



**LWM v Kioko & 2 others (Civil Case 75 of 2019)
[2024] KEHC 8270 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 8270 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL CASE 75 OF 2019
SN RIECHI, J
JUNE 27, 2024
IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT
AND
IN THE MATTER OF THE LAND REGISTRATION ACT**

BETWEEN

LWM APPLICANT

AND

PWK 1ST INTENDED RESPONDENT

RWK 2ND INTENDED RESPONDENT

CAK 3RD INTENDED RESPONDENT

RULING

1. LWM the applicant and Ndolo Kioko Muigai (now deceased) married on 28th November, 1987. They had 3 issues of the marriage.
 1. PWK – born in 1989
 2. DMK – born in 1991
 3. RLW – born in 2003
2. The parties acquired various properties. In 2017 the parties divorced in cause No. 417 of 2017. On 27.11.2019 Loise filed Originating Summons seeking the following orders:
 1. That it be declared that the Applicant has acquired interest in the properties listed below and that a 50% share of the same is held in trust by the Respondent for the benefit of the Applicant.



- i. Title Number Kwale/Simba North/Kundutsi 'A'/1807 and all the developments thereon.
 - ii. House No. 247 constructed on Title No. Nairobi/Block 101/145 and all the developments thereon.
 - iii. House No. 17 MMI constructed on Title No. Nairobi/Block 111/752 and all the developments thereon.
 - iv. Crater Park Parcel C064 being a portion of Title Number Naivasha/Maraigushu Block 10/13 (Kedong) and all the developments thereon.
 - v. Mua Hills Land measuring approximately Seven (7) Acres and all the developments thereon.
2. That it be declared that the Applicant has acquired interest in the motor vehicles listed below and that a 50% share of the same is held in trust by the Respondent for the benefit of the Applicant.
 - i. Mercedes Benz C200, Model 2000, Motor Vehicle Registration No. xxx 915L
 - ii. Land Rover Discovery 3 S/ Wagon Motor Vehicle Registration No. xxx 460X
 - iii. Pickup Nissan Hard Body Model 85 Motor Vehicle Registration No. xxx 581M
 3. That the Respondent, his servant and/or agent be restrained from selling, charging, alienating, transferring, subdividing, giving in exchange or encumbering, or in any other way disposing the said movable and immovable properties listed in Paragraph 1 and 2 above.
 4. That House Number 247 constructed on Title Number Nairobi/ Block 101/145 and all the developments thereon be granted to the Applicant absolutely.
 5. That the following properties be shared equally between the Applicant and the Respondent:
 - i. Title Number Kwale/Simba North/ Kundutsi 'A'/ 1807 and all the developments thereon.
 - ii. House No. 17 MMI constructed on Title Number Nairobi/ Block 111/752 and all the developments thereon
 - iii. Crater Park Parcel C064 being a portion of Title Number Naivasha/ Maraigushu Block 10/13 (Kedong) and all the developments thereon.
 - iii. Mua Hills Land measuring approximately Seven (7) Acres and all the developments thereon.
 6. That the Respondent be ordered to substitute Title Number Nairobi/ Block 101/145 which is held as a security by Citibank N.A with his share of the g Matrimonial Property.
 7. That the subdivision to separate the interest in be done within 90 days from the date of the Judgment at the Respondent's cost.
 8. That the Respondent be ordered to transfer the Applicant's share in the property to her within 60 days from the date of subdivision.
 9. That in default, The Registrar High Court of Kenya be authorized to sign any transfer documents in place of the Respondent or any other person holding any title on behalf of the Applicant to effect all the orders of this Court in favor of the Applicant.



10. That this Honorable Court be pleased to grant such further or other relief as may be just in the circumstances.
 11. That the costs of this suit be to the Applicant.
3. The matter proceeded between the parties and interim orders issued on 7.10.2021 by Achode J. where the respondent was restrained from selling, alienating, transferring, sub-dividing, encumbering or in any way disposing of the named properties pending the hearing and determination of the suit.
 4. On 30.12.2021 Ndolo Kioko Musyimi died at Appollo Hospital India. On 1.2.2024 LWM the applicant filed this Chamber summons seeking the following orders. th February 2024 in which she depones:
 1. That whereas it is true that this court has appointed the three (3) Intended Respondents as the Legal Representative of my late Ndolo Kioko Musyimi, and whereas these proceedings existed between the Applicant and my late father, I am advised by my Advocates on record which advice I verily believe to be true that these proceedings abated upon the death of the said Ndolo Kioko Musyimi.
 2. That there is pending Milimani Succession Cause No. E600 of 2022: In the Estate of Ndolo Kioko Musyimi for which the Applicant is an intended beneficiary. I am advised by my Advocates on record which advice I verily believe to be true that any entitlement by the Applicant, if any, in the estate of the deceased should be determined in the said cause (Annexed herein and marked as CAWK-1 is a true copy of a Memorandum of Appearance by the Applicant dated 9th January 2024).
 3. That these proceedings have abated and given that the cause of action herein do not survive the deceased, the legal representatives of the deceased for which am part cannot be enjoined and/or substitute the deceased.
 6. By Consent the application was canvassed by way of Written Submissions. I have considered the pleadings and submissions. The issues for determination are:
 2. Whether the Cause of action survived the death of Ndolo Kioko Musyimi
 2. Did the suit abate?
 7. Counsel for both parties filed their respective submissions.
M/s Kiguatha for the Applicant.
 8. Submits that the applicant filed this suit in 2019 and obtained interim conservatory orders. Before the matter would be heard Ndolo Kioko Musyimi died. The intended respondents files Succession Cause No. E 600/2022 where the intended respondents were issued with grant and appointed administrators. PWK and RLW are the biological children of Loise the applicant while Cindy Ann Wanza Kioko is a child of Kioko by a different mother. Cindy objects to the application on the ground that the cause abated upon the death of the deceased.
 9. M/s Kiguatha submits that this is a Matrimonial Property cause where the court is asked to determine “whose property is this.” Counsel submits that the question ‘whose is this’ is a question of ownership and that even at the death of the respondent, this question has to be answered and for it to be answered



the cause survives even after the death of the Respondent. Counsel submits that the interest of the deceased in the property has not been terminated by his death.

10. Mr. Ondieki for the 3rd Intended Respondent Cindy Ann Wanza Kioko submitted that the cause of action in these proceedings was personal in nature and did not survive the deceased. He submitted that causes of action of a personal nature do not survive for the benefit of the of the deceased's estate. He referred this court to the decision in Estate of JMM (Deceased) 2021 eKLR where Mabeya J stated that:

“Obviously that would have been a consideration in the case for division of Matrimonial Property under the Matrimonial Property Act. However, those proceedings abated. In the present proceedings what the court has to consider is what is set out in Section 29 of the Act.”

11. There is no dispute that the applicant filed the Originating Summons when the deceased Ndolo Kioko was alive. Indeed, proceedings commenced and interim orders issued when he was alive. Before the main hearing of the Originating summons would proceed, the deceased died. The Intended Respondent contend that the suit abated upon the death of the deceased. Order 24 Rule 1 Civil Procedure Rules provide:

Whether a matrimonial property suit abates upon the death of the Respondent.

Order 24, Rule 1 of the Civil Procedure Rules, 2010 states that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

12. It is therefore clear that the death of a Plaintiff or defendant shall not cause a suit to abate if the cause of action survives or continues.

Further, Order 24, rule 4(1) of the Civil Procedure Rules, 2010 provides the following procedure in case of death of a defendant in a suit:

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. When the Court is determining whether to allow substitution of a Deceased Defendant, the above provision requires that the Court consider whether the cause of action survives or continues after his demise of the Deceased.

13. What is a cause of action that was discussed in:

Anne Jepkemboi Ngeny Vs Joseph Tireito & another [2021 eKLR. The Court quoted with approval Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR, where the Court of Appeal gave the following holding:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”



That definition was given by Pearson J. in the case of *Drummond Jackson vs Britain Medical Association* (1970) 2 WLR 688 at page 616. In an earlier case, *Read vs Brown* (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court.”

Lord Diplock, for his part in *Letang vs Cooper* [1964] 2 All ER 929 at 934 rendered the following definition: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.

14. The intended Respondents are administrators of the estate of Kioko the then Respondent. They were appointed under the *Law of Succession act* to administer his estate section 3 defines estate means;

“his estate means his free property when he was living. His free property refers to the property that the deceased was legally competent freely to dispose of it and in respect of which his interest has not been terminated by his death.”
15. The freeness of estate which they are entitled to administer is this one which was being challenged by the applicant in the O.S when the deceased was alive. The same was not extinguished upon his death.
16. The suit related to the property which was registered in his name. It is not a suit personal in nature and which does not survive upon his death. Interest in property is not a cause that is personal. Personal action would be suits in respect of determination like divorce, child custody, or determination of suits of personal nature. Upon careful consideration, I find that the cause of action in this matter related to property which the deceased held and survives, the deceased for the benefit of his estate, was not extinguished by his death.
17. The second issue is whether the suit abated due to time. Counsel for the applicant submitted that under Order 24 Rule 4 (3) of the Civil Procedure rules the application for substitution should have been filed within one year of the respondent’s death that is by 20.12.2022.
18. However, order 24 Rule 7 (2) provides that the order for abatement or dismissal can be set aside if it is proved that there was sufficient cause. In explaining sufficient cause counsel submitted:
 - a. PWK and Rianna Wanjiru Kioko are the 1st and 2nd Intended Respondents in this matter. Since the Petition was filed in time, the need for a citation did not arise.
 - b. An Objection was thereafter filed in August by Jane Jerry Kioko (the mother of Cindy Ann Wanza Kioko, who is the 3rd Intended Respondent in this matter.)
 - c. On 14th December 2023, after multiple Court appearances and interim applications, two of the Petitioners (PWK and Rianna Wanjiru Kioko) and the Objector's daughter (Cindy Ann Wanza Kioko) were appointed to act jointly as administrators in the Deceased's Estate.
 - d. As soon as Administrators were appointed, the Applicant in this matter (Lois Wambui Muigai) filed the present application before this Court, seeking to substitute the Deceased Respondent with the Administrators. It was filed promptly on 1st February 2024.
 - e. We submit that this is not an inordinate delay on the part of our client, since she filed this application as soon as she could after the administrators were appointed. She was prevented



from filing it earlier, not owing to any fault on her part, but solely for the reason that no Administrators had been appointed in the Succession Cause.

19. Mr. Ondieki for Intended Respondent on this issue submits that this suit abated within one year for failure by the applicant to file this application for substitution within year upon the death of the deceased. He therefore urged this court to find this suit abated after the expiry of one year since death of deceased/respondent.

Order 24 rule 4 of the Civil Procedure Rules states as follows:

“(4) Procedure in case of death of one of several defendants or of sole defendant

[Order 24, rule 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 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. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
3. Where within one year application is made under sub-rule (1) the suit shall abate as against the deceased defendant.

20. In the case of Said Sweilem Gheithan Saanum —v- Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR, the Court of Appeal held that:

21. If no such application is made within one year or within the time extended by leave of the court the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action. 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.

22. Additionally, 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.”

23. The Deceased/ Respondent died on 30th December 2021 and by virtue of law an application to have the legal representatives substitute the Deceased/ Respondent ought to have been made by 29th December 2022, The Applicant ought to have caused substitution within a year from the demise of the Deceased/ Respondent. None was made. The application herein was made on 1st February 2024, almost two and a half years Deceased Respondent died.

24. We are alive to the power of this court to revive a suit that has abated.



24, rule 7(2) of the Civil Procedure Rules states:

“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which. has abated or to set aside order of dismissal• and, if it is proved that he was by any sufficient cause from continuing the suit, the court shall revive the suit or set dismissal upon such terms as to costs or otherwise as it thinks fit”

25. We submit that no such application to revive the suit has been made by the Applicant and without such revival, the suit having abated, an order of substitution will be a nullity and of no consequences in law. We place our reliance in the case of Kenya Farmers' Co-operative Union Limited V Charles Murgor (Deceased) T/A Kaptabei Coffee Estate [200] eKLR where the Learned Judge held, thus:

In the instant case there was no application for substitution made within one year since the death of the Defendant. Therefore, as a matter of law the suit as 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.

It is to be noted that under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. In the present case there was no application for revival of the suit which had abated by operation of the law.

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 time of 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 has 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...

26. Upon considering the application. I find that the Provision of Order 24 Rule 4 required that if the applicant was desirous of continuing with the suit, she should have filed this application within one year of death of Kioko the Respondent, that is by 20.12.2022. By 21.12.2022 this suit had abated by operations of the law. Having so abated, there was no suit alive to enjoin the intended Respondent as the suit having abated ceased to exist. I therefore find no merit in this application which is dismissed with costs.

DATED AT NAIROBI THIS 27TH DAY OF JUNE, 2024

S. N. RIECHI

JUDGE

