



**Nyoro v Nyambura (Environment and Land Appeal E072 of 2023)  
[2024] KEELC 3477 (KLR) (30 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3477 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E072 OF 2023**

**JA MOGENI, J  
APRIL 30, 2024**

**BETWEEN**

**PAUL MUGO NYORO ..... APPELLANT**

**AND**

**SCHOLASTICA NYAMBURA ..... RESPONDENT**

*(Being an Appeal from the ruling of the Hon Wendy K. Micheni CM in  
CMCC No 4596 of 20139- Milimani, Nairobi delivered on the 30/5/23)*

**JUDGMENT**

1. The Appellant herein, “being aggrieved and dissatisfied with the finding, decision, ruling and orders of the Learned Magistrate Hon. Wendy K. Micheni CM in CMCC No 4596 of 20139- Milimani, Nairobi delivered on the 30/5/23” prepared this appeal against Scholastica Nyambura, the Respondent, raising the following seven (6) grounds.
  1. That the Learned trial Magistrate erred in law and in fact by misapprehending the provisions of Order 24, Rule 4(3) and Order 24, Rule 7 of the Civil Procedure Rules
  2. That the Learned trial Magistrate erred in law and in fact by reviving the Suit in the trial Court that had abated as against the deceased Defendant on 23<sup>rd</sup> December 2019.
  3. That the Learned trial Magistrate erred in law and in fact by failing to appreciate that whereas Plaintiff’s suit that has abated could be revived, it is not so in the case of a Defendant.



4. That Learned trial Magistrate erred in law and in fact by failing to appreciate that any application seeking extension of time to apply for the revival of an abated suit only applied to a deceased Plaintiff and not a deceased Defendant.
  5. That the learned trial Magistrate exercised her discretion erroneously in allowing the Respondent's Notice of Motion Application dated 10<sup>th</sup> February, 2023 despite compelling evidence placed before the Court and case laws in opposition to the said Application
  6. That the learned trial Magistrate erred in law by disregarding the numerous binding authorities cited by the Appellant's Counsel and thereby basing the Ruling on wrong principles.
2. The record of appeal is dated 21/11/2023 and the appeal was admitted to hearing on 23/01/2024. When the appeal came up for hearing before me parties agreed to proceed by way of written submissions. Accordingly, counsel for the appellant filed submissions dated 9/02/2024 while counsel for the respondent filed submissions dated 24/10/2023.
  3. In his Appeal, the Appellant prays for orders that the Appeal be allowed and the ruling of the Court and all the consequential orders be set aside, and the suit in Milimani CMCC Case Number 4596 of 2013 be deemed to have abated as against the deceased defendant. Further that the costs of this Appeal and the costs of the suit in the lower court be borne by the Respondent.
  4. The Appeal was canvassed by written submissions which I have read and considered.
  5. The Appellant contends that the Learned Magistrate erred by reviving a suit that had abated yet the period allowed for reviving of a suit was only one year. That the suit CMCC No. 4596 of 2013 had abated on 23/12/2019 and the application for reviving the suit was made more than 4 years after the death of one Paul Mugo Nyoro.
  6. It is the appellant's submission that an abated suit cannot be revived against a defendant only against a plaintiff as provided by Order 24 rule 3. He therefore prays that the appeal be allowed as prayed.
  7. The appellant argues that the respondent knew of the death Paul Mugo Nyoro as early as August 2019 and chose not to pursue Mr. Martin Nyoro the Legal Representative of the deceased respondent at the time. Further that the respondent has not provided sufficient cause to warrant the reviving of an abated suit as it were.
  8. As to whether the suit offends the provisions of Order 24 Rule 7 of the Civil Procedure Rules, the Appellant argued that the respondent did not provide any sufficient cause of the delay except stating that she had sent a letter to the legal representative dated 28/08/2019 before the suit abated and one on 4/03/2020 after the suit abated but did not prove that she was barred from pursuing the suit by any sufficient cause.
  9. Consequently, the appellant has submitted that the respondent is not deserving the equitable relief that she was granted by the Chief Magistrate's Court as she has not shown sufficient cause for the court to grant the application.
  10. In response to the appeal, the respondent swore a replying affidavit dated 4/10/2023 in which she deponed that the appeal before the court was fatally defective and ought to be struck out. She averred that the appellant is indicated as Paul Mugo Nyoro yet Martin Nyoro Mugo deponed the supporting affidavit as the legal representative of the deceased appellant. It is her contention that dead people do not litigate. that was the reason CMCC 4596 of 2013 was delayed.



11. That the current appeal is brought in the name of a deceased person and not the personal representative and this therefore means that there is not appeal capable of being adjudicated by the court.
12. She further avers that the appeal merely challenges the trial court's decision to revive a suit that had abated yet granting of orders of the impugned application was at the discretion of the trial court. That the appeal does not challenge the fact that the suit has abated can be revived.
13. It is her contention that the fact that the appeal is brought in the name of a deceased person makes it fatal since a suit against a dead person is a nullity and so is a suit instituted by a dead person.

### **Analysis and Determination**

14. I will not delve into the issues raised in the appeal but will consider the issue of the legality of the appeal lying before this court first. The respondent has submitted that there is no appeal before the court because it is brought by a dead person.
15. It is settled under our laws that a dead person ceases to be a legal person or to have legal personality to sue or to be sued. Therefore, an action instituted in the name of a dead person is void ab initio.
16. Justice Mboghli J (as he then was) addressed this issue in the case of *Viktar Maina Ngunjiri & 4 Others vs Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows :-

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.”

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.”

17. The Court of Appeal has also had occasion to address the issue of a suit filed against a dead person in the case of *Geeta Bharat Shah & 4 Others vs Omar Said Mwatayari & Another*, Court of Appeal at Mombasa, Civil Appeal No. 46 of 2008, (2009) eKLR. In that case, a suit was filed against two persons one of whom was already dead when the case was filed. Judgment was entered against the deceased. An application to set aside the judgment was disallowed and the applicants appealed to the Court of



Appeal. The Court of Appeal held that the judgment could not be sustained as it was entered against a person who was already dead. The court stated as follows: -

“In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr. Oddiaga, is with respect right in conceding the appeal in respect of him on that score. We see no merit in directing that he be allowed to file defence as he is not there to do so and the administrators to his estate cannot in law take over the matter as it was filed after he was already dead”.

18. The instant appeal as drafted contains numerous errors one notable and outstanding error is that the legal representative of the deceased defendant/appellant despite the court in CMCC 4596 of 2013 allowing after reviving the abated suit to have him substituted, chose to file the Appeal in the name of the deceased. The other error is that the legal representative is the deponent of the affidavit in support of the appeal who describes himself as the legal representative of the deceased defendant. Yet he consciously filed an appeal in the name of a deceased person. Which action is a nullity.
19. I am bound by the above decision of the Court of Appeal. My understanding of the Court of Appeal decision is such that if an action against a dead person is a nullity ab initio it follows that a purported action of instituting a suit in the name of a deceased person by his legal representative engages in action that is a futility and is null and void ab initio.
20. It was stated by the Supreme Court of Nebraska in the case of Richard Muller, appellant, v. Carl Weeder and Margene Cork, 313 Nebraska Reports that;

“A deceased person cannot maintain a right of action against another or defend a legal interest in an action or proceeding”.

In essence a dead person is no longer a party to a suit in any capacity.

21. In the circumstances I have no option but to find that the Appeal lodged in the name of the deceased defendant (named as Appellant in the instant appeal) was a nullity ab initio and I hereby strike it out for want of capacity. I will not make any orders as to the costs of the suit since it is still pending in the lower court but the respondent will have the costs of this appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF APRIL 2024**

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**MOGENI J**

**JUDGE**

In the virtual presence of:

Ms. Chaui holding brief for Mr. Kimani for the Appellant

Mr. Elkington for the Respondent

Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

