



Wanyonyi & 2 others v Masinde; Wanyinyi (Applicant) (Environmental and Land Originating Summons 10 of 2021) [2024] KEELC 13981 (KLR) (17 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13981 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 10 OF 2021

EC CHERONO, J

DECEMBER 17, 2024

**IN THE MATTER OF THE LIMITATION OF ACTIONS ACT CAP 22
LAWS OF KENYA AND ORDER 37, RULE 7 CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF LAND PARCEL NO. LR NO. WEST BUKUSU/NORTH MATEKA/3575

BETWEEN

BILIAH MAKIKA WANYONYI 1ST PLAINTIFF

JOSEPHAT WEKESA WANYONYI 2ND PLAINTIFF

WILSON SITATI WANYONYI 3RD PLAINTIFF

AND

NYONGESA WANYONYI MASINDE DEFENDANT

AND

PATROBER WAFULA WANYINYI APPLICANT

RULING

1. The Applicant moved this Honourable Court *vide* a Notice of Motion application dated 11/08/2023 seeking the following orders;
 - a. That the applicant herein Patrober Wafula Wanyonyi be and is hereby substituted as the 1st Applicant/Respondent herein.
 - b. That costs of this application be provided for.
2. The application is supported by grounds apparent on the face of the said and Applicant's affidavit sworn on 11/08/2023 where he deponed that Biliah Naliaka Wanyonyi, the 1st plaintiff herein died on



23/03/2022 and the Applicant herein has since been issued with letters of administration ad litem in respect of her estate. He sought leave to substitute the 1st plaintiff.

3. I have considered the application herein and find that the issue that commends for determination is whether the Applicant deserves the orders sought in the application.
4. Order 24 of the *Civil Procedure Rules, 2010* comprehensively outlines what ought to happen if a party or parties to a suit dies; Order 24, rule 3 provides for the procedure in case of death of one of several Plaintiffs or of sole Plaintiff.
5. It is however noteworthy that the defendant in this case i.e. Nyongesa Wanyonyi Masinde is deceased. This is as was confirmed by the certificate of death serial no. 1382951 presented in court on 02/05/2023 by one Protus Juma Nyongesa which indicated that the deceased (Nyongesa Wanyonyi Masinde) died on 07/04/2022. The court on that date issued directions to the extent that the suit against the defendant is marked as abated and that the plaintiffs were to bear the costs of the suit.
6. Order 24 rule 4 (4) of the *Civil Procedure Rules* provides that;

“ 4.

- (1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or 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.

7. This therefore means that upon death of a defendant and on an application by an applicant, the court has the discretion to substitute the deceased defendant but where no application is made within one year, the suit abates. In this matter, it cannot be denied that the suit has abated. The deceased defendant died on 07/04/2022 and no application has ever been filed to revive the suit. 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 explanation, if any, for the delay.
8. In the case of *Titus Kiragu v Jackson Mugo Mathai* (2015)eKLR it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

9. Therefore, it is clear that when a suit abates, it ceases to exist under the law prior to being revived. I do not see how I can substitute a plaintiff, let alone revive an abated suit where there is no legal representative appointed by the legal representatives of his estate. The procedure should first be to have a person appointed to represent the estate of the deceased before an application for substitution of a plaintiff or even revival of an abated suit can be made. My view is that this application is premature. Therefore, the current application to substitute a plaintiff is not tenable for the abovementioned reasons. In *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 others* Civil Appeal No.283 of 2015 [2017] eKLR the Court of Appeal held that;



But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted...[Emphasis added]

10. I will therefore struck out the said application dated 11/8/2023 for the above reasons with no order as to costs.
11. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF DECEMBER, 2024.

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HON.E.C CHERONO

ELC JUDGE

In the presence of

1. Mr Were for the Applicant
2. Respondent/Advocate-absent
3. Bett C/A

