



Boraya v Nyamwange & another; Ondoro (Interested Party) (Environment & Land Case 1112 of 2012) [2024] KEELC 13203 (KLR) (13 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13203 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 1112 OF 2012**

**M SILA, J
NOVEMBER 13, 2024**

BETWEEN

STANLEY ONDORO BORAYA PLAINTIFF

AND

GEORGE NYAMWANGE 1ST DEFENDANT

CHARLES NYAMWANGE 2ND DEFENDANT

AND

RHODA MONG'INA ONDORO INTERESTED PARTY

RULING

(Application for substitution after death of the judgment debtor; whether such application permissible; whether such application caught up by the one year period for substitution; though not mandatory it is prudent for application for substitution to be made where a judgment debtor or judgment creditor dies so that it may be known who is representing the estate; such applications coming after judgment not caught up by the one year rule for substitution since the case cannot abate for reason that it is finalized; application herein filed about 12 years after death of the deceased plaintiff/ judgment creditor; application allowed)

1. The application before me is pretty old as it is one dated 24 July 2015 and filed on 2 September 2015 by the defendants. It was filed through the law firm of M/s Kimanga & Company Advocates then on record for the defendants. It probably remained unprosecuted for reason that the proprietor of the said firm passed on. The defendants are now represented by the law firm of M/s Bosire Gichana & Company Advocates. What the defendants seek is an order to substitute the deceased plaintiff, one Stanley Ondoro Boraya, with Rhoda Mong'ina Ondoro who is said to be his legal representative. The application is based on grounds that the original plaintiff is deceased and Rhoda Mong'ina Ondoro is his legal representative. The supporting affidavit is sworn by George Nyamwange, the 1st defendant.



- He deposes that the suit was dismissed for want of prosecution on 13 June 2004; that they filed a bill of costs on 28 September 2004; that the plaintiff filed an application dated 16 November 2004 seeking to set aside the taxation which application is still pending; that the plaintiff died and that Rhoda Mong'ina Ondoro obtained letters of administration but has not sought substitution.
2. Rhoda Mong'ina Ondoro filed a preliminary objection and grounds of opposition dated 8 May 2024. In it is averred that the case was originally filed in 1968 as Civil Suit No. 74 of 1968; that the plaintiff died on 8 December 2004; that the suit was dismissed on 16 May 2004 for want of prosecution; that a decree was drawn on 8 October 2004 and bill of costs taxed ex parte on 5 July 2004 at Kshs. 303, 591/=; that there was an application dated 16 November 2011 to set aside the ex parte taxation which has not been heard to date; that the application dated 24 July 2015 was dismissed on 5 November 2018; that no action can be brought upon judgment after 12 years and the date of delivery of judgment was 16 May 2004; that substitution was not done within one year of death; that the applicants have not been following up on the matter diligently; that litigation has to come to an end; that the matter should rest for good.
 3. I invited counsel to file submissions towards the application, which they did and I have gone through them together with the record herein.
 4. I do not have the original plaint in this case but the suit must have been filed in 1994 given that it was registered as Kisii HCCC No. 534 of 1994. I am aware that in opposing the application it was claimed that the case was originally filed in 1968 as Civil Suit No. 74 of 1968 but from what I see that was a separate suit between the now deceased plaintiff and the deceased father of the defendants. It is that judgment that separated what the two old men owned and determined that the plaintiff would own the Parcel No. 2 Gesima, and the father of the defendants the parcel No. 5 Gesima. In the suit herein, as discernible through the amended plaint filed on 9 July 1996, the deceased plaintiff averred to be the proprietor of the land parcel Gesima Settlement Scheme/2 which was subject to subdivision and among the subdivisions were plots No. 341 and 344. The plaintiff complained that the defendants had trespassed into these plots No. 341 and 344 on the allegation that they formed part of the land parcel Gesima Settlement Scheme/5 which they (defendants) owned. In the suit, the plaintiff wanted an order of eviction, a permanent injunction, and costs. The defendants filed defence wherein they asserted that they have confined themselves to the parcel No. 5. The suit partly proceeded and there was reference to the Land Registrar to file a report which was filed. The case was however not substantively concluded as it was dismissed on 16 June 2004 for want of prosecution by Bauni J. Thereafter a bill of costs was filed on 5 July 2004. I see that the same was taxed at Kshs. 303, 591/= on 28 September 2004. There followed an application dated 16 November 2004 seeking to set aside the taxation on the reason that the plaintiff had not been served with the taxation notice. The application may not have been canvassed because the plaintiff died shortly thereafter on 18 December 2004. Nothing happened in the case until this application was filed on 1 September 2015 and it seeks substitution of the deceased plaintiff with his personal representative. However, I do observe that on 15 November 2018 (not 8 November 2018 as insinuated by the respondent) the matter went before Mutungi J who dismissed it for want of prosecution. That is an error apparent on the face of record since the case had already been dismissed on 16 June 2004 by Bauni J.
 5. It is apparent that the defendants wish to substitute the deceased plaintiff with his legal representative and I would think that it is for no other reason other than to proceed with execution of costs.
 6. Substitution of deceased parties is comprehensively addressed under Order 24 of the Civil Procedure Rules. The general rule is that substitution is done within one year of death of the party sought to be substituted. This is addressed in Order 24 Rule 3 of the Civil Procedure Rules. If there is no substitution within one year of death then the suit abates as provided in Order 24 Rule 3 (2) in case



of a deceased plaintiff and under Order 24 Rule 4 (3) in case of a deceased defendant. Under Order 24 Rule 7, when a case abates no fresh suit can be brought for the same cause of action.

7. But what of a situation where there is already judgment and one party dies ? Does the suit abate within one year of death ? The answer is no. The suit does not abate for reason that Order 24 Rule 11 provides that Rules 3, 4 and 7 do not apply to proceedings in execution of the decree or order, and there is good reason for that. You see, once there is judgment, the suit is finalized and the matter resolved so there is nothing to abate. This was indeed addressed in the case of Agnes Wanjiku Wang'ondy v Uchumi Supermarkets, Nairobi HCCC Civil Appeal No. 137 of 2002 (2008) KEHC 2233 (KLR). It was held thus :

I would uphold Mr Ndege's submission that the lower court was wrong in holding that the "suit" had "abated", because the application for substitution had not been made within one year as required under Order 23 Rule 4 (3). There was no suit pending before the lower court, and therefore, it could not have possibly "abated". The suit in the lower court had been determined, and, in fact, the Judgment partly satisfied. There was nothing to "abate".

8. The second issue is whether a decree cannot be executed without there being substitution. Here let me cover both scenarios i.e the death of a decree holder and the death of a judgment debtor. When a decree holder dies there is a judgment in his favour, but he is of course dead, so he is not there to execute it. Execution can only be done by his Legal Representative. Once a legal representative is appointed , he can in fact proceed with execution without the need for the formality of substitution given Rule 11 above. However, for good order and for the record, it is prudent, and in fact advisable, that an application for substitution be made, if for no other reason, so as to know who it is that is representing the estate of the deceased and mandated to execute. In absence of this, it may be difficult to know who is representing the estate and there could be some busy bodies who may take advantage of the lacuna to claim that they are representing the estate of the deceased when in actual fact, they are not. I would thus say, that it is prudent for an application for substitution to be made so that it is known who is representing the estate of the deceased and thus mandated to proceed with execution.
9. What of where the person who is dead is the judgment debtor ? An estate of a deceased person is protected and ought not to be intermeddled with until there is a legal representative. People may in fact be tempted to take advantage of the lack of a legal representative to cause havoc to the estate. Immediately there is a legal representative, there is nothing to stop execution, since the estate has an administrator who is present to protect the interest of the estate. Again pursuant to Rule 11, it is not mandatory to first seek substitution, but just as I have explained above, for purposes of good order and record, it is prudent to file an application to substitute, so that it is also known to all and sundry and also to the court, who is representing the estate of the deceased judgment debtor. So yes, although execution can proceed, it is good practice to undertake substitution.
10. Indeed without an application being made, one may not know if the estate of the deceased party has a legal representative, and if so, who it is. The court will also not be informed of who is in charge of collecting the proceeds of the decree or who is obligated to make good the decree.
11. Such applications for substitution, coming after judgment, cannot suffer the limitation of one year of death and can be made at any time.
12. Substitution is restricted to identifying the person representing the estate of the deceased party to the suit and nothing else. I am aware that within this application it has been raised that there has been no execution for a long time and therefore the decree is stale. I opt not to go there at this moment in time because all I have is an application for substitution, not an application for execution. If one comes,



we will deal with it. That is a bridge that can be crossed later in the event that the applicants wish to execute the decree.

13. For the above reasons, the application is hereby allowed to the extent only of substitution the deceased plaintiff with his legal representative who is acknowledged to be Rhoda Mong'ina Ondoro. There is no need to amend any pleadings save that future documents may have Rhoda Mong'ina Ondoro being described as Legal Representative of the estate of the deceased plaintiff. There will be no orders as to the costs of this application.
14. Orders accordingly.

DATED AND DELIVERED THIS 13 DAY OF NOVEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of :

Ms. Bosire for the applicants

N/A on part of Mr. Okenye for the respondent

Court Assistant – David Ochieng'

