



Murwithania & 4 others v M’ikiara & another (Both Legal Representative of M’ikiara Antuankure) (Environment and Land Appeal E039 of 2023) [2024] KEELC 13861 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13861 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E039 OF 2023
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

**MARY KATHURE MURWITHANIA 1ST APPELLANT
M’MURWITHANIA GATWANKURE 2ND APPELLANT
HARRIET KANANU GUANTAI 3RD APPELLANT
JOHN MUTUMA MURWITHANIA 4TH APPELLANT
MOSES KINOTI MURWITHANIA 5TH APPELLANT**

AND

**MOSES KIMATHI M’IKIARA 1ST RESPONDENT
JOHN MURIUKI M’IKIARA 2ND RESPONDENT
BOTH LEGAL REPRESENTATIVE OF M’IKIARA ANTUANKURE**

RULING

1. Before me for determination is the notice of preliminary objection dated 27th September, 2024 by the respondents to have the appeal dismissed on the grounds that the court is bereft of jurisdiction to determine this appeal as the appellant’s suit at the trial court had abated on or around 26th December, 2018 by dint of the death of the initial defendant, M’ikiara Antuankure on 26th December, 2017 and no order was granted to revive the same.
2. In their submissions dated 22nd October, 2024 filed through the firm of John Muthomi & Co. Advocates, the respondents gave a background of the matter which I will highlight since it has an impact on the objection herein.



3. The respondents stated that by a plaint dated 13th January, 2017, first filed in Meru Viz ELC No. 90 of 2017, the appellants as the plaintiffs sued the defendant, M’ikiara Antuankure seeking reliefs sought thereon. That the defendants filed a defence and counterclaim dated 4th December, 2017.
4. The respondents stated that the appellants suit was later transferred to the lower court and became Githongo ELC Case no. 5 of 2017.
5. That during the pendency of the suit, the defendant M’ikiara Antuankure died on 26th December, 2017. That vide an application dated 4th April 2019, the appellants sought to have the deceased defendant substituted with his legal representatives, the respondents in the instant appeal. The said application was allowed by the trial court on 31st May 2019.
6. That subsequently, the trial court heard the suit and rendered a judgment on 2nd December, 2022 and a decree was issued on 14th February, 2023. That being aggrieved by the aforementioned judgment and decree, the appellants filed the instant appeal vide the memorandum of appeal dated 2nd June 2023.
7. The respondents submitted that their preliminary objection herein is to the jurisdiction of this court to the effect that the appellants suit in the Lower court had abated. The respondents counsel relied on the famous case of Mukisa Biscuits Manufacturing Company Limited Vs West End Distributors Limited (1969) EA 696 which stated as follows-;

“A preliminary objection consists of point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of Limitation or a submissions that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.”

8. The respondents’ counsel also cited Order 24 Rule 4 which provides as follows-;

“4. Procedure in case of death of one of several defendants

- (1) Where one or two or more defendants dies and the cause of action does not survive or continue against the surviving defendants or defendants alone, or a sole defendant or a 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) ...
- (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant”.

9. Learned counsel for the respondents submitted that the foregoing means that upon the death of defendant and on application, the court has the discretion to substitute the deceased defendant and after one year with no application, a suit abates. That in the instant matter, there is no dispute that the initial defendant, M’ikiara Antuankure died on 26th December, 2017. That there is no doubt either that a year thereafter, say on 26th December, 2018, no legal representative of the deceased defendant had by any application been brought on board. That the suit against him therefore abated on 26th December, 2018.



10. The respondents counsel submitted that the application to substitute the aforementioned defendant was filed on 4th April 2019, about four months after the abatement of the suit. That the said application was allowed on 31st May, 2019 over five months after the said abatement. It was further submitted that when the appellants filed the aforementioned application dated 4th April 2019 they neither sought enlargement of time to bring it nor revival of the suit. The respondents counsel relied on the case of Rebecca Mijide Mungole & another Vs Kenya Power and Lighting company Limited & 2 others [2017] eKLR where the Court of Appeal stated-;

“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 the 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 rejoinder 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 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.”

11. Learned counsel for the respondents also relied on the case of Kenya Farmers Co-operative Union Ltd Vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate [2005] eKLR where an application for substitution of the deceased defendant was filed more than one year after the defendant had died, and Justice H.D.G Waweru stated as follows-;

“Therefore, as a matter of law the suit against him abated. When substitution was subsequently purportedly made on 5th March, 1998, there was no suit subsisting in which substitution could be made. It had abated on or about 23rd April, 1996, that is one year since the death of the defendant. The order of substitution was thus made in error. It was unlawful and ought not to have been entered.

The suit having abated on or about 23rd April 1996, as seen above, the order of substitution of 5th March, 1998 was a nullity in law and of no effect. Equally, the subsequent hearing and judgment were null and void in law, the resulting decree was also equally a nullity. It is not a sufficient answer that the application has come too late in the day or that these issues ought to have been raised at the time of hearing the application for substitution or at the latest at the hearing of the suit. Of course it would have been best had these issues been raised as early as possible. But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit) where the suit has already abated by operation of the law? Obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operation of the law? Certainly not. If a suit has abated it ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time.”

12. The respondents' counsel also relied on M'Mboroki M'Arangacha Vs Land Adjudication officer Nyambene & 2 others [2005] eKLR where the court stated-;

“But it is clear that such an application seeking that the legal representative be made a party in the place of the deceased plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased



plaintiff is concerned. The language used by the legislature is mandatory as the words used are “the suit shall abate”. It is my understanding and view that the abatement of the suit is automatic and does not as Mr. Kiogo argued, need an order of the court to abate the suit.”

13. Further, learned counsel for the respondents relied on the case of Mbaya Nzulwa Vs Kenya Power & lighting co. Ltd. [2018] eKLR in which the court held-;

“ 12. In this matter it cannot be denied that the suit abated. An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.”

14. Similarly, the respondents counsel relied on the case of Said Sweilem Gheithan Saanum Vs Commissioner of Lands (being sued through Attorney General & 5 others [2015] eKLR where the court of Appeal stated-;

“The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

15. The respondents’ counsel implored the court to find and hold that the suit in the trial court abated around 26th December, 2018 and any proceedings, judgment and decree written or based on its abated status, was null and void abinitio. They also relied on the case of Owners of Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd [1989] eKLR and urged the court to down its tools in the instant appeal by upholding the preliminary objection and dismissing the appeal with costs to the respondents.

16. In their submissions dated 9th October, 2024 filed through the firm of Maitai Rimita & Co. Advocates, the appellants also relied on the case of Mukhisa Biscuit Manufactures Ltd Vs Wes End Distributors Ltd (supra) and beside the holding stated above, referred to the decision by Sir Charles Newbold President as follows-;

“ A preliminary objection is in the nature of what used to be 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 any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.”

17. Learned counsel for the appellants also relied on the case of Owners of Motor Vessel “Lillian S” Vs Caltex (Kenya) Ltd (Supra) on the issue of Jurisdiction. Further, on the source of jurisdiction, the appellants’ counsel relied on the case of Samuel Kamau Macharia & another Vs Kenya Commercial Bank Limited & others [2012] eKLR.

18. The appellants counsel cited the provisions of Order 24 Rule 4 of the Civil Procedure Rules. It was submitted that it is not in doubt that the initial defendant M’Ikiara Antuankure passed on on 26th December 2017. That the trial court ordered that the beneficiaries of his estate do file a succession cause to have an administrator of the said estate in order for substitution to be made. The appellants counsel referred the court to the timelines in which it took for the respondents to file a succession cause for an administrator to be appointed in order for substitution of M’Ikiara Antuankure to occur. That as observed, there were delays on the part of the respondents to acquire the letters of administration even necessitating citation for them to file the cause. That they further cited problems in processing of the



certificate of death. It is argued that this facilitated the delay in substitution and progress of the suit which culminated to the completion of one year without doing the substitution.

19. It is the appellants submission that even after being issued with the letters of administration on 22nd October, 2018 the respondents did not take the appropriate steps to file an application for substitution until the appellants herein undertook to file the said application dated 4th April, 2019 which was allowed on 31st October, 2019. That the respondents herein were not opposed to the application for substitution, neither did they file a notice of preliminary objection then citing that the plaintiffs' suit had abated, neither did the court on its own motion cite the matter as abated. The appellants submitted that this is an afterthought on the part of the respondents questioning why they waited for the matter to be concluded by the trial court, have the same appealed and submissions tendered by all the parties, only for them to file a notice of preliminary objection when the appeal is ready for judgment. The appellants argued that any oversight on the part of the respondents if any, should not be visited upon the appellants who are seeking justice before this Honourable court, having in mind that the respondents on the ground have resulted to threatening the appellants to an extent of illegally evicting them from the land even before the matter has been determined.
20. The appellants submitted that if at all the matter abated, which they submit it hadn't, then the respondents are at fault. That the fact that the respondents went ahead to defend the suit upto the appeal stage does not deprive this court of jurisdiction to determine the matter. That the court as a shrine of justice has a mandate to do justice to all parties and not to be too strictly bound by procedural technicalities. The appellants' counsel cited Article 159 (2) (d) of *the Constitution*. That this demonstrates that a court of law should be perceived to be just and fair and this can only be achieved by ensuring that cases before it are heard to their conclusion rather than having them dismissed on mere technicalities. That substantive justice is what the court should adhere to at all time to achieve, which will ensure that all parties to the suit are satisfied and no party shall feel shortchanged. It is the appellants' submission that dismissal of the same affects the fair administration of justice contrary to Article 47 of *the Constitution* which provides for the right to administrative action that is expeditious, lawful, reasonable and procedurally fair.
21. The applicants' counsel submitted that it would have been useful too if the respondents looked at the provisions of Order 24 Rule 7(2) which mandates the court to revive a suit which has abated. That more crucial, however, is the need to give justice on merits. That it is no longer appropriate in this day and age to expect dismissal of a suit on the basis that a certain procedural step has been overlooked or complied with on time, adding that this is precisely what the respondents are trying to do here.
22. Learned counsel for the appellants further submitted that Section 19(2) of the *Environment and Land Court Act* enjoins that proceedings be conducted without undue regard to procedural technicalities and that Section 3 A of the *Civil Procedure Act* clothes the court with inherent power to ensure that real and substantive justice is done. They also cited Section 1A and 1B of the same Act and argued that the overarching concern of these two provisions is that the court should strive to deliver justice on the merits of a case. That that is the overriding objective, and that the sections enjoin that the ends of any decision or interpretation a court may make should have overall regard to justice on the merits as opposed to undue emphasis on procedural technicalities. It is therefore the appellants submissions that the preliminary objection raised by the respondents is not merited and should be dismissed with costs.
23. The suit out of which this appeal arises began by a plaint dated 13th January, 2017 in Meru ELC No. 90 of 2017 wherein the appellants herein (as plaintiffs) sued M'Ikiara Antuankure as defendant) seeking the reliefs thereon. The said M'Ikiara Antuankure filed a defence and counterclaim dated 4th December, 2017. The suit was later transferred to the lower court and became Githongo PMC ELC case No. 5 of 2017.



24. From the record, it is not in dispute that during the pendency of the suit, the defendant, M'Ikiara Antuankure died on 26th December, 2017. Vide an application dated 4th April 2019, the appellants sought to substitute the deceased defendant with his legal representatives, the respondents herein and the said application was allowed by the trial court on 31st May 2019. Subsequently, the trial court heard the suit and rendered a judgment on 2nd December, 2022, and a decree was consequently issued on 14th February, 2023. Being aggrieved by the said judgment, the appellants filed this appeal. Later, the appeal was admitted for hearing and the court directed that the same be canvassed by way of written submissions which were duly filed by the parties. However, before a judgment date was fixed by the court, the respondents raised an objection on the appeal on the grounds that the court is bereft of jurisdiction to determine the appeal as the appellants' suit at the trial court had abated on or around 26th December, 2017 by dint of the death of the initial defendant, M'Ikiara Antuankure on 26th December, 2017 and that no order was granted to revive the same.
25. I have anxiously considered the objection raised and the submissions filed. The main issue for determination is whether the notice of preliminary objection is merited. In the case of Mukisa Biscuit Manufacturing Co. Ltd Vs West end Distributors Ltd (Supra) Law JA at P 700 stated as follows-;
- “...so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit...”
26. In the same case, Sir Charles Newbold P stated at P 701 as follows:
- “... 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 facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”
27. From the documents on record and indeed submissions by both parties, I have no hesitation in coming to the conclusion that all the facts relating to the death of M'Ikiara Antuankure on 26th December, 2017 and substitution with the respondents as his legal representatives on 31st May, 2019 are not in dispute. Since the objection raised is to the effect that the court lacks jurisdiction to determine the appeal because the suit at the trial court had abated, I am also of the view that the preliminary objection herein consists of a pure point of law which, as held by Newbold P above, is argued on the assumption that all the facts pleaded are correct.
28. As already stated, the preliminary objection the respondents have raised is that the appellants' suit at the trial court had abated and therefore the court has no jurisdiction to determine the matter. Order 24 Rule 4 provides as follows-;
- “ 4 Procedure in case of death of one of several defendants.
- (1) Where one of several defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or a 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) ..



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

29. In this matter, there is no dispute that the initial defendant M’Ikiara Antuankure died on 26th December, 2017. From the record, there is no doubt either that by 26th December, 2018, which is a year later, no application had been made to cause the legal representative of the deceased defendant to be made a party to the suit and to proceed with the suit. The application for substitution was filed on 4th April 2019, which was some months after the abatement of the suit. The said application was allowed on 31st May 2019 which was over five months after the said abatement. The suit having abated on 26th December, 2018, the order of substitution of 31st May 2019, was, in my view a nullity and of no effect. Equally, the subsequent hearing and judgment were null and void in law, and the resulting decree was also equally a nullity.
30. In the case of Rebecca Mungole & another Vs Kenya Power and Lighting Company Ltd, & 2 others (supra), the Court of Appeal stated as follows:
- “ 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 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 revival of the action.”
31. It is clear from the above decision of the court of appeal that the trial court had no jurisdiction to order substitution (except in an application to revive the suit) where the suit had already abated by operation of the law. Further, the trial court had no jurisdiction to hear and determine a suit that had already abated by operation of the law. If a suit has abated, it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. In this case, there was no application made to revive the suit that had abated. Therefore, by purporting to hear and determine a suit that had abated was really an exercise in futility. It was a grave error on the part of the trial court and this court cannot pretend to perpetuate that error by determining the appeal herein. The error was one of jurisdiction and it can be raised at any time as the respondents have done. The abatement of suit is automatic and does not even need an order of the court to abate the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased defendant. (see Said Swilem Gheithan Sannun Vs Commissioner of Lands (sued through Attorney General) & 5 others [2015] eKLR.
32. The language used by the legislature under Order 24 Rule 4(3) is mandatory. The words used are that “where within one year no application is made under Sub-rule (1), the suit shall abate as against the deceased defendant.” Once the appellants had not applied for revival of the suit, the trial court had no jurisdiction to hear and determine a suit that had already abated by operations of the law, and this court also finds that it has no jurisdiction to determine the appeal. As was held in Owners of motor Vessel Lillian “S” Vs Caltex Oil (Kenya) Ltd (Supra) a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. The purported hearing and determination by the trial court of a suit that had abated was an exercise in futility. As already stated,



if a suit has abated, it ceases to exist and there was no suit upon which a trial could be conducted and judgment pronounced.

33. Going by the material on record, submissions by counsel and the authorities, I am persuaded that the appeal herein cannot be sustained. The upshot is that the preliminary objection dated 27th September, 2024 is merited and therefore the same is allowed. The appeal is hereby struck out for being incompetent, null and void. The judgment of the subordinate court is set aside for being a nullity. The respondents are awarded the costs.

34. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

IN THE PRESENCE OF

Court Assistant – Tupet

John Muthomi for respondents

No appearance for appellants

C.K YANO

JUDGE

