



REPUBLIC OF KENYA



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Nabibia v Tabani; Wamalwa (Applicant); Tabani (Respondent) (Environment & Land Case 336 of 2013) [2023] KEELC 335 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 335 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE 336 OF 2013**

**BN OLAO, J
JANUARY 26, 2023**

BETWEEN

NASHON WAMALWA NABIBIA PLAINTIFF

AND

BEN WANYAMA TABANI DEFENDANT

AND

EDWIN SIMIYU WAMALWA APPLICANT

AND

BEN WANYAMA TABANI RESPONDENT

RULING

1. The Notice of Motion dated May 12, 2022, and which is the subject of this ruling, is clearly res judicata and must be struck out.
2. Edwin Simiyu Wamalwa(theapplicant herein) had previously moved thiscourt vide his Notice of Motion datedJune 21, 2021 seeking the following orders:
 - a. Spent.
 - b. That this honourable court be pleased to substitute the deceased Nashion Wamalwa Nabibia with the applicant Edwin Simiyu Wamalwa.
 - c. That this honourable court do rectify the decree issued on June 8, 2018to include the terms of the award for its enforcement.
 - d. That this honourablecourt be pleased to order the Deputy Registrar of this court to execute the transfer forms and mutation forms and curve out a portion of land measuring 0.2 Ha from



the land parcel East Bukus/north Sang'oro/5013 measuring 1.27 Ha which land was created after the original land comprised in the land parcel No East Bukusu/nort Sang'oro/3181 was sub-divided by the defendant/Respondent creating several numbers including the land parcel No East Bukusu/north Sang'oro/5013 measuring 1.27 Ha.

e. That costs of this application be provided for.

The application was opposed and vide a ruling delivered on December 8, 2021, I dismissed the application and ordered that the parties meet their own costs.

3. The reasons why I dismissed the application were two fold. Firstly, the suit in which the applicant sought to be substituted had abated by operation of law and there was no application filed for its revival. Secondly, there was no decree capable of being rectified or executed by the Deputy Registrar.
4. In this new application, the applicant citing the provisions of Order 24 Rule 7(2) and Order 51(1) of the *Civil Procedure Rules* seeks the following orders:
 1. That this court be pleased to reinstate and/or revive the abated suit against the deceased plaintiff the late Nashion Wamalwa Nabibia.
 2. That this court be pleased to extend time within which to substitute the deceased plaintiff herein.
 3. That this court further be pleased to grant leave to the Applicant to substitute the plaintiff now deceased with Edwin Simiyu Wamalwawho is now the legal representative of the deceased the late Nashion Wamalwa Nabibia.
5. The gravamen of the application which is premised on the grounds set at therein and supported by the applicant's affidavit is that the plaintiff is deceased having passed on more than one year ago and the suit abated. That the applicant has now obtained a Limited Grant and is ready to proceed with the suit from where the deceased plaintiff left it. That the delay in applying for substitution was occasioned by the fact that the chief's letter was not procured in good time and also that the applicant's previous counsel Paul Juma Advocate did not file the application despite being instructed to do so. That this suit was never heard and determined and it is in the interest of justice that the application be allowed as it will not prejudice the respondents in any way.
6. Annexed to the application are the following documents:
 1. The death certificate of the deceased.
 2. A receipt No100 for Kshs.25,000 issued to the applicant by the firm of Paul Juma & Company Advocates being the fees for filing of an application to revive suit.
 3. Copy of this court's ruling dated December 8, 2021.
7. The application is opposed and Ben Wanyama Tabani (the respondent) has filed a replying affidavit dated August 24, 2022 in "which it is averred, inter alia, that the applicant made an application for substitution which was determined vide this court's ruling dated December 8, 2021. That the applicant cannot purport that there was delay in procuring the chief's letter yet he had obtained the Grant for purposes of filing the previous application dated June 2, 2021 and which was dismissed. That this application is an abuse of the process of this court and equity aids the vigilant."
8. Annexed to the replying affidavit are the following documents:
 1. Copy of the ruling delivered on December 8, 2021.



2. Copy of the Notice of Motion dated June 2, 2021.
3. Limited Grant of Letters of Administration issued to the Applicant on May 26, 2021 in Bungoma Cm Succession Cause No E86 of 2021 for purposes of continuing with this case.
9. The application has been canvassed by way of written submissions. These have been filed by the applicant's new counsel Mr. Robert Wamalwa instructed by the firm of Robert Wamalwa & Company Advocates and by MR Kundu instructed by the firm of Situma & Company Advocates for the Respondent.
10. I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.
11. As I stated at the commencement of this ruling, this Notice of Motion dated May 12, 2022 and which is the subject of this ruling is clearly *res judicata* the previous Notice of Motion dated June 2, 2021 both of which have been filed by the Applicant.
12. *Res judicata* is provided for under section 7 of the [Civil Procedure Act](#) as follows:

7. "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." Emphasis mine

Explanation No 4 of that section states thus:

4. "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

The doctrine of *res-judicata* is meant to bring litigation to an end. It applies not only to suits but applications as well – *Uhuru Highway Development Ltd v Central Bank of Kenya* [1996] eKLR.

Further, as was held by Wigram V C In *Henderson v Henderson* 1843 3 Hare 100 [1843 67 ER 313] a decision that has been applied in this country:

"The plea of *res judicata* applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward." Emphasis mine.

13. In this court's ruling delivered on December 8, 2021, I dismissed the Applicant's Notice of Motion dated June 2, 2021 in which he sought to be substituted in place of the deceased plaintiff because the suit had abated and so there was no suit in which he could be substituted. It is clear from that ruling that by the time the applicant filed that application, he had already obtained the Limited Grant dated May 26, 2021. Indeed it was among the documents which he had filed but no prayer was sought for the revival of the abated suit. And although the applicant has not annexed that Limited Grant to the application subject of this ruling, the same has been annexed to the replying affidavit by the



Respondent – annexure BWT – III. The respondent has deponed in paragraph 8 of his replying affidavit thus:

8. “that the applicant cannot purport to say that thus (sic) was delay in procuring chief’s letter while he got a grant for purposes of this suit that he need to file the application dated June 2, 2021 that was dismissed for devoid (sic) of merit. See copy of Limited Grant Ad-Litem annexed marked BWT-III.”

That is correct. The applicant already had a copy of the Limited Grant issued on May 26, 2021 by the time he filed his earlier application dated June 2, 2021 but for reasons best known to him and his counsel, no prayer was made for the revival of the abated suit. It is therefore insincere on the part of the applicant to depone, as he has done in paragraph 4 and 5 of his supporting affidavit;-

4. “That since the property in issue was situate within the local jurisdiction of the area chief, I was forced to first procure the introductory letter from the chief’s office to enable me proceed to apply for the Limited Grant.”
5. “That it is in this office that the much delay was experienced when the area chief decided to take me in circles only to release to me the said introductory letter late when time in which to expressly file substitution had since lapsed.”

The lethargy and bureaucracy in some of the chief’s offices is a matter of common notoriety and I have no doubt that the applicant experienced some delays in procuring the necessary documents to enable him apply for the Limited Grant. However, it is also a fact that by the time he filed his Notice of Motion dated June 2, 2021, he had already obtained the Limited Grant which he even annexed to that application. There is no explanation why he did not seek an order for the revival of the suit at that time. That prayer must be rejected.

14. Having declined to issue orders for the revival of the suit herein, it follows that there can be no basis for granting the prayers for extension of time within which the applicant can substitute the deceased plaintiff. The whole application is res-judicata.
15. The up-shot of the above is that the Notice of Motion dated 1 May 2, 2022 is res-judicata. It is accordingly struck out with no orders as to costs.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 26TH DAY OF JANUARY 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

26TH JANUARY 2023

