of Attorney purposely to represent him in the instant case.
 5. That he only became aware of the existence of the instant suit when the Plaintiff herein served him with a Judgment on 16th May 2022. That upon perusing the court file his Advocate had discovered that the present suit had been heard on 25th July, 2012 whereupon the Plaintiff had closed his case. That the matter could not proceed for defence hearing due to the defense Counsel's illness. Thereinafter, on 3rd June, 2015, the court had been informed of the demise of both the Plaintiff and the Defendant wherein leave had been granted for their substitution.
 6. On 4th July, 2017, the Plaintiff's Counsel sought to serve a hearing Notice to the Defendant personally and a hearing date was scheduled for the 7th November, 2018 whereby the same did not materialize and the Defendant's suit upon application of the Plaintiff's Counsel, was closed on 6th December, 2021 wherein after the Plaintiff filed their submissions, and judgment was delivered on 28th April, 2022, albeit the death of the parties therein.
 7. That after the previous application had been stuck out for non-conformity with the provisions of 9 Rule 9 of the Civil Procedure Rules, for which representation had not been corrected by the adoption of the consent for change of Advocates, the Plaintiff had immediately transferred the ownership of the suit land to the deceased Defendant (sic) which land had then been subdivided into two parcels being Kericho/Sosiot/1655 and Kericho/Sosiot/1656 to original parcel number Kericho/Sosiot/604 through an operation of decree of the judgement of the instant suit. That the Plaintiff had further taxed the bill of costs and sought to evict him and his family from the suit land whereby they would be rendered destitute if the orders sought herein were not granted, for which he would suffer irreparable loss and damages.
 8. The Application was opposed by the Plaintiff/Respondent's Replying Affidavit dated 19th September, 2023 sworn by Philip Kimutai Langat, the Respondent herein who deponed that the Defendant, John Kibet Maina had died on the 23rd December, 2013 before the instant matter could be concluded.
 9. That since civil suits survived parties, on 3rd June, 2015 the court had directed that the deceased Defendant be substituted wherein the Plaintiff/Respondent filed for citation where the court had cited, via orders dated 2nd May, 2019, the beneficiaries of the estate of the Defendant including the interested party who had, on 20th January 2020, been issued with temporary grant of Letters of Administration as a personal representative of the deceased Defendant's estate.



10. That despite the matter having been listed severally for hearing, the interested party had willfully absconded and/or neglected to attend despite service hence the court ought not to allow him and the having harm if to benefit from his refusal to attend court. That it was thus surprising for the interested party to claim that he had not been aware of the instant suit despite him being a witness and writing a witness statement that had been received in court on the 10th August, 2011. That further, despite having a general Power of Attorney and a grant of Letters of Administration, he had opted not to defend the case but instead had filed for confirmation of grant before the lower court in Kericho Chief Magistrate Court Succession Cause No. 230 of 2019 in a bid to obtaining a certificate of confirmed grant and proceeding to subdivide the fraudulently obtained land.
11. That he had filed a caveat and a supporting affidavit to the said succession cause. Further that it had been disingenuous for the interested party to allege that they had not been aware of the instant case despite there being a restriction on the impugned land being Kericho/Sosiot/1655 lodged on 19th October, 2006 and which the certificate of official search had clearly indicated that there would be no dealings on the land until civil case No. 100 of 2005 had been determined. That subsequently, it had been clear that the interested party had not approached the court with clean hands as his application had been tainted with non-disclosure of facts within his knowledge.
12. That the interested party had not met the threshold for review and or setting aside of the judgement delivered on 28th April, 2022 as set out in Order 45 of the Civil Procedure Rules and Section 80 of the *Civil Procedure Act*. Further, that the said judgement had been a regular judgement since there had been a defence on record hence the same ought not to be set aside. That the interested party had not proffered a plausible and reasonable explanation for not entering on record despite being served hence setting aside of the said judgement would greatly prejudice the Respondent, the instant case being a 2005 matter that had lagged in court for over 17 years.
13. That the Respondent and the beneficiaries of the estate of the late Kiplangat Arap Maina had been denied the enjoyment, use and quiet possession of the suit land which was currently occupied by the interested party thus setting aside the judgement would be tantamount to allowing the interested party to benefit from an illegality having fraudulently obtained title to the suit land. That the allegation by the interested party that the instant suit had abated since a period of over one (1) year had lapsed without substitution of the deceased Defendant had been untrue since the said interested party had a general power of attorney to act on behalf of the deceased defendant, but he had opted not to participate in the proceedings despite being served.
14. That the interested party had been after delaying the Respondent from enjoying the fruits of a lawful judgement delivered by the court and vexing the said Respondent. That the instant application was fatally defective, frivolous, vexatious and an abuse of the court process.
15. Directions were given that the application be canvassed by way of written submissions to which the parties complied and filed their respective written submissions to which I shall herein summarize as follows:

Interested Party/Applicants Submissions.

16. The Applicant vide his submissions dated 20th November, 2023 framed his issues for determination as follows:
 - i. Whether the court should vary or review and/or set aside the judgement delivered on 28th April, 2022.



- ii. Whether the instant suit had abated as a result of the demise of the Plaintiff and the Defendant in the year 2013.
 - iii. Whether the Applicant is entitled to orders of stay of execution of the Decree and/or consequential order emanating from a default judgment delivered on 28th April, 2022.
 - iv. Whether leave should be granted to the Applicant to be enjoined in the instant suit.
 - v. Whether the suit land namely Kericho/Sosiot/604 which was subdivided into resultant number Kericho/Sosiot/1655 and Kericho/Sosiot/1656 may be reinstated to the names of the Defendant.
 - vi. Who will bear the costs of the instant suit?
17. On the first issue for determination as to whether the court should vary or review and/or set aside judgement delivered on 28th April, 2022, the Applicant reiterated the contents of his Supporting Affidavit to submit that the instant matter having been instituted in the year 2005 and having been handled by several judges, the Plaintiff's Counsel had misled the court about the genesis of events of the suit prompting the court to erroneously deliver a default judgement of the deceased parties without substitution hence the said default judgement should be reviewed and set aside. That they had annexed the extracted decree as was held in the decided case of Suleiman Murunga v Nilestar Holdings Limited & Another [2015] eKLR.
18. He placed reliance on the Provisions of Order 45 Rule (1) of the Civil Procedure Rules on three requirements for the grant of review orders to submit that in the instant case, the mistake or error apparent on the face of the record had been that the court mistakenly gave a judgement in respect of the parties who had been deceased after being erroneously guided by the Plaintiff's Counsel that the Defendant who had died in the year 2013 had failed to prosecute his defence case giving rise to the filing of written submissions and the delivery of the default judgement on 28th April, 2022.
19. His reliance was hinged on the provisions of Section 80 of the *Civil Procedure Act* to submit that the court was empowered to review its judgement. Further reliance was placed in the decided case of Sylvester Nthenge v Johnstone Kiamba Kiswili [2021] eKLR, where the court had cited the Court of Appeal's decision in the case of Shanzu Investment Ltd v Commissioner for Lands (Civil appeal No. 100 of 1993) on what any other sufficient reason meant, to submit that the Applicant had demonstrated the grounds of review of the judgement of the instant suit and prayed that the same be allowed.
20. On the second issue for determination as to whether the instant suit had abated as a result of the demise of the Plaintiff and the Defendant in the year 2013, the Applicant reiterated the contents of his Replying affidavit to submit that due to the misdirection of the Plaintiff's Counsel on 6th December, 2021 when the present matter had come up for Notice to Show Cause why the same should not be dismissed for want of prosecution, the defence case had been closed and the judgement delivered. That had the Plaintiff's advocate informed the court that the Defendant herein had died in the year 2013, the court would have not proceeded with the matter hence the same would have been marked as abated given that it had been 9 years since the death of the Plaintiff and the Defendant. Therefore, the instant suit had abated by virtue of order 24 Rule 4(3) of the Civil Procedure Rules, 2010.
21. He placed reliance on the decided case of Aggrey Swaka Waswa v Patrick Omonge Khaemba; Thomas Meshack Omonge & 3 others (Proposed Respondents) [2020] eKLR, where the court had cited the case of Said Sweilem Gheithan Saabnum v Commissioner of Lands (Being sued through the Attorney General and 5 Others [2015] eKLR (sic) where the Court of Appeal had explained the Provisions of



Order 24 of the Civil Procedure Rules, to submit that the Plaintiff had not given sufficient reason as to why he had not made an application for the substitution of the deceased parties but he had instead misled the court to believe that the parties had been surviving by making an application to close the defence case as a means of rescuing the suit not to be dismissed for want of prosecution. That the effect of an abated suit was that it ceased to exist in the eyes of the law.

22. On the third issue for determination, it was the Applicant's submission that as a result of the suit herein having abated, the decree and any other consequential order emanating from the said default judgement be stayed as the same would be prejudicial to the Applicant and the estate of the deceased Defendant.
23. As to whether leave should be granted to the Applicant to be joined in the instant suit, the Applicant submitted that having demonstrated that he was the legal representation of the Defendant, he ought to be joined in the present suit in default to which he would not have the locus standi to bring the instant application seeking orders of review of judgement due to apparent error on the face of the record.
24. On the fifth issue for determination, the Applicant reiterated that upon their first application dated 16th May, 2022 being struck out on 27th April, 2023 due to un-procedural representation of the Defendant, the Plaintiff had immediately proceeded to effect the transfer of the suit property to the deceased Plaintiff's name by the operation of the decree of the instant suit. He thus prayed that the suit land being Kericho/Sosiot/604 which had been subdivided into two parcels, that is, Kericho/Sosiot/1655 and Kericho/Sosiot/1656 be reinstated in the names of the Deceased Defendant herein.
25. The Applicant thus submitted that the instant application was merited and should be allowed and that the costs of the same be borne by the Plaintiff.

Plaintiff/Respondent's Submissions.

26. The Plaintiff/Respondent vide his written submissions dated 14th November, 2023 framed his issues for determination as follows:
 - i. Whether there is proper application on record since the same had been filed by Tengekyon & Koske Co. Advocates after judgement and without obtaining leave of the court.
 - ii. Whether the Applicant is entitled to the orders of stay of execution.
 - iii. Whether the court should vary or review and/or set aside the judgement dated 28th April, 2022.
 - iv. Whether the interested party should be enjoined and/or substituted with the deceased Defendant.
 - v. Whether the suit abated.
27. On the first issue for determination, the Respondent's reliance was hinged on the provisions of Order 9 Rule 9 of the Civil Procedure Rules to submit that the Applicant herein had been represented by the firm of M/S S.G. Onganyi & Co. Advocates before the judgement dated 28th April, 2022 had been delivered but the firm of M/S Tengekyon & Koske Co. Advocates had filed the present application without seeking for and obtaining leave of the court. He acknowledged that there existed a consent dated 24th May, 2023, however, there had not been any indication in the Application that the consent was ever adopted as an order of the court yet it was trite that no change of an advocate could be effected without an order of the court on an application or a consent being filed.
28. That there had been no order of the court effecting the change of advocates hence the instant Application had been filed in disregard of the law. That the provisions of Order 9 rule 9 of the Civil



Procedure Rules were couched in mandatory terms thus the procedure therein should be followed to the letter. Reliance was placed on a combination of the decisions in the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR and *James Ndonyu Njogu v Muriuki Macharia* [2020] eKLR. That the obtaining of the leave of court before coming on record after judgement had been delivered was not a mere technicality that could be cured by Article 159 of *the Constitution* hence he urged the court to strike out the present application as the same had been filed in gross violation of the law.

29. On the second issue for determination as to whether the Applicant was entitled to the orders of stay of execution, the Respondent placed reliance on the principles guiding the court on deciding whether to grant stay of execution or not as enumerated under the provisions of Order 42 rule 6 (2) of the Civil Procedure Rules.
30. Regarding the substantial loss, reliance was placed on the decided case of *Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani)* HCMCA No. 1561 of 2007 to submit that the Applicant had not provided evidence in support of the claim that he would suffer substantial loss if stay orders were not issued. That the Respondent was a successful litigant entitled to enjoy the fruits of a successful litigation hence should not be restricted while in pursuit of the same. That the Applicant's father had obtained the suit land fraudulently thus they should not be allowed to benefit from their illegality and ulterior motives of evading from prosecuting the matter to its logical conclusion.
31. That further, the Applicant had not led any evidence to show that he had been in occupation of the suit land, however, he had conceded in his Supporting Affidavit that the execution of the judgement of the court had already been done as the title had reverted back to the original owner thus there had been nothing to stay. That the failure to prove substantial loss was enough reason to dismiss the Applicant's application since the suit land had been obtained fraudulently.
32. He relied on the provisions of Order 42 rule 6 (1) (2) of the Civil Procedure Rules to submit that the Applicant had neither provided security nor indicated any willingness to abide by the conditions that the court may impose in terms of security. Further, that he had not even settled the costs as per the certificate of costs that he had attached in his Supporting Affidavit hence he was underserving of the stay orders.
33. On the third issue for determination as to whether the court should set aside the judgement dated 28th, April, 2022, the Respondent reiterated the contents of his Replying Affidavit to submit that the Applicant herein was fully cognizant that the instant matter had been ripe and pending in court hence the court should not allow him to benefit from his dilatory tactics. That equity aids the vigilant and not indolent but in the instant case, the Applicant's indolence and laxity had been intentional thus should not be excused.
34. He placed reliance on the provisions of Article 159 (2) (d) of *the Constitution* and Section 1A and 1B of the *Civil Procedure Act* to submit that in administering justice, the court should focus on substantive justice and the just, efficient and expeditious disposal of cases, rather than procedural technicalities.
35. On whether the Applicant had offered sufficient justifications for the court to exercise its discretion in setting aside its judgement, reliance was placed on the Provisions of Order 12 Rule 2 (a) of the Civil Procedure Rules, Article 159 of *the Constitution*, Sections 1B and 3A of the *Civil Procedure Act*, Sections 18 and 19 of the Environment and Land Court to submit that the court had a duty to provide prompt justice to parties. He also relied on the decided case of *Patel v E.A Cargo Handling Services Ltd* (1974) EA 75 on the guiding principles in exercising the court's discretion. Further reliance was placed on the decision in the case of *James Kanyita Nderitu & Another* [2016] eKLR (sic) to submit that in setting aside a judgement, the court was called upon to examine whether the judgement had



- been entered regularly or irregularly and whether, in the case of a regularly entered judgement, there had been justifiable reasons for the court to exercise its discretion.
36. His submission was that in the instant case, the judgement that had been entered on 28th April, 2022 had been a regular one as summons had been properly served wherein the Defendant entered appearance and had filed his defence. That after the demise of the Defendant, the Applicant had refused, ignored and neglected to be substituted to continue defending the instant matter despite having a general Power of Attorney and even after obtaining the Letters of Administration. That further, the Applicant's Counsel on record had been served with the hearing notices as per the affidavit of service on record.
 37. That the judgement herein having been entered regularly, the court had to consider whether there had been justifiable reasons to exercise its discretion in setting aside its judgment. Reliance was placed on the James Kanyita Nderitu's case (supra) on the factors to be considered by the court in exercising such a discretion.
 38. On whether the Applicant had a good reason for his failure to appear, the Respondent reiterated the contents of his Replying Affidavit to submit that it had not been true for the Applicant to allege that he had not been aware of the instant case despite there having been a restriction on the impugned parcel of land Kericho/Sosiot/1655 lodged on 19th October, 2006 and which the certificate of official search had clearly indicated that there would be no dealings on the land until civil case No. 100 of 2005 had been determined. That subsequently, it had been clear that the interested party had not approached the court with clean hands as his application had been tainted with non-disclosure of facts within his knowledge. He thus submitted that there had not been plausible reasons which had been proffered by the Applicant for their failure to continue defending the instant suit.
 39. As to whether the defence had raised triable issues. It was the Respondent's submission that the defence had been a mere denial and a sham which had been calculated to cause undue delay to the Respondent to prevent him from enjoying his proprietary interests in the subject land yet he was entitled to the fruits of successful litigation.
 40. As to whether the orders were warranted in light of the prejudice to be occasioned to the Respondent considering the interest of justice on the whole, the Respondent relied on the decision in the James Kanyita Nderitu's case (Supra) to submit that in the instant case, were the Applicant's application granted, the Respondent stood to suffer delay in enjoying the benefits of a regularly entered judgement. That the Respondent would also be denied the right to use and occupy their land in violation of his rights as protected under Article 40 of *the Constitution*. Further, that the court would be entertaining a violation of people's rights by not evicting trespassers who were acting with impunity and in clear disregard of the law.
 41. That the Applicant had deliberately without any excusable mistake avoided participating in the hearing hence setting aside the judgement would greatly prejudice the Respondent, the present matter having lagged in court for over 17 years. He thus submitted that the Applicant had not met the threshold for setting aside a regular judgement hence his application should be dismissed with costs.
 42. Regarding whether the court should review the judgement dated 28th April, 2022, the Respondent's reliance was hinged on the provisions of Section 80 of the *Civil Procedure Act* and Order 45 of the Civil Procedure Rules on the grounds for the grant of review orders, to submit that there had been nothing on record which showed that there had been a discovery of new and important evidence, or any error apparent on the face of the record or any sufficient reason to allow the review orders. He thus submitted that the review orders should not be granted.



43. On the fifth issue for determination as to whether the interested party should be joined and/or substituted with the deceased Defendant, the Respondent reiterated the contents of his Replying affidavit to submit that the instant matter had lagged in court for over 17 years hence allowing the Applicant to continue delaying it further would be a great travesty and injustice to the Respondent who had wished to enjoy the fruits of the lawful judgement that had been rendered on 28th April, 2022.
44. As to whether the instant suit had abated, the Respondent reiterated that leave had been sought to file an application for substitution wherein the court had granted the same on 3rd June, 2015 but the Applicant and other beneficiaries through their dilatory schemes had decided not to substitute the deceased Defendant. That the Respondent had further sought orders for citation that had been granted and upon learning of the same, the Applicant filed Succession Cause in court and had been granted the letters of administration but still failed to defend the instant matter being fully aware that the said matter had been pending before court. That the Interested party/Applicant was after vexing the Respondent and the court should not entertain him.
45. In conclusion, the Respondent submitted that based on the provisions of law and authorities, and other grounds that had been adduced, the Application dated 31st July, 2023 was frivolous, vexatious and abuse of the court process hence the same ought to be dismissed and or/struck out with costs.

Determination

46. The Court, in its ex-parte judgment of the 28th April 2022, cancelled title to Land Parcel No. Kericho/Sosiot/1655 held by the Defendant, upon the subdivision of the original parcel No. Kericho/Sosiot/604 and re-instated it in the name of Kiplangat Arap Maina who was its original proprietor.
47. Subsequently a consent of Change of Advocates dated the 24th May 2023 between the Defendant's outgoing Counsel and his incoming Counsel, was filed on an equal date wherein vide a Motion dated the 31st July 2023, the Applicant sought to be joined as a legal representative of the estate of the Deceased Defendant and thereafter, the court to vary, review and/or set aside its judgment delivered on 28th April, 2022 in the terms that the instant suit be declared as abated since over one (1) year had lapsed without substitution of the deceased Plaintiff and the deceased Defendant as per directions given by the court on 3rd June, 2015 and secondly that there be an order of restoration and/or re-transfer of the suit property namely Kericho/Sosiot /604 which had been subdivided to two parcels of land known as Kericho/Sosiot/1655 and Kericho/Sosiot/1656.
48. The Applicant's grounds in support of the application was that the Defendant died on 23rd December 2013 during the pendency of the suit. That he had only become aware of the existence of the instant suit when the Plaintiff herein served him with a Judgment on 16th May 2022. That the matter had proceeded despite knowledge by the Plaintiff and his Counsel that both the Plaintiffs father and the Defendant had died in the year 2013 and therefore the suit herein had abated one year after their demise.
49. The Application was opposed by the Respondent to the effect that before the Defendant, John Kibet Maina died on the 23rd December, 2013, he had given the Applicant herein a General Power of Attorney dated 17th October 2013. That upon the Defendant's demise, the Applicant refused to be substituted as his legal representative wherein the Respondent filed for citation and vide an order dated 2nd May, 2019, the beneficiaries of the estate of the Defendant including the interested party had been cited as such. On the 20th January 2020, they had been issued with temporary grant of Letters of Administration as personal representatives of the deceased Defendant's estate. That thereafter they had willfully absconded and/or neglected to attend court despite service. That he could not now come



and feign ignorance of the ongoing case wherein he had indeed recorded a witness statement that had been received in court on 10th August 2011.

50. I find the issues that arise for determination as being:
- i. Whether the Applicant should be joined as a legal representative of the estate of the Deceased Defendant.
 - ii. Whether the court should vary, review and/or set aside its ex parte judgment delivered on 28th April, 2022.
51. It is not to be lost that the both the Respondent and Applicant herein held Powers of Attorney granted by the original Parties to the suit herein to act for them over their respective properties and which powers of Attorney were dated the 8th August 2005 and 17th October 2013 respectively.
52. That the Respondent had proceeded to testify on behalf of his father the Plaintiff during his lifetime wherein he had closed his case on the 28th March 2012. It is not in dispute that during the pendency of the case both the Plaintiff and the Defendant had subsequently passed away on the 17th December, 2013 and 23rd December 2013 respectively.
53. It therefore follows that upon their deaths, the respective Powers of Attorney were extinguished by operation of law. However the suit not to be personal in nature, the action survived the donors of the extinguished power of Attorney as provided for pursuant to the provisions of Order 24 rule 1, 3 and 4 of the Civil Procedure Rules, therefore it was upon both the Respondent and the Applicant herein to apply and obtain Letters of Administration permitting them to substitute the deceased parties and within a period of one (1) year of their demise, although, the Court is clothed with discretion to so extend the time for substitution on good reasons.
54. The Applicant was subsequently cited by the Respondent wherein he eventually obtained temporary grant of Letters of Administration as a personal representative of the deceased Defendant's estate on the 20th January 2020 which was 7 years after the demise of the Defendant. Judgment had subsequently been delivered on the 28th April 2022 in error and which judgment the Applicant seeks to be reviewed and/or set aside for having been delivered without substituting the deceased parties whose case had abated.
55. Order 24 Rule 4(1) of the Civil Procedure Rules provides that where a sole defendant dies and the cause of action survives or continues the court, on 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. Subrule (3) of the same Rule is in the following words-
- “(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”
56. When judgement was pronounced on the 28th April 2022, there was no suit subsisting and no application had been made for revival of the suit which had abated by operation of the law. The subsequent judgment was therefore null and void in law as well as the resulting decree which was equally a nullity.
57. Although this application has come late in the day yet in the spirit of the powers granted upon the court pursuant to the provisions of Section 1B and 3A the Civil Procedure Act I find that this is really a matter that goes to the issue as to whether the court has jurisdiction to order for joining of the Applicant to the suit where there is no suit pending the same having abated by operation of the law?. The answer



would be in the negative because the suit ceased to exist when both the Plaintiff and the Defendant died, and there had been neither substitution one year after their death, nor an application for revival of the suit after it had abated. My reasoning is further fortified by the decision in Kenya Farmers Co-operative Union Limited v Charles Murgor (deceased) t/a Kaptabei Coffee Estate [2005] eKLR.

58. I find that the judgement herein delivered was an error apparent on the face of the record and I allow the application dated the 31st July, 2023 but only to the extent that the judgment entered on 28th April 2022 and the consequent decree and orders are hereby set aside. There shall be no orders to cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 21ST DAY OF MARCH 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

