



**Mkullu v Hassan; Abdulkarim (Applicant) (Environment & Land  
Case 89 of 2015) [2024] KEELC 4467 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4467 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 89 OF 2015  
SM KIBUNJA, J  
JUNE 5, 2024**

**BETWEEN**

**MOHAMED ABUSHIRI MKULLU ..... PLAINTIFF**

**AND**

**SULEIMAN ABDALLA HASSAN ..... DEFENDANT**

**AND**

**NASSEM ABDULKARIM ..... APPLICANT**

**RULING**

1. The applicant moved the court through the notice of motion dated the 10<sup>th</sup> October 2023, seeking for orders that:
  - a. The original 1<sup>st</sup> defendant, now deceased, be substituted with the applicant.
  - b. Setting aside of the judgment and or decree given on 26<sup>th</sup> June 2023.
  - c. Order that the suit be heard inter partes.
  - d. Costs be awarded to 2<sup>nd</sup> & 3<sup>rd</sup> defendants.

The application is based on the 23 grounds on its face and supported by the supporting and supplementary affidavits of Nassem Abdulkarim, applicant, sworn on the 10<sup>th</sup> October 2023 and 5<sup>th</sup> December 2023, deposing inter alia that she is a widow to the late defendant, who died on the 9<sup>th</sup> July 2021; that the plaintiff called her over the phone on 25<sup>th</sup> August 2023, and because he had been rude to her earlier when she called him over the restraining order registered over the suit property, she asked him to channel all communications through her advocates; that on the 25<sup>th</sup> August 2023, she received copy of the judgement and draft decree through email, but had been unaware of the suit, and she asked her advocates to confirm the status of the documents; that her advocates confirmed to her



that they were genuine; that the plaintiff knew where to get her husband before his death and had not been served with the suit papers; that the estate of the deceased defendant will be greatly prejudiced if the judgement and decree are executed, while they have a good defence, and her application should be allowed; that her counsel had established the deceased was only served with the mention notice on 7<sup>th</sup> February 2019 through the Standard newspapers; that the portion of the suit property where the plaintiff's house is situated does not belong to the deceased but to the 2<sup>nd</sup> defendant.

2. The application is opposed by Mohamed Abushiri Ahmed, plaintiff, through his replying affidavit sworn on the 6<sup>th</sup> November 2023, in which he *inter alia* deposed that the applicant has not explained what the deceased had done to respond to the adverse possession claims prior to his death; that as the deceased did not defend the said claim, the administrators of his estate are estopped from purporting to resist the claim and or judgement entered thereof; that the adverse possession claim and the judgement thereof, being a claim in rem survived the death of the deceased; that the applicant as the administrator of the deceased's estate has no *locus standi* to resist execution as she is not the absolute owner of the property; that he had served the deceased with the suit papers and was under no obligations to serve the deceased's wife as she was not a party to the suit.
3. The applicant filed her submissions dated the 2<sup>nd</sup> February 2024, which the court has considered.
4. The following are the issues for the court's determinations:
  - a. Whether the applicant has made out a case for her substitution for the defendant.
  - b. Whether the applicant has established a reasonable case for the review and setting aside of the court judgement and decree of 26<sup>th</sup> June 2023.
  - c. Whether the suit should be heard de novo, afresh.
  - d. Who pays the costs.
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, the record and come to the following findings:
  - a. That though the plaintiff had filed the claim against Suleiman Abdalla Hassan and the Estate of Said Swellam Gethan Saanun, as the 1<sup>st</sup> & 2<sup>nd</sup> defendants respectively, his claim against the latter was struck out on the 17<sup>th</sup> July 2012, as captured at paragraph 5(c) of the judgement delivered on the 26<sup>th</sup> June 2023. The hearing then proceeded against Suleiman Abdalla Hassan, who the court has since established had died on 9<sup>th</sup> July 2021.
  - b. That flowing from the finding in (a) above, it is clear by the time the plaintiff testified on the 19<sup>th</sup> April 2023, the defendant had been dead for about one year nine months. The plaintiff did not disclose to the court the information about the death of the defendant at the time he testified.
  - c. Order 24 Rule 4 of the [Civil Procedure Rules](#) provides on what happens when a defendant dies. Sub-rule (3) thereof provides that;
    - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”That by the operations of the law, and in view of the undisputed fact that the deceased died on the 9<sup>th</sup> July 2021, and no substitution was done within one year of his death, the plaintiff's suit against the said deceased abated on or about 9<sup>th</sup> July 2022.



- d. It follows that there was no suit, indeed no valid suit, in existence by the time the plaintiff tendered his testimony as PW1 on 19<sup>th</sup> April 2023. Equally, there was no suit upon which the court could deliver a decision on, by the time the judgement of 26<sup>th</sup> June 2023 was delivered. That judgement is to say the least void *ab initio*.
- e. That the applicant's notice of motion dated 10<sup>th</sup> October 2023 was filed over two (2) years after the death of the deceased. The applicant therefore needed to seek for extension of time to file the application for substitution and setting aside. I have perused the said application and it does not contain a prayer for extension of time, which superior courts have held must always precede the prayer for substitution, setting aside and other related prayers, where the application is filed outside the one year period after death. The application dated 10<sup>th</sup> October 2023, is therefore a non-starter, but it has attained one important thing of bringing the fact of the death of the defendant to the attention of the court, otherwise an illegality would have been committed through the successful execution of the irregularly obtained judgement.
- f. It is now that the court has understood why the plaintiff filed the notices of motion dated the 5<sup>th</sup> February 2024 and 22<sup>nd</sup> April 2024 seeking for review of the judgement of 26<sup>th</sup> June 2023. Those applications were filed months after the instant one had been filed, served, replying and supplementary affidavits filed. As was observed by the court in the ruling dismissing those applications delivered on the 15<sup>th</sup> May 2024, the plaintiff had not provided any basis for the review applications. It is now apparent that the plaintiff was in haste to avoid scrutiny on the regularity of the proceedings and judgement thereof. His scheme has fortunately failed, and this can only be taken, as a win for the judicial process that assures justice for those who seek it in accordance with the law. For that, I thank the applicant.
- g. Though section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs follow the events unless where for good cause otherwise ordered, the court is of the view in the circumstances of this case, each party bears their own costs in the application dated 10<sup>th</sup> October 2023.
  1. That the upshot of the foregoing is that the Applicant's notice of motion dated the 10<sup>th</sup> October 2023 is without merit and the court orders as follows:
    - a. The application dated 10<sup>th</sup> October 2023 is dismissed.
    - b. Each party to bear his/her own costs.
    - c. That the plaintiff's suit against the defendant abated on or about 9<sup>th</sup> July 2022, by operation of the law.
    - d. That for avoidance of doubt, the proceedings that took place after 9<sup>th</sup> July 2022, including the hearing of the plaintiff's case on 19<sup>th</sup> April 2023, the judgement delivered on the 26<sup>th</sup> June 2023 and the decree thereof are all nullities and void *ab initio*, as there was no suit in existence then.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5<sup>TH</sup> DAY OF JUNE 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF:**



Plaintiff ...: No appearance

Defendant : No appearance

Applicant : M/s Hamid for Hamza

**Leakey – Court Assistant.**

