



Mutwiwa (Suing on the Legal Representative of the Estate of the Late Mutethia Mutehia Mutwiwa Muthungu – Deceased) & another v Syokimau Farm Limited & 14 others (Environment & Land Case 291 of 2011 & 58 of 2017 (Consolidated)) [2024] KEELC 4580 (KLR) (12 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4580 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 291 OF 2011 & 58 OF 2017 (CONSOLIDATED)**

CA OCHIENG, J

JUNE 12, 2024

BETWEEN

THOMAS MULI MUTWIWA (Suing on the Legal Representative of the Estate of the Late Mutethia Mutehia Mutwiwa Muthungu – Deceased) PLAINTIFF

AND

**SYOKIMAU FARM LIMITED 1ST DEFENDANT
PAUL SEBASTIAN MUINDE KATHILU 2ND DEFENDANT
GEORGE NGURE KARIUKI 3RD DEFENDANT
DAVID NZOMO NZELE 4TH DEFENDANT
JOSEPH MUSAU KAUNDA 5TH DEFENDANT
CHRISTOPHER MUINDE NZIMBI 6TH DEFENDANT**

**AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 58 OF 2017**

BETWEEN

GEORGE NGURE KARIUKI PLAINTIFF

AND

**MBUKONI HOLDINGS LIMITED 1ST DEFENDANT
BENSON APOLLO OGOLA 2ND DEFENDANT**



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|--------------------------------|---------------------------------|
| JAMES KARUKU | 3RD DEFENDANT |
| NOEL ERIC ADERA | 4TH DEFENDANT |
| ALFRED MUHANDARE | 5TH DEFENDANT |
| JIMMY MWENESI | 6TH DEFENDANT |
| ROBERT KIMUYU | 7TH DEFENDANT |
| FRANKLIN MUNYASYA | 8TH DEFENDANT |
| ZURA MULLYA | 9TH DEFENDANT |

RULING

1. What is before Court for determination is the 3rd Defendant's Notice of Motion Application dated the June 29, 2023 where he seeks the following Orders:-
 - a. Spent.
 - b. That the Plaintiff's Suit No. ELC No. 291 of 2011 be and is hereby deemed to have abated.
 - c. That ELC. No. 58 of 2017 be and is hereby fixed for case management.
 - d. That prohibitory order registered on LR No. 12715/363 be and is hereby lifted.
 - e. That the cost of this Application be borne by the Plaintiff's representatives.

2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of George Ngure Kariuki where he deposes that on December 2, 2002, the Plaintiff filed Nairobi High Court Case No. 1772. He explains that on July 23, 2004 the Plaintiff sought to amend the Plaintiff's Application dated the July 22, 2004 and the said Application was allowed. Further, the amended Plaintiff's Application was filed in court on March 1, 2005. He confirms that all the Defendants herein filed their respective Statements of Defence.

3. He contends that on March 23, 2010, the Plaintiff filed an Application seeking for transfer of the suit to Machakos - Environment and Land Division, which Application was allowed. Further, the suit was transferred to Machakos and allocated ELC. No. 291 of 2011. He avers that on 16th January, 2018, the 3rd Defendant through the law firm of Ajaal Olubayi Advocate filed a Motion seeking to have ELC No. 58 of 2017 and ELC No. 291 of 2011, to be consolidated, which application was allowed on February 18, 2020.

4. He states that the parties herein have never taken pre-trial directions since the filing of the suit. Further, on November 23, 2021 when the matter came up for direction, the Plaintiff's Counsel sought for the time to file an Application to substitute the Plaintiff because he was deceased. He reiterates that despite the suit being slated down for Mention on January 25, 2022, February 21, 2022, May 18, 2022, 20th September, 2022, December 6, 2022, March 9, 2023 and May 8, 2023 to confirm substitution of the Plaintiff, no steps have been taken for over two(2) years. Further, that on 22nd March, 2023 his advocate on record wrote a letter to all the Advocates for parties herein, informing them that the matter was slated down for mention on May 8, 2023 and ELC. No. 291 of 2011 should abated.



5. He reaffirms that on May 8, 2023 the court allowed the 3rd Defendant to file a formal Application seeking to have ELC No. 291 of 2011 abated and all consequential orders of court, to be discharged and/or lifted. Further, that it is in the interest of justice that ELC No. 291 of 2011 be abated for lack of substitution and ELC. No. 58 of 2017 be allowed to proceed for case conference.
6. No parties filed responses to oppose the instant Application.
7. The Applicant's Counsel informed court that he filed written submissions on December 1, 2023 to canvass the instant Application but the same is not in the court file.

Analysis and Determination

8. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, the following issues are for determination:-
 - a. Whether the Plaintiff's suit no. ELC No. 291 of 2011 should be deemed to have abated.
 - b. Whether ELC. No. 58 of 2017 should be fixed for case management.
 - c. Whether the prohibitory order registered on LR No. 12715/363 should be lifted.
9. As to whether the Plaintiff's suit no. ELC No. 291 of 2011 should be deemed to have abated.
10. The 3rd Defendant has sought for ELC No. 291 of 2011 to be deemed to be abated. I note on the 18th February, 2020 the court directed that ELC No. 291 of 2011 was to be consolidated with ELC No. 58 of 2017. Further, ELC No. 291 of 2011 was deemed as the lead file. On 23rd November, 2021, the Plaintiff's Counsel in ELC No. 291 of 2011 informed court that the Plaintiff had died, and to date he is yet to be substituted. It is trite that consolidation of suits is to ensure expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties, but not to create a disadvantage to other parties.
11. In the current scenario, the deceased Plaintiff in the lead file was an administrator of a deceased's Estate. As per the provisions of Order 24 Rule 3 of the [Civil Procedure Rules](#), it provides that:-

“(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.”
12. On a keen reading of these provisions even though we are dealing with a consolidated suit, I opine that since the Plaintiff in ELC. No. 291 of 2011 has not been substituted for over one (1) year, the said suit shall be deemed as abated by operation of the law. I direct parties to proceed with case management in ELC. No. 58 of 2017 in accordance with the provisions of Order 11 of the [Civil Procedure Rules](#).



13. On removal of the prohibitory Order, I wish to make reference to the various legal provisions within the [Land Registration Act](#) which relate to restrictions/prohibitory orders: Section 76 provides that:-

“(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, and after directing such inquiries to be made and notices to be served and hearing such persons as the Registrar considers fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge. (2) A restriction may be expressed to endure— (a) for a particular period; (b) until the occurrence of a particular event; or (c) until a further order is made, and may prohibit or restrict all dealings or only or the dealings that do not comply with specified conditions, and the restriction shall be registered in the appropriate register. (2A) A restriction shall be registered in the register and may prohibit or restrict either all dealings in the land or only those dealings which do not comply with specified conditions.”

14. Further Section 78 stipulates that:-

“(1) The Registrar may, at anytime and on application by any person interested or at the Registrar’s own motion, and after giving the parties affected by the restriction an opportunity of being heard, order the removal or variation of a restriction. (2) Upon the application of a proprietor affected by a restriction, and upon notice to the Registrar, the court may order a restriction to be removed, varied, or other order as it deems fit, and may make an order as to costs.”

15. It is trite that prohibitory orders are entered to protect any dealings in land until occurrence of an event. In this instance, the restriction was entered to protect the substratum of a suit. It is my considered view that since this suit is still pending and there are several parties staking a claim over the suit land, the said Prohibitory Order should subsist until the suit is heard and determined.

16. In the circumstances, I find the instant Notice of Motion Application partially successful as I have allowed prayers No. (b) and (c) only. I decline to grant the rest of the prayers.

17. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF JUNE, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Murimi Murango for 3rd Defendant in ELC. No. 291 of 2011 and

Plaintiff in ELC. No. 58 of 2017

No appearance for other parties

Court Assistant – Simon/Ashley

