



REPUBLIC OF KENYA



**Okwako v Emitundo (Environment and Land Appeal E058 of 2022)
[2024] KEELC 1428 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1428 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E058 OF 2022**

DO OHUNGO, J

MARCH 14, 2024

BETWEEN

JOSEPHAT BOAZ KHAKASA OKWAKO APPELLANT

AND

DORCAS EPWONO EMITUNDO RESPONDENT

*(Being an appeal from the ruling and order of the Chief Magistrate's
Court at Kakamega (Hon. H Wandere, Senior Principal Magistrate)
delivered on 7th December 2021 in Kakamega MCELC No. 132 of 2018)*

JUDGMENT

1. Litigation leading to this appeal started in the Subordinate Court when Malachi Emitundo filed Originating Summons dated 15th July 2014 wherein he averred that he had become entitled to the parcel of land known as West/Bunyore/Embali763 by adverse possession. Malachi Emitundo passed away on 19th October 2019 and the Respondent herein filed Notice of Motion dated 24th May 2021, seeking to substitute him. She also sought a restraining order and an order of inhibition.
2. Upon hearing Notice of Motion dated 24th May 2021, the Subordinate Court (Hon. H Wandere, Senior Principal Magistrate) delivered ruling on 7th December 2021 and allowed the application.
3. Dissatisfied with the ruling, the Appellant filed this appeal on 22nd November 2022, through Memorandum of Appeal dated 17th November 2022. The following grounds are listed on the face of the Memorandum of Appeal:
 1. That the Learned Magistrate erred in Law and in fact by failing to have due regard to the 2nd defendant's affidavit and Submissions.
 2. That as a consequence of ground 1 above the Learned Magistrate failed to appreciate that there are very substantial issues of facts and law to be determined.



3. That the Learned Magistrate erred in fact and In law by relying on technicality other than substantive justice.
 4. That the Learned Magistrate erred in fact and in law by entertaining a suit that had abated.
 5. That the Learned Magistrate erred in fact and in law by entertaining an Application that has irredeemably been filed out of time.
 6. That the Learned Magistrate erred in law and in fact by to consider that key crucial witness had died hence Justice may not be rendered and/or obtained.
 7. That the Learned Magistrate erred in Law and in fact by admitting documents filed by a lawyer who is not on record and who has not sought the leave of court to file.
 8. Thatthe Learned Magistrate erred in law and in fact by finding in favour of the Respondent.
 9. Thatthe Learned Magistrate failed to reign in and/or regularize the issues raised by the Appellant before a decision was delivered.
 10. That in all the circumstances of the case, the Learned Magistrate failed to do justice before the Appellant.
4. The appeal was canvassed through written submissions, which both parties duly filed. The Appellant argued that Malachi Emitundo passed away in the year 2019 and that since no action was taken to substitute him for two years, the suit had abated. He relied on Order 24 rule 3 of the *Civil Procedure Rules* as well as the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR. He further argued that the firm of Mukabi & Company Advocates which drew and filed Notice of Motion dated 24th May 2021 was not properly on record for the Respondent and that all their actions in the matter were irregular. Consequently, he urged this court to allow the appeal.
 5. In response, the Respondent argued that delay in filing Notice of Motion dated 24th May 2021 was reasonable and that the fact that the application was allowed had an effect of both extending time and reviving the suit. She further argued that although the firm of D.C. Chitwa & Company was on record for Malachi Emitundo, when Malachi Emitundo passed away D.C. Chitwa & Company's instructions lapsed. She also argued that the Subordinate Court properly exercised its discretion. She therefore urged this court to dismiss the appeal.
 6. As the first appellate court in this matter, this court has an obligation to re-consider and re-evaluate Notice of Motion dated 24th May 2021, the affidavits, pleadings, and the material on record and to determine whether the conclusions reached by the learned Magistrate are to stand or not and to give reasons either way. See *Selle & another v Associated Motor Boat Co. Ltd & others* [1968] EA 123 and *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
 7. I have considered the grounds of appeal, Notice of Motion dated 24th May 2021, the pleadings, the affidavits, the parties' submissions, and the authorities cited. The issues that arise for determination are whether the suit had abated and whether the orders sought ought to have issued.
 8. There is no dispute that Malachi Emitundo who was the Plaintiff passed away on 19th October 2019. Through Notice of Motion dated 24th May 2021, the Respondent sought inter alia to substitute Malachi Emitundo. The application was brought under Order 24 rule 3 of the Civil Procedure Rules which provides:



- (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 subrule (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.

9. I have perused the record of the Subordinate Court and I note that Malachi Emitundo was not substituted within one year of his death. Consequently, the suit stood abated on 19th October 2000, in terms of Order 24 rule 3 (2) of the *Civil Procedure Rules*. The Respondent or the estate of Malachi Emitundo may wish to file an appropriate application for revival for consideration by the Subordinate Court.
10. By the time Notice of Motion dated 24th May 2021 was filed on 27th May 2021, there was simply no suit upon which the Respondent herein could be made a party or in which injunctive and prohibitory orders could issue. The issue of the suit being abated was raised at length by the Appellant both in his replying affidavit which he filed on 14th June 2021 and his written submissions dated 15th July 2021. The learned Magistrate did not address the issue in the ruling. Despite the warning sounded by the Appellant, the Respondent did not take heed by amending Notice of Motion dated 24th May 2021 so as to introduce appropriate prayers for extension of time, revival of the abated suit and substitution of Malachi Emitundo.
11. The suit having abated on 19th October 2000, the orders granted by the learned Magistrate on 7th December 2021 were at best a nullity and void. As Lord Denning stated in *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169:

If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... 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.
12. The orders sought in Notice of Motion dated 24th May 2021 could not issue in the absence of a valid suit. The Subordinate Court did not have jurisdiction to grant the orders in the absence of a valid suit. As the Court of Appeal stated in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/ a Newspaper Service* [2019] eKLR, a suit or application filed devoid of jurisdiction is dead on arrival and cannot be remedied.
13. I therefore find merit in this appeal. I make the following orders:
 - a. This appeal is allowed.
 - b. The orders granted by the Subordinate Court on 7th December 2021 are set aside and replaced with an order striking out Notice of Motion dated 24th May 2021.
 - c. The suit in the Subordinate Court is marked abated pursuant to Order 24 rule 3 (2) of the Civil Procedure Rules.



- d. The Appellant shall have costs of this appeal and costs of Notice of Motion dated 24th May 2021.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF MARCH 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Appellant

Mr Osango holding brief for Mr Amasakha for the Respondent

Court Assistant: M Nguyayi

