



**Mishek & another v Munga & another (Environment & Land Petition
7 of 2017) [2024] KEELC 3697 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND PETITION 7 OF 2017**

JO OLOLA, J

MAY 9, 2024

BETWEEN

ISAAC NDIRITU MISHEK PETITIONER

AND

MESHACK KARIUKI APPLICANT

AND

JOSEPH MAINA MUNGA 1ST RESPONDENT

NYERI LAND REGISTRAR 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 28th March 2023, Meshack Kariuki (the Applicant) prays for orders:
 1. That the Petition be revived;
 2. That Meshack Kariuki be joined as the Petitioner in place of Isaack Nderitu Mishek (deceased) to prosecute the Petition to its conclusion; and
 3. That the costs of this Application be in the cause.
2. The Application is supported by an Affidavit sworn by the Applicant wherein he deposes at the relevant Paragraphs 4 to 9 as follows:
 4. That the matter has proceeded to pre-trial stage but on 31st August, 2019 the Petitioner died. (Attached and marked MK 1 is a copy of the death certificate);
 5. That the cause of action is violation of the right to property known as Land Reference No. Mahiga/Munyange/36 where the said cause of action survives the Petitioner;



6. That the said Petition has abated since one year has lapsed from the date of the Petitioner's death thus the need for reinstatement;
 7. That I filed an Application for grant Ad Litem and the same was allowed appointing me as the legal representative to the deceased's estate;
 8. That the Grant Ad Litem grants me limited powers to continue prosecuting ELC Petition No. 7 of 2017 to its conclusion as the legal representative to the Petitioner (Attached and marked ML-2 is a copy of the grant Ad Litem); and
 9. That it is only, fair and in the interest of justice that this suit is reinstated to enable me prosecute the matter to its conclusion."
3. Some three (3) months after the Applicant instituted the Application, Joseph Maina Muuga (the 1st Respondent) filed a Notice of Preliminary Objection dated 6th June, 2023 wherein he objected to the Application on the grounds;
1. That the Plaintiff's suit has no merit, it is frivolous, bad in law and ought to be dismissed with costs;
 2. That the suit has abated by virtue of Order 24 Rule 4(3) of the *Civil Procedure Rules* since the deceased Defendant (sic) passed away on 31st August, 2019 and therefore there is no valid suit before this Honourable Court for the proposed Petitioner to be substituted.
 3. That the suit is fatally defective, filed in bad faith, an afterthought calculated to waste the humble time of this Honourable Court as the same has happened more than four (4) years ago; and
 4. That it is an abuse of the due process of law.
4. I have carefully perused and considered both the Motion as well as the Notice of Preliminary Objection. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
5. By the Application dated 28th March 2023, the Applicant has urged the Court to revive the suit and to have him joined as the Petitioner in place of Isaack Nderitu Mishek the original Petitioner who is said to have passed away on 31st August, 2019. In response to the said Application the 1st Respondent has filed a Notice of Preliminary Objection wherein he urges the Court to strike out the Application on some four (4) grounds.
6. The first ground is that the Petitioner's suit is frivolous, bad in law and that the same ought to be dismissed with costs. I was unable to contemplate how the 1st Respondent expected the Court to action this ground. From the Applicant's own Application and Ground No. 2 of his own Notice of Preliminary Objection, the Petitioner herein passed away on 31st August, 2019 and the suit had abated as at 31st August, 2020.
7. A suit that has abated is non-existent and hence the prayer by the Applicant for its revival. That being the case, it was but a matter of common sense that there was no suit that could be said to lack in merit and that requires to be dismissed at this stage by the Court.
8. In Ground No. 2 of the Objection, the 1st Respondent asserts that the suit has abated by virtue of Order 24 Rule 4(3) of the *Civil Procedure Rules* and that therefore there was no valid suit before the



Court for the Applicant to be substituted. That ground again can only arise out of a very erroneous interpretation of the law. The said Order 24 Rule 4(3) of the Civil Procedure Rules provides as follows:

“Where within one year no Application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

9. From a reading of the above provision, it was clear that it is applicable where the party who dies is the Defendant and not as in this case the Petitioner. It was also clear to me that the provisions of Order 24 of the Civil Procedure Rules require to be read as a whole and not in the manner that the 1st Respondent has tried to do herein. In respect of the death of a claimant such as the Petitioner herein, the relevant provision, Order 24 Rule 3(2) of the Rules provides thus:

“Where within one year no Application is made under sub rule (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 that the Court may, for good reason on application, extend the time” (Emphasis mine).

10. From my reading of the proviso to that Rule, it was apparent that even where a suit has abated and the cause of action subsisted, a legal representative of the estate was not left without recourse. By the application before the Court brought under the same Order 24 Rule 3(2) of the Civil Procedure Rules, the Applicant has sought the revival of the suit and it is for this Court to consider whether or not there is merit in the same.

11. The contention by the 1st Respondent that the suit as filed is fatally defective and amounts to an abuse of the Court process are equally clearly misconceived and cannot be for the very reasons given herein above. At any rate and as was stated in the celebrated case of *Mukisa Biscuit Manufacturing Company Limited -vs- West End Distributors Limited* (1969) EA 696:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

12. In the premises herein, it was apparent that the grounds raised by the 1st Respondent to the Application had no basis and the same did not constitute what can be referred to as Preliminary Objection. The objection was filed without any basis and the same is hereby dismissed.

13. Turning to the Motion dated 28th March 2023, it is the Applicant’s prayer that the Petition be revived and that he be joined in the suit to substitute the Petitioner who is said to have passed away on 31st August, 2019. The said Motion is premised on the provisions of Order 24 Rule 3(1) and (2) aforesaid as well as on Order 24 Rule 7(2) of the Civil Procedure Rules.

14. The said Order 24 Rule 7 of the Civil Procedure Rules provides as follows:

- (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.



- (2) The Plaintiff or the person claiming to be the legal representative of a deceased Plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal, and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.”
15. Considering the above provisions in *Rebecca Mijide Mungole & Another-vs- Kenya Power & Lighting Company Limited & 2 Others* (2017) eKLR, the Court of Appeal (Makhandia, Ouko & M’Inoti, JJA) held as follows:
- “Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view, there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted.”
16. The Court of Appeal further went on to hold as follows:
- “After the time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter of course or right. If the applicant demonstrates and the Court is satisfied that he was prevented by any sufficient cause from continuing the suit, the Court will allow the revival of the suit upon such terms as to costs or otherwise as the Court may think fit.”
17. Applying the above principles in the Application before me, it was clear that the same was, like the Preliminary Objection filed by the 1st Respondent, incompetent and misconceived. While the Petitioner is said to have died some four years before this Application for revival and joinder was made, the Applicant has not applied for extension of time within which to do so.
18. Even more fundamentally, a perusal of the Supporting Affidavit sworn by the Applicant reveals no explanation whatsoever as to why it took the Applicant some four (4) years before an attempt was made to revive the abated suit. In the absence of any demonstration on the part of the Applicant as to what sufficient cause prevented him from filing the Application, the prayer for the revival of the suit has no legs to stand on and must fail.



19. In the premises both Preliminary Objection as well as the Motion dated 28th March, 2023 are hereby dismissed.

20. Each Party shall bear their own costs.

**RULING DATED SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF MAY, 2024.**

In the presence of:

Mr. Tumo for the Petitioner/Applicant

No appearance for the Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

