



**Chibungu & 2 others v Mpelelezi (Intended Administrator of the Estate of Mpelelezi Ndewa Kalama Deceased) & 2 others (Environment & Land Case 31 of 2005) [2023] KEELC 22 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 22 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**  
**ENVIRONMENT & LAND CASE 31 OF 2005**  
**SM KIBUNJA, J**  
**JANUARY 18, 2023**

**BETWEEN**

**JOSEPH SANGA CHIBUNGU ..... 1<sup>ST</sup> PLAINTIFF**  
**SEBASTIAN MWAMUYE CHIBUNGU ..... 2<sup>ND</sup> PLAINTIFF**  
**STEVEN NGALA MTONDOO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PHEDES MPELELEZI (INTENDED ADMINISTRATOR OF THE ESTATE OF MPELELEZI NDEWA KALAMA DECEASED) ..... 1<sup>ST</sup> DEFENDANT**  
**HARRISON MPELELEZI (INTENDED ADMINISTRATOR OF THE ESTATE OF MPELELEZI NDEWA KALAMA DECEASED) ..... 2<sup>ND</sup> DEFENDANT**  
**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The record show that when this matter came up on the February 14, 2022, for notice to show cause why the suit should not be dismissed for want of prosecution, the counsel for the Plaintiffs, 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted on various issues including whether the suit against the 1<sup>st</sup> defendant had abated, and whether the suit should be dismissed for want of prosecution. The court then made the following order;

“I see that Mr Lijoodi has authorities to rely on. I direct that written submissions be filed addressing both the veracity of the suit and NTSC. I give 7 days to Mr Lijoodi to do so. Ms Murage can respond 7 days thereafter. We will proceed further on March 15, 2022.”



That the matter came up for mention on the October 11, 2022 but no party or counsel attended court. A further mention of November 15, 2022 was fixed and on that date only Ms Kiptum for Gikandi for the defendants was present. The counsel informed the court that the plaintiffs had failed to comply with the earlier orders of the court, and submitted that the suit should be dismissed for want of prosecution. The court then fixed the matter for ruling, and while perusing the record, the court has seen a copy of submissions by M/s T S Ambwere & Associates advocates for the plaintiffs dated the August 18, 2022, which the court has considered.

2. The issues for determinations by the court are as follows;
  - a. Whether the suit should be dismissed for want of prosecution.
  - b. Whether the suit against the 1<sup>st</sup> defendant has abated.
  - c. Who pays the costs.
  
3. The court has carefully considered the record, submissions by counsel, and come to the following determinations;
  - a. This suit was commenced through the originating summons dated the February 10, 2005 and filed on the February 10, 2005. The summons clearly shows that it as an “application of Joseph C Chibungu and three others who claim a portion out of Plot Number Kilifi/Bandarasalama/6.” The court takes note that heading of the summons has three (3) and not four (4) plaintiffs/applicants.
  - b. The summons at prayer 2 seeks for “An order directed at the 2<sup>nd</sup> Defendant/Respondent that the title over plot number Kilifi/Bandarasalama/6 wholly representing the 1<sup>st</sup> Defendants ownership of the entire premises by nullified.” That in the supporting affidavit filed with the originating summons, and sworn by Joseph Sanga Chibungu on February 10, 2005, deposed at paragraphs 2 to 4 as follows;
    - “2. That we have from our birth to date and our parents and grandparents before us occupied and tilled a portion of the suit premises known and registered as Kilifi/Bandarasalama/6 registered in the name of the 1<sup>st</sup> Defendant herein.
    3. That the first registered owner was one Amos Lewa Kishenga(deceased) who sought registration over the whole piece of land as a result of mistake, irregularities, fraud, misrepresentation and/or inadvertence during the land adjudication exercise whilst fully aware of our occupation side-by-side to him on the said plot. I now annex and mark “JSC 1” a copy of the title deed that had been issued to the said Amos Lewa Kishenga(deceased).
    4. That the said Amos Lewa Kishenga(deceased) transferred the title to the suit premises to the 1<sup>st</sup> Defendant herein. I now annex and mark “JSC 11” a copy of the search certificate indicating the same.”

The court has perused the copy of the title deed and noted at page 2 that the said parcel’s register is indicated to have been opened on the April 28, 1982. It further shows that Amos Lewa Kishenga became registered as proprietor under entry number 5 on the December 30, 1985, and title deed was issued in his name on the December 30, 1986. The copy of the certificate of search issued on the September 30, 2004 shows that the land was registered and title deed issued in the name of Mpelelezi Ndewa Kalama on the March 8, 1995 as entry number 7. The foregoing leads the court to



the conclusion that Amos Lewa Kishenga was probably not the 1<sup>st</sup> registered proprietor of the said land after adjudication contrary to the deposition at paragraph 3 of the supporting affidavit set out above.

- c. The 1<sup>st</sup> defendant/respondent in the originating summons is indicated as Phedis Mpelelezi, who is described as the intended administrator of the estate of Mpelelezi Ndewa Kalama (deceased). From the details on the copies of the title deed and certificate of official search set out in (b) above, there is nothing to show or suggest that the suit land has ever been registered in the name of Phedis Mpelelezi, 1<sup>st</sup> defendant/respondent.
- d. That the record further shows that an application by way of chamber summons dated and filed on the February 10, 2005 seeking for the court “to appoint Phedia M Mpelelezi the widow and Harrison Safari Mpelelezi- first son to be the executors of the estate of the deceased Mpelelezi Ndewa Kalama; for the purposes of this suit,” was filed and allowed by consent of both counsel on the March 17, 2005. That consent order appears not to have been successfully appealed against or reviewed and is still valid for purposes of this suit, even though no succession cause in respect of the estate of the late Mpelelezi Ndewa Kalama appear to have been commenced since.
- e. That the record also confirms that last hearing date when oral evidence was taken was on the July 10, 2018. The counsel for the plaintiffs applied for and obtained adjournment to the July 25, 2018, when counsel sought for an adjournment to consider some amendments to the pleadings. The matter was then scheduled for mention on the December 18, 2018, when hearing date of February 18, 2019 was fixed. On that date there was no attendance by the plaintiffs or counsel. The counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants informed the court that the 1<sup>st</sup> defendant had died on the December 31, 2018. The matter was then placed for mention on the May 22, 2019, July 29, 2019, October 8, 2019 and December 9, 2019 but the plaintiffs and their counsel did not attend court on either of the said dates. The court then directed the matter be mentioned on the March 17, 2020 but there is no indication of any party or counsel attending or proceeding having taken place on that date. That no further step was taken by any of the parties towards prosecuting the suit and the court issued and served upon counsel for the parties the notice to show cause for hearing on the February 14, 2022 when the directions on filing of submissions referred to in (1) above were issued.
- f. That flowing from (e) it is evident from the last court appearances of December 9, 2019 to the December 6, 2021 when the notice to show cause was issued, a period of about two years had lapsed without any action or step being taken by the parties in this suit towards prosecuting it. Indeed, as noted above, the last time the plaintiffs attended court, and that was through counsel, was on the December 18, 2018. A period of about three years had therefore lapsed from that date to the December 6, 2021 when the notice to show cause was issued without the plaintiffs taking any steps or action to prosecute their suit.
- g. There is no dispute that the 1<sup>st</sup> defendant passed on the December 31, 2018 and there is no application for her substitution that was filed within one year, or for leave to extend time. The plaintiffs’ claim or suit against 1<sup>st</sup> defendant lapsed after one year after her death, that is on or about December 31, 2019. Therefore, by the time the notice to show was issued on the December 6, 2021 for hearing on the February 14, 2022, the plaintiffs’ claim that was surviving then was only against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The plaintiffs appear through their submissions to blame the defendants/respondents for the delay in substituting the 1<sup>st</sup> defendant/respondent. That while all parties in a suit have equal rights and duties to take steps or actions towards prosecuting their claims, the plaintiffs herein have not explained



or even attempted to offer any explanation why they did nothing towards prosecuting their suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, even after their claim against the 1<sup>st</sup> defendant lapsed. They cannot find solace by saying that it was for the defendants to act first as they appear to suggest. The court therefore finds no reasonable explanation for failure to take steps or action to prosecute the suit by the plaintiffs/applicants for over one year from December 9, 2019 has been presented to the court and the suit should be dismissed for want of prosecution under Order 17 Rule 2 (1) of *Civil Procedure Rules*.

- h. That as the defendants had defended the suit by filing their replies and participating in the hearing through counsel, they must have incurred expenses and are therefore entitled to costs under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya.
4. Flowing from the above determinations, the court finds and orders that;
- a. That the plaintiffs' claim against the 1<sup>st</sup> defendant be and is hereby marked to have lapsed after one year from her death on the December 31, 2018, that is, on or about December 31, 2019.
  - b. That the plaintiffs' suit/claim against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be and is hereby dismissed for want of prosecution.
  - c. The plaintiffs to pay the defendants costs.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 18<sup>th</sup> DAY OF JANUARY 2023.**

**S.M. Kibunja, J.**

**ELC MOMBASA.**

**IN THE PRESENCE OF;**

**PLAINTIFFS: Absent**

**DEFENDANTS : Absent**

**COUNSEL : M/s Gwahalla for Gikandi for 2<sup>nd</sup> defendant and Mr Lijoodi for the plaintiff.**

**WILSON .. COURT ASSISTANT.**

**S.M. Kibunja, J.**

**ELC MOMBASA.**

