



**Tonui (Suing as Personal Representative of the Late Daniel Kiplangat Ruto) v Rutto & another
(Environment & Land Case 37 of 2018) [2024] KEELC 3879 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3879 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 37 OF 2018**

MC OUNDO, J

MAY 16, 2024

BETWEEN

**LEONARD TONUUI (SUIING AS PERSONAL REPRESENTATIVE OF THE LATE
DANIEL KIPLANGAT RUTO) PLAINTIFF**

AND

KIPKEMOI RUTTO 1ST DEFENDANT

SARAH CHEPKIRUI RUTTO 2ND DEFENDANT

RULING

1. Coming up for determination is a Notice of Motion dated 9th October, 2023, brought pursuant to the provisions of Order 24 Rule 4 and 7(2), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 1B of the *Civil Procedure Act* and all other enabling provisions of the law wherein the Applicant seeks leave to revive the suit against the deceased Defendants and thereafter, time be extended to substitute them with their legal representatives namely Geoffrey Kimutai Langat and Elijah Kipkorir Rotich respectively. The Plaintiff further seeks for such other directions from the court in the interest of justice and for costs of the application to be in the cause.
2. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Leonard Tonui, the Plaintiff herein who deponed that despite the Defendants' deaths, the cause of action had survived them.
3. That while the 1st Defendant died on 13th March, 2021, the 2nd Defendant died on 25th April, 2018 wherein the suit against them had abated after one year for failure of substitution. That it had been on or about the 1st of October, 2023 when he had been informed of the Kericho High Court Succession Cause 117 of 2008 in which the deceased representatives had obtained a rectified certificate of confirmation of grant dated 10th November, 2022.



4. That he had been prevented from continuing with the instant suit by the lax and clandestine manner in which the persons entitled to take out letters of administration to the deceased's estate had maneuvered as well as the acts of the Defendants' Counsel who despite having promised to substitute the Deceased Defendants and being aware of the existence of the rectified grant, had failed to do so.
5. That he had proffered sufficient cause for reviving of the suit and substitution of the Defendants. That the Legal representatives, intended Defendants were not willing to file an application for substitution to their advantage to delay the fair finalization of the instant matter which acts would continue to occasion him to suffer loss and damages.
6. In response, the intended deceased's administrators, Geoffrey Kimutai Langat and Elijah Kipkorir Rotich filed their Grounds of Opposition dated 17th November 2023 as well as their respective Replying Affidavits of equal opposing the Applicant's Application on the grounds that Applicant had sued a deceased person Sarah Chepkirui Ruto (2nd Defendants) who had died on 25th April, 2018 wherein the suit and Summons to enter appearance had been filed/issued on 17th May, 2018.
7. That secondly, the Applicant had been granted Letters of Administration Ad Litem in Kericho Chief Magistrates' Court Ad Litem Cause No. 29 of 2018 in respect to the estate of his late father one Daniel Kiplangat Rutto in order to pursue a claim in respect of land parcel No. LR Kericho/Roret/936 and not in respect of No. LR Kericho/Nyamanga/108 which formed part of the estate of Kipkoske Ngetich.(1st Defendant).That the Applicant therefore lacked the locus standi to file in court any kind of suit/application in relation to the estate of Kipkoske Ngetich.
8. That a rectified Certificate of Confirmation of Grant had been issued in Kericho High Court Succession Cause No. 117 of 2008 in the joint names of Geoffrey Kimutai Langat, Elijah Kipkorir Rotich and Joel Kipkirui Tonui but the Applicant had mischievously omitted to join his brother Joel Kipkirui Tonui in the instant application. That indeed all the issues the Applicant had raised herein had been conclusively dealt with before the family court in Kericho High Court Succession Cause No. 117 of 2008 wherein the estate of the late Kipkoske Ngetich had been distributed.
9. In his Replying Affidavit, the intended deceased's administrator Geoffrey Kimutai Langat deponed that Kipkemoi A. Rutto (Deceased) was his father who had died on 23rd March 2021. That the Applicant herein who was his first cousin knew about the death of the said Kipkemoi yet he had not given his reasons for failing to seek for substitution from the date of his deceased father's death. That the issues touching on parcel No. LR Kericho/Nyamanga/108 had been dealt with substantively in Kericho High Court Succession Cause No. 117 of 2008 thus the current application was a waste of court's time. That the Applicant was a vexatious litigant who was out to satisfy his ego.
10. The second intended deceased's administrator Elijah Kipkorir Rotich in his Replying Affidavit deponed that his mother the late Sarah Chepkurui Ruto died on 25th April, 2018. That the Applicant herein was his first cousin and had been aware of her death. That at the time the Applicant filed the instant suit, his mother had already died hence the order of substitution being sought herein was a waste of time as the Applicant was seeking to introduce him into the suit through acts of trickery and in bad faith.
11. In a rejoinder, the Plaintiff/Applicant vide his Further Affidavit dated 1st December, 2023 deponed that all through the mentions and hearings, the Defendants' Counsel never raised any objection that he had sued a diseased person hence they could not be allowed to raise the said objection 5 years later. That he had never been issued with Grant ad litem to pursue a case in LR Kericho/Roret/936 as had been alleged and that he had always been pursuing the interests of the late Daniel Kiplangat Rutto which interests were in LR Kericho/Roret/108.



12. That the rectified certificate of confirmation of grant dated 10th November, 2022 was clear that it had been issued to only two (2) people to wit; Geoffrey Kimutai Langat and Elijah Kipkorir Rotich hence the allegations that he had left out Joel Kipkirui Tonui had only been a way of misleading the court. That it was a trite law that a family court could not cancel a title and or confer ownership of property to a party and that only the Environment and Land Court had such powers, hence the Respondents' position that all issues in the instant matter had been conclusively determined in the family court was not true as the same was untenable in law.
13. He reiterated that he had taken long to file the instant application because of the lax and clandestine manner in which the Respondents who were the persons entitled to take out Letters of Administration of the Deceased's estate had maneuvered coupled with the acts of their Counsel who despite promising to substitute the Deceased Defendants had failed to do so.
14. The instant application was canvassed by way of written submissions summarized as herein under.

Plaintiff/Applicant's Submissions.

15. The Plaintiff/Applicant vide his written submissions dated 13th December, 2023 gave a brief factual background of the instant matter before framing one issue for determination to wit; whether the court should grant the orders sought.
16. 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. That under the provisions of Sections 3A and 63 (e) of the *Civil Procedure Act*, the court had inherent powers to make such orders as may be necessary to meet the ends of justice.
17. That where a cause of action continued and/or survived a deceased Defendant, a party could apply for the legal representative of his or her estate to be made a party so as to continue with the case. Further, that where a suit had abated and/or dismissed for failure to substitute within the prescribed time, a party could apply to the court for revival and for setting aside of the dismissal orders upon showing sufficient cause that he or she had been prevented from continuing with the suit. Reliance was placed on the provisions of Order 24 Rules 4(1) and 7(2) of the Civil Procedure Rules as well as the decided case of *Chege v Land Settlement Fund Board of Trustee & 2 Others; Chege (Applicant) (Environment & Case 303 of 2017)* [2021] KEELC 4745 (KLR) (4 March 2021) (Ruling).
18. The Applicant thus reiterated the contents of his Supporting and Further Affidavit to the effect that he had been prevented from continuing with the instant suit because of the laxity on the part of the Defendants/Respondents to apply for the substitution of the Deceased Defendants herein. That he had always been ready to pursue the deceased Plaintiff's interest in land parcel No. LR Kericho/Roret/108. That a family court could not cancel a title or confer ownership of the same to a party. Finally that the instant application was merited and should be allowed as prayed.

Defendants/Respondents Submissions.

19. The Respondents vide their submissions dated 23rd January, 2024, reiterated the contents of their Statement of Opposition and the Replying Affidavit of Elijah Kipkorir Rotich to the effect that the 2nd Defendant had died on 25th April, 2018 prior to the filing of the instant suit in May, 2018, facts of her death which were well within the Applicant's knowledge.
20. That the application was bad in law and amounted to an abuse of the court process, and not even the oxygen rules under the *Civil Procedure Act* or Article 159(2) of *the Constitution* could salvage the same.



That since the court had not dismissed the instant suit or made a finding that the same had abated, the Applicant ought to have moved the court under Order 24 Rule 4(1) and not Order 24 Rule 7(2) of the Civil Procedure Rules.

21. They reiterated their ground of opposition that the Applicant's Letters of Administration Ad-Litem had been in regard to land parcel No. Kericho/Roret/936 and not in respect of No. LR Kericho/Nyamanga/108 which formed part of the estate of the late Kipkoske Ngetich, to maintain that the Applicant lacked locus standi to file a suit of any kind or even make an application against the Respondents regarding the estate of Kipkoske Ng'etich. They urged the court to look at the said Ad-Litem in making its determination. That the Applicant had through trickery and mischief, after he had been issued with the Ad Litem Orders, filed a suit in respect to a totally different estate that was not Daniel Kiplangat Ruto, his father's estate.
22. That the rectified Grant of Letters of Administration in Kericho High Court Succession Cause No. 117 of 2008 had been issued in the joint names of Geoffrey Kimutai Langat, Elijah Kipkorir Rotich and Joel Kipkirui Tonui yet the Applicant had conveniently left out Joel Kipkirui Tonui in the instant Application. That subsequently, the instant application was scandalous, frivolous, vexatious and an abuse of the court process hence should be dismissed with costs.
23. The Respondents, while placing reliance in a combination of decisions in the decided cases of Kishor Kumar Dhanji Varsani vs Amolak Singh & 4 Others [2016] eKLR and Said Swailem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR submitted that the application had been brought after inordinate delay which had not been explained. That the reasons for the delay that had been proffered in the Applicant's Supporting Affidavit were neither candid nor plausible. That while the instant suit belonged to the Applicant, he seemed to blame the Respondents and their Counsel over his own laxity.
24. They urged the court to make a finding that the Applicant had not given a candid and plausible reasons to warrant the court to judicially exercise its discretion in his favor. That the suit against the 1st Defendant Kipkemoi Rutto (Deceased) had abated, that an application/order for substitution of Sarah Chepkirui Ruto (Deceased) with Elijah Kipkorir Rotich could not issue owing to the fact that there had neither been a valid nor competent suit as against the said Sarah who was already deceased at the time the instant suit had been filed. They sought that the application be dismissed for want of merit, with costs

Determination.

25. Applicant herein seeks leave to revive the suit against the deceased Defendants and thereafter, time be extended to substitute the deceased Defendants with their legal representatives namely Geoffrey Kimutai Langat and Elijah Kipkorir Rotich respectively.
26. In response the deceased Defendants intended legal representatives filed their Grounds of opposition and replying affidavit to the effect that the Applicant's application for the revival of the suit and substitution of the deceased Sarah Chepkirui Ruto (2nd Defendant) was moot as the suit had been filed against the 2nd Defendant long after she was deceased. Secondly, that the Applicant had no locus standi on matters affecting the estate of the 1st deceased Defendant, Kipkemoi Rutto, as he had no locus standi the Letters of Administration ad litem having been issued in Kericho Chief Magistrates' Court Ad Litem Cause No. 29 of 2018 in respect to the estate of his late father one Daniel Kiplangat Rutto in order to pursue a claim in respect of land parcel No. LR Kericho/Roret/936 and not in respect of No. LR Kericho/Nyamanga/108 which formed part of the estate of the 1st Defendant.



27. I have considered the pleadings and submissions made by both the Applicant herein and the deceased Defendants intended legal representatives. I find the issues that arises for determination as being;
- i. Whether there is a competent suit against the 2nd Defendant.
 - ii. Whether the Applicant had locus standi as against the 1st Defendant.
 - iii. Whether Plaintiff's suit against the deceased Defendants should be revived and the deceased Defendants be substituted out of time.
28. Order 24 Rule 4(1) of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of sole Defendant where it states 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 subrule (1), the suit shall abate as against the deceased Defendant.
29. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules speaks on the effect of abatement of such a suit and gives the court discretion to revive an abated suit provided there is sufficient proof that the Applicant was prevented by any sufficient cause from continuing the suit.
30. The Court of Appeal in the case of *The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011* observed as follows as to the meaning of sufficient cause:
- “Sufficient cause or good cause in law means:-
- ‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See *Black’s Law Dictionary*, 9th Edition, page 251.
- Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
31. In the instant application, the Applicant herein averred that he had been prevented from continuing with the instant suit by the lax and clandestine manner in which the persons entitled to take out letters of administration to the deceased’s estate had maneuvered as well as the acts of the Defendants’ Counsel who despite having promised to substitute the Deceased Defendants and being aware of the existence of the rectified grant, had failed to do so.
32. This suit was filed vide the Applicant’s Complaint dated the 15th May 2018 in which he had sued both the Defendants herein on a cause of action in relation to land parcel No. LR Kericho/Nyamanga/108 seeking a permanent injunction against them, their agents, servants, employees or otherwise from



interfering in any way or doing any acts that were prejudicial to his proprietary interest in the said parcel of land.

33. On the first issue for determination, it is clear from an annexure marked as “LT2” annexed to Applicant’s application, which was a death certificate of one Serah Chepkurui Ruto, the 2nd Defendant herein, that the said Defendant had died on the 24th April 2018 which was prior to the filing of the suit herein. It is trite that the suit against the 2nd Defendant was null and void for one cannot sue a dead man/woman and claim that the suit is properly before court.
34. Indeed 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 the court had 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 whosoever 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.”
35. The Court of Appeal in 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 had held as follows:
- “Indeed, in our view, there was no need for the administrators of the deceased’s estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed. In any event, because the person cited in the plaint as the first Defendant was already dead by the time the suit was filed meant that the plaintiff (now first respondent) did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein for how could he say that against undisputed fact later discovered that by the time he was saying so, the first Defendant was long dead whereas paragraph 2 of the plaint he allegedly verified stated:-“
36. 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.
37. Applying the above captioned decision to which I am bound, it follows that the present suit against the deceased 2nd Defendant is void ab initio because a nullity is a nullity and nothing can come out of a nullity/this suit. The present suit against the 2nd deceased Defendant cannot therefore be resuscitated by infusing any remedy and is therefore struck out.
38. On the second issue as to whether the Applicant had locus standi to file suit against the 1st Defendant, on 8th March 2022, the suit against the 1st Defendant was marked as abated after the court had been informed that he had passed away on 13th March 2021 there having been no substitution within one year as stipulated by the provisions of Order 24 Rule 4(1) of the Civil Procedure Rules. The Applicant now seeks to revive the suit against him and have him substituted which prayer, the 1st Defendant (deceased) intended administrator has opposed for reasons that the Applicant’s Letters of



Administration ad litem issued in Kericho Chief Magistrates' Court in Ad Litem Cause No. 29 of 2018 were in respect to the estate of his late father one Daniel Kiplangat Rutto who was a proprietor of land parcel No. LR Kericho/Roret/936 and not No. LR Kericho/Nyamanga/108 which formed part of the estate of the 1st Defendant.

39. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & Another (1982-99) 1 KAR, Morjaria v Abdalla [1984] KLR 490 and in Trouistik Union International & Another v Jane Mbeyu & Another Civil Appeal No. 145 of 1990 to the effect that Locus standi is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued rendered a suit incompetent.
40. There is no doubt that the letters of Administration ad litem which were granted to the Applicant in Kericho Chief Magistrates' Court Ad Litem Cause No. 29 of 2018 was in respect to the estate of one Daniel Kiplangat Rutto. In the Applicant's annexure "LT4", the subject matter herein being LR No. Kericho/Nyamanga/108 which was the estate of the 1st Deceased Defendant one Kiposese Ngetich alias Kipruto Ngetich was shared amongst the Deceased Defendants intended legal representatives namely Geoffrey Kimutai Langat, Elijah Kipkorir Rotich and Joel Kipurui Tonui vide a rectified certificate of confirmation of grant dated 10th November 2022 by the High Court sitting in Kericho in Succession Cause No. 117 of 2008.
41. There has been no evidence supplied to this Court confirming that indeed the Applicant herein had applied for and had been issued with a grant of representation to the estate of the deceased 1st Defendant so as to give him the locus to file suit on behalf of his estate, the subject parcel of land being in issue.
42. The impact of a party in a suit without locus standi can be equated to that of a Court acting without jurisdiction since it all amounts to null and void proceedings. The issue of locus standi becomes even more serious in a case such as this one where the matter involves the estate of a deceased person that might involve several other beneficiaries and/or interested parties.
43. Indeed in the case of Isaya Masira Momanyi v Daniel Omwoyo & another [2017] eKLR, the court had held as follows:

"A party can thereof not commence a suit on behalf of the estate of a deceased person without letters of administration and thereafter obtain the letters of administration subsequently. Where a suit is commenced without letters of administration in respect of a deceased estate such a suit is null and void abinitio and cannot be cured by a party subsequently obtaining the letters of administration."
44. The power to strike out suits is vested in the Court by Order 2 Rule 15. The Court retains the discretion to strike out a Plaintiff if it discloses no cause of action and to strike out a defence if it discloses no reasonable defence or to order their amendment. The issue of locus standi being a point of law which goes to the root of any suit cannot be termed as a mere technicality.
45. In the end, I find that the Plaintiff's suit against the deceased Defendants cannot be revived for substitution of the deceased Defendants out of time. The application dated 9th October 2023 is herein dismissed with costs.



Dated and delivered via Microsoft Teams at Naivasha this 16th day of May 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE



