



**Nyachae & 3 others v Nyabera & 4 others (Environment & Land Case 1216 of 2016) [2023] KEELC 68 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 68 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 1216 OF 2016**

**M SILA, J  
JANUARY 19, 2023**

**BETWEEN**

**THOMAS M. NYACHAE ..... 1<sup>ST</sup> PLAINTIFF  
ELIJAH OGETO ONGECHI ..... 2<sup>ND</sup> PLAINTIFF  
BENARD MAKORI GETETE ..... 3<sup>RD</sup> PLAINTIFF  
LEONARD BOGONKO NYAMBEGERA ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**ISAAC MOINDI NYABERA ..... 1<sup>ST</sup> DEFENDANT  
EAGLE AND BISON LIMITED ..... 2<sup>ND</sup> DEFENDANT  
DAVID KENYANYA MAGARE ..... 3<sup>RD</sup> DEFENDANT  
SAMUEL MOBEGI ..... 4<sup>TH</sup> DEFENDANT  
JOHN JOSEPH MOKAYA T/A ABAGUSII THEATRE CINEMA  
COMPANY ..... 5<sup>TH</sup> DEFENDANT**

*(Application seeking substitution of the deceased 4<sup>th</sup> defendant to the counterclaim; there having been an earlier application for substitution which had been allowed; application thus res judicata and is struck out)*

**RULING**

1. The application before me is that dated 30 September 2022 filed on behalf of the 4<sup>th</sup> defendant to the counterclaim filed by the 1<sup>st</sup> defendant in the main suit (I observe that the 4<sup>th</sup> defendant to the counterclaim of the 1<sup>st</sup> defendant has commonly, though erroneously, been described in this suit as the 5<sup>th</sup> defendant which is not the case). The application is brought pursuant to the provisions of order



- 24 rule 3 (2) and order 4 rules (1) and (2) of the *Civil Procedure Rules, 2010*. The substantive order sought is in prayer (3) of the application which seeks orders to have the applicant, George Mokaya, substitute the deceased 4<sup>th</sup> defendant to the counterclaim one John Joseph Mokaya (deceased). The applicant avers to be the son of the deceased and that he has obtained a grant of letters of administration ad litem to enable him represent the estate of the deceased. The supporting affidavit deposes that the deceased died on 7 October 2014 and thereafter goes into details of the case herein which I do not see the necessity of setting out.
2. The plaintiffs filed grounds of opposition to oppose the application stating that the application is incurably defective and bad in law. The 2<sup>nd</sup> defendant, a limited liability company, filed a replying affidavit sworn by its director, Michael Moragia Nyachae, to oppose the motion.
  3. Ms Nyaenya, learned counsel for the plaintiff, submitted that such an application needs to be made within one year of death and the applicant has not applied for extension of time under order 24 rule 4 (3) and the application therefore needs to be struck out. Mr Nyanhoga, learned counsel for the 2<sup>nd</sup> defendant, submitted inter alia that the application is res judicata as a similar application had been allowed on 19 September 2019 (sic). He also submitted that the application is belated, coming 8 years after the demise of the deceased and added that this will affect the proceedings. He pointed out that the case has already been heard and is pending the filing of final submissions and judgment. Despite these submissions, and before Mr. Okenye learned counsel for the applicant could make his response, Mr Nyanhoga stated that upon discussion with Mr Okenye, the application may be allowed only that the 4<sup>th</sup> defendant to the counterclaim will be limited to filing submissions on the basis of the pleadings and evidence on record. Ms Nyaenya maintained that she is opposing the application.
  4. The background is that this suit was commenced by the plaintiffs on 17 December 2008 against two defendants, respectively being Isaac Moindi Nyabera and Eagle and Bison Limited. The plaintiffs averred that the 1<sup>st</sup> defendant represented himself to be the owner of the land parcel Kisii Municipality/Block III/57 (the suit property) and pursuant to that representation they agreed to rent some space for use as a garage. They averred that they took possession in the year 2003 and started paying rent of Kshs 3,000/=. They pleaded that on 14 November 2008, the 1<sup>st</sup> and 2<sup>nd</sup> defendants forcefully entered the premises, towed away 11 motor vehicles on the premises that had been brought for repair, and other equipment, and destroyed their shed and offices. In the suit, the plaintiffs inter alia seek orders of delivery of the spare parts and tools of trade or their equivalent in value, damages for conversion and trespass, and an injunction to restrain the two defendants from taking possession of the land. The 1<sup>st</sup> defendant filed defence and counterclaim. In his defence, he basically denied the allegations of the plaintiffs. In his counterclaim, he sued the 2<sup>nd</sup> defendant and three other persons, being David Kenyanya Magare, Samwel Mobegi Okiagera and John Joseph Mokaya t/a Abagusii Theatre Cinema Company. For reasons I cannot fathom, these are the persons referred to in this suit as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants though they are respectively actually the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in the counterclaim.
  5. In the counterclaim, the 1<sup>st</sup> defendant contended that the 4<sup>th</sup> defendant to the counterclaim (Joseph, now deceased) and one Yuvinalis Michael Motuka Mageka (Yuvinalis), had sold to him the suit land on 25 March 1997. He claimed that before the transfer could be registered, David Kenyanya Magare (David) and Samwel Mobegi (Samwel), fraudulently obtained an order from the subordinate court to have the land registered in their names. He averred that on 14 November 2008, the defendants to the counterclaim forcefully entered the suit land. He did a search and discovered that the land had become registered in the names of the 2<sup>nd</sup> defendant at the instance of the other defendants to the counterclaim. He contended that this registration was fraudulent. In his counterclaim, he has sought orders that the suit land belongs to him, cancellation of the title of the 2<sup>nd</sup> defendant and for the land to be registered



in name of Abagusii Theatre Cinema Company, and for a further order that thereafter the land be transferred to him.

6. The position of the 2<sup>nd</sup> defendant is that she purchased the suit property from the then registered owners, being David and Samwel, through a sale agreement dated 21 October 2008. Subsequently, the 2<sup>nd</sup> defendant was given vacant possession.
7. The 4<sup>th</sup> defendant to the counterclaim, Joseph Mokaya (now deceased) also filed defence and counterclaim. He denied transacting with the 1<sup>st</sup> defendant in the main suit or with the other parties. He pleaded that the suit land was registered in the name of Abagusii Theatre Cinema with himself and Yuvinalis being the proprietors of this business. He pleaded that Yuvinalis, David, Samwel and himself were in partnership in other properties, which they divided, and David and Samwel ceded their interest in the suit property to Yuvinalis and himself. He averred that David and Samwel later filed the suit Kisii CMCC No 291 of 2007 against Yuvinalis and obtained judgment for the suit land but which judgment was later set aside. He contended that using the judgment that was set aside, David and Samwel fraudulently got themselves registered as proprietors of the suit land and later sold the land to the 2<sup>nd</sup> defendant company. In his counterclaim he sought an order of cancellation of title or in the alternative he be paid one half of the proceeds of sale together with interest.
8. I have seen that on 28 May 2009, an application dated 18 May 2009 was allowed, which application sought to have this suit consolidated with the suit Kisii HCCC No 159 of 2008. On 20 July 2011, directions were taken that the plaintiff in the said suit be treated as 6<sup>th</sup> defendant in this suit and the 3<sup>rd</sup> defendant in that suit be treated as the 7<sup>th</sup> defendant in this suit. I further observe that the plaintiffs gave evidence on 20 May 2013 before Okong'o J, and thereafter the matter has proceeded for defence hearing before Onyango J. On 31 May 2022, Onyango J directed parties to file and exchange written submissions within 60 days. That is the stage that the matter had reached prior to this application being filed.
9. I have already mentioned that the application is one to substitute Joseph Mokaya, the 4<sup>th</sup> defendant in the counterclaim. Joseph Mokaya died on 7 October 2014. It was urged by Mr Nyanchoga that this application is res judicata and my perusal of the record does indeed reveal that there was an application for the substitution of the 4<sup>th</sup> defendant dated 26 March 2019 filed through the law firm of M/s Josiah Abobo & Company Advocates. The applicant was George Mokaya who is the same applicant in the subject application. That application came up before Mutungi J on 30 April 2019 and the same was allowed. The Judge stated as follows: -

“While I technically agree with the 2<sup>nd</sup> defendant that since the 4<sup>th</sup> defendant died in 2014 the suit against him has in real sense abated, I am also mindful that at times it takes time to identify a representative to take over the suit. The applicant has made the effort to obtain a grant to enable him to step into the shoes of the 4<sup>th</sup> defendant. The court has discretion to revive a suit that has abated and in the present case I am constrained to order a revival of the suit against the 4<sup>th</sup> defendant on terms that the applicant be substituted and that all the parties be ready to proceed with the hearing of the suit on 19.9.2019 when it is fixed for hearing. It is my view that no prejudice will be occasioned to the 2<sup>nd</sup> defendant if the suit against the 4<sup>th</sup> defendant is revived and applicant substituted to replace the 4<sup>th</sup> defendant. article 259 (2) (d) (sic), sections 1A, 1B and 3A of the [Civil Procedure Act](#) and section 19 ELC Act all inform this court to render substantive justice and in allowing the applicant's application I invoke these provisions for the ends of justice to be served and met. The costs of the application will be in the cause.”



10. Despite the above order, the record does not show any amendment to reflect the substitution of the 4<sup>th</sup> defendant to the counterclaim. Proceedings subsequent to the substitution also do not show that the firm of M/s Josiah Abobo & Company Advocates were ever served to attend the hearing of the matter. I am aware that Mr Abobo, who was the proprietor of M/s Josiah Abobo & Company Advocates is deceased, meaning that Mr. George Mokaya thus needed to be served. My own view of the matter is that the proceedings subsequent to the substitution of the 4<sup>th</sup> defendant to the counterclaim are tainted for want of service but I will reserve that for directions after delivery of this ruling which is restricted to the issue of substitution of the deceased 4<sup>th</sup> defendant to the counterclaim.
11. I have demonstrated that the 4<sup>th</sup> defendant to the counterclaim is already substituted through the order of Mutungi J of 30 April 2019. The person who was allowed to substitute the 4<sup>th</sup> defendant cannot file a second application for substitution because his first application has already been allowed.
12. As a result, this application is *res judicata* and I have no option but to dismiss it. It is hereby dismissed with costs to the plaintiffs. I regret inability to award costs to the 2<sup>nd</sup> defendant given the concession that the application could be allowed.
13. Orders accordingly.

**DATED AND DELIVERED THIS 19 DAY OF JANUARY 2023**

.....

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

