



**Mathenge v Maina & another (Civil Appeal 110 of 2019)
[2024] KECA 1035 (KLR) (12 April 2024) (Judgment)**

Neutral citation: [2024] KECA 1035 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 110 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
APRIL 12, 2024**

BETWEEN

NG'ANG'A MATHENGE APPELLANT

AND

JOHN NDIRANGU MAINA 1ST RESPONDENT

MUHOTETU FARMERS CO. LTD 2ND RESPONDENT

*(Being an appeal from the ruling of the Environment and Land
Court of Kenya at Nyeri (Waithaka, J.) dated 7th October, 2016 in
ELC Case No. 566 of 2014 (Formerly Nyeri HCCC No. 86 of 1996)*

JUDGMENT

1. This is an appeal against the ruling of the Environment and Land Court of Kenya (ELC) at Nyeri (Waithaka, J.), delivered on 7th October, 2016, whereby the ELC dismissed the appellant's application dated 27th September, 2010, which sought reinstatement of the suit, after it had been dismissed for want of prosecution.
2. A brief background of the case is that the appellant instituted suit against the respondents before the High Court at Nyeri vide a plaint dated 12th April, 1996. It was the appellant's case that on 26th April, 1980, his late father, Mathenge J. Ngayu, purchased plot number 982 at Karaba, measuring 62 acres, from the 2nd respondent, vide ballot card number 407. The appellant averred that his father died in 1986, and the said parcel was transferred to his mother, Marion Wanjiku Mathenge, in November 1990. That on 9th November, 1990, 36 acres out of the said parcel were transferred to him. He contended that the 2nd respondent fraudulently excised and transferred 15 acres from the appellant's parcel, to the 1st respondent, without the appellant's knowledge or consent. The 15 acres were registered as Gituamba/Muhotetu/Block 2/944 (hereinafter "suit property").



3. In this regard, the appellant sought the following orders: rectification of the register in respect of the suit property by cancelling and deleting the 1st respondent's name and replacing it with the appellant's name; in the alternative, an order directing the 1st respondent to transfer the suit property to the appellant; a declaration that the 1st respondent holds the suit property in trust for the appellant; general damages for conversion and trespass; and mesne profits.
4. The 1st respondent filed a statement of defence and counterclaim dated 14th November, 1996. The 1st respondent averred that the suit property was allocated to him by the 2nd respondent vide ballot card 282. The 2nd respondent filed a statement of defence dated 22nd June, 1996, where it denied the appellant's averments made in the plaint, and contended that the suit property was legitimately allocated to the 1st respondent.
5. By consent of the parties, the matter was referred to Ng'arua Land Dispute Tribunal, and an award issued thereto, declaring the appellant as the rightful owner of the suit property. From the record, the award was erroneously adopted by the Senior Principal Magistrate's Court at Nyeri, vide a ruling dated 21st July, 2000. The appellant made an application before the High Court to have the award recalled for having been filed erroneously before the wrong court.
6. Unfortunately, before the said application could be heard, the 1st respondent died on 3rd February, 2003, during the pendency of the suit. The matter was stood over generally by the court on 9th April, 2003, pending substitution. It was later dismissed by the court, suo moto, on 22nd March, 2007, for want of prosecution.
7. The appellant filed an application dated 27th September, 2010, seeking reinstatement of the suit. The application was opposed. The 2nd respondent, vide a replying affidavit dated 5th December, 2012, deponed that the appellant was not keen on prosecuting his case as a long period of time had gone by, particularly between 2003 and 2007. The 2nd respondent averred that the appellant filed the application for reinstatement three years after the suit had been dismissed. It deponed that the application was improperly before the court and asked the court to dismiss the same.
8. Before this application could be heard, the appellant filed another application dated 23rd June, 2014, seeking to substitute the 1st respondent with his widow and the legal administrator of his estate, Erika Muthoni Ndirangu. The application was opposed by the 2nd respondent. The 2nd respondent in its replying affidavit dated 15th May, 2015, stated that the matter had been dismissed in 2007. There was no suit pending before court.
9. The suit was transferred to Nyeri Environment and Land Court, by an order of the court dated 2nd December, 2014. By consent of the parties, the appellant's application seeking substitution of the 1st respondent, was allowed 19th January, 2015.
10. The parties sought a hearing date for the pending application filed by the appellant seeking reinstatement of the suit. The application was heard on 28th October, 2015. The 2nd respondent had earlier filed a notice of preliminary objection on 2nd October, 2015, challenging the competency of the appellant's application seeking reinstatement of the suit. However, counsel for the 2nd respondent withdrew the objection on account of the parties having consented to substitution of the deceased 1st respondent.
11. The appellant's application seeking reinstatement of the suit was argued orally before the learned Judge (Waithaka, J.). It was the appellant's case that his attempt to substitute the 1st respondent was frustrated by his widow, who had refused to be substituted as the legal representative of the 1st respondent's estate. He further stated that when the matter was dismissed by the court suo moto, no notice of the order of dismissal thereto was issued to either party. Counsel for the 2nd respondent,



on his part, submitted that the appellant had enough time to apply for the substitution of the 1st respondent between 2003, when the 1st respondent died, and 2007 when the case was dismissed. He urged that equity did not aid the indolent. Counsel for the appellant, in rejoinder, stated that no action could have been taken by the appellant, with respect to substitution, without letters of administration in respect of the estate of the deceased 1st respondent, which were issued by the succession court on 23rd November, 2013. He explained that the parties having entered into a consent on the issue of substitution, the same ought to not be re-argued again before the court.

12. After hearing the parties, the learned Judge, in a ruling delivered on 7th October, 2019, observed that the delay in the prosecution of the matter was properly accounted for by the appellant, in the circumstances of the case. However, in a turn of events, the learned Judge determined that the case against the deceased 1st respondent abated by operation of law, one year after he died without being substituted. The learned Judge held that reinstating the suit would be of no effect to the case against the 1st respondent. The learned Judge determined that the consent of the parties adopted on 19th January, 2015, substituting the 1st respondent with Erika Muthoni Ndirangu was moot, as no suit existed against the 1st respondent at the time of the said substitution. Consequently, the learned Judge dismissed the appellant's application.
 13. It is this decision of the learned Judge that provoked the instant appeal. In his memorandum of appeal, the appellant faulted the learned Judge for rendering a ruling on a preliminary objection that had been withdrawn by the 1st respondent on 28th October, 2015. He was aggrieved that the learned Judge overlooked the fact that the issue of substitution was allowed by consent of the parties entered on 19th January, 2015, hence in essence, the suit had effectively been revived. He complained that the entire ruling of the superior court was in contravention of the law. In the premises, he urged us to set aside the decision of the ELC, and allow his application dated 27th September, 2010.
 14. The appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Karweru, submitted that the question of substitution had been settled by the consent order on record. He explained that on 28th October, 2015, the parties canvassed the issue of substitution once again before the learned Judge, where the 2nd respondent withdrew its preliminary objection on grounds that substitution had already been settled by consent of the parties. He urged that, what was before the learned Judge was an application for reinstatement of the appellant's suit, which had been dismissed by the court for want of prosecution.
 15. Learned counsel for the appellant was of the view that the court should have downed its tools after determining that the appellant's application for reinstatement was merited, as opposed to addressing itself on the question of abatement, especially since the 2nd respondent had earlier withdrawn its preliminary objection. It was his submission that the learned Judge overlooked the fact that there are two respondents in the suit, and that the case against the 2nd respondent was still alive.
- Mr. Karweru finally urged that the appeal is merited, and asked us to allow the same as prayed.
16. None of the respondents, despite being duly served with the hearing notice, filed any response or written submissions in this appeal.
 17. This being a first appeal, our duty was well stated in *Abok James Odera T/A A.J. Odera & Associates v. John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where this Court held:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”



18. Guided by the foregoing principles, grounds of appeal, the record of appeal as well as the appellant's submissions, we find that the issues arising for our determination are:
- i. Whether the learned Judge erred in finding that there was no existing suit, for the 1st respondent to be substituted, on account of abatement; and,
 - ii. whether the appellant's suit ought to be reinstated.
19. Order 24 of the Civil Procedure Rules. Rule 4 stipulates 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.
 - (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."
20. There is no doubt in our minds that the application for substitution, filed by the appellant on 23rd June, 2014, was lodged long after the one-year period provided by the law had lapsed. The suit had by this time, abated. Was the suit capable of being revived? We are of the opinion that an abated suit is non-existent, prior to it being revived. In this case, the application for substitution was allowed by consent of the parties. It is our considered view that the respondents, by conceding to the substitution, by implication agreed to the revival of the suit, and with the approval of the court.
21. When the appellant's application for reinstatement of the suit was scheduled for hearing, the parties and the court proceeded with the understanding that the suit had been revived. This was evident from the fact that the 2nd respondent withdrew its preliminary objection, which had challenged the competency of the appellant's application for reinstatement of the suit, for reasons that the parties had agreed by consent to substitution of the deceased 1st respondent with his legal representative.
22. This court, in *Peter Mbiri Michuki v. Samuel Mugo Michuki* [2014] eKLR, when faced with a similar set of facts, made the following finding:

"We have considered the submission by the appellant the decision by this Court in *Maneklal Maganlal Rawal v. Manilal Maganlal Rawal*, (1990) 2 KLR 145 and *Pim v Morton*, (1978) KLR 196, are relevant to the issue of representation. In *Maneklal Maganlal Rawal v. Manilal Maganlal Rawal* (1990) 2 KLR 145, one of the issues for determination by the court was framed as follows: that the present plaintiff is not proper legal representative of the deceased and is not entitled to continue with the proceedings in the name of the plaintiff as the consent to make the present plaintiff a party was made the suit having abated. Gachuhi, J.A. in his judgment stated that the consent order was granted without any opposition and it was conclusive. Hancox CJ in his judgment observed that:

'In nine cases out of ten, no doubt, there is unlikely to be a dispute regarding legal representation; the decision by the High Court to record consent was a valid determination of the issue of legal representation. The appellant was properly represented and could easily have objected but did not do so. It would be quite



wrong and contrary to principle, 13 years later to cast doubt on the situation upon which everybody had quite obviously acted for all that time’.”

23. From the foregoing, it is our finding that the 1st respondent was properly substituted by consent of the parties. The learned Judge erred in addressing herself on the issue of abatement, and, consequently, dismissing the appellant’s application for reinstatement of the suit on said ground, despite the fact that the parties had by their conduct, revived the suit, when they consented to the substitution of the deceased 1st respondent. The learned Judge, having determined that the delay in prosecution of the matter was properly accounted for by the appellant, in the circumstances of the case, then she ought to have allowed the appellant’s application that sought the reinstatement of the suit that had been dismissed by the court for want of prosecution.
24. Having thus held, we are satisfied that the appeal herein is merited. The ruling of the learned Judge dated 7th October, 2016 is hereby set aside, and substituted by a decision of this Court allowing the appellant’s application dated 27th September, 2010. The suit is reinstated to hearing. We further order that the case should be heard on a priority basis in view of the length of time that the case has remained pending before court.
25. We make no orders as to costs.

DATED AND DELIVERED AT NYERI THIS 12TH DAY OF APRIL, 2024.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

