

KENYA / JUDGMENT

Muatha v Mwikya & another [2025] KEELC 5441 (KLR)

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COURT

Environment and Land Court

BEFORE

EO Obaga

CASE / FILE NUMBER

Environment and Land Case E015 of 2020

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Muatha v Mwikya & another (Environment and Land Case E015 of 2020) [2025] KEELC 5441 (KLR)
(23 July 2025) (Ruling)

Neutral citation:

[2025] KEELC 5441 (KLR)

Republic of Kenya

In the Environment and Land Court at Makueni

Environment and Land Case E015 of 2020

EO Obaga, J

July 23, 2025

Between

Michael Kalani Muatha

Plaintiff

and

Kyalo Mwikya

1st Defendant

Kennedy Mwikya

2nd Defendant

Ruling

1. This is a ruling in respect of a Notice of Motion dated 22nd November, 2024 in which the Plaintiff/Applicant seeks the following orders:1. Spent2. Spent3. The honourable court do set aside the order of 6th November, 2024 dismissing the Plaintiffs/Applicants suit for want of prosecution.4. Costs abide in the cause.
2. The affidavit in support of the application was sworn by the Applicant's counsel Mr. Joseph T. Nzioka who deponed that this suit was dismissed on 6th November, 2024 due to his genuine and mistaken believe that the matter had been listed for mention on 11th November, 2024.
3. On 11th November, 2024 when he checked on the online cause list, he did not see the case listed there. He followed up with the registry where he was informed that the suit had been dismissed on 6th November, 2024 for non-attendance. He deponed that the Applicant had been served with a notice for implementation on 18th December, 2024. He therefore deponed that it is important for the suit to be reinstated so that it can be heard on merits.
4. The Applicant's application was opposed by the Defendants/Respondents based on a replying affidavit sworn on 2nd December, 2024. The Respondents contend that the suit herein abated as the Applicant who died in the year 2021 was never substituted. The Respondent further stated that the Applicant was never keen on prosecuting the suit. His counsel had applied for adjournment on many occasions and that at one time he was ordered to pay adjournment costs of Kshs.10,000/= which he never paid.
5. The parties were directed to file written submissions. The Applicant filed submissions dated 18th March, 2025. The Respondent filed their submissions dated 30th April, 2025.
6. The Applicant submitted that nonappearance in court on 6th November, 2024 was due to misdiarization of the matter in the diary. He relied on the case of Fran Investments Ltd –vs- G4S security services Ltd (2015) eKLR where it was held that dismissal of a suit without affording opportunity to the parties to be heard is a draconian step which ought not to be encouraged.
7. On their part the Respondents submitted that the suit had abated and that though an application to substitute had been made, the same was never prosecuted. They submitted that there was no prayer in the application seeking to have the suit revived before the prayer for reinstatement could be allowed. They further submitted that the Applicant was not deserving of the orders of reinstatement of the suit as he had failed to pay costs of Kshs.10,000/= as ordered.
8. The Respondents further submitted that the application for reinstatement had been overtaken by events in that the implementation of the Minister's decision which had been stopped was implemented after the suit was dismissed and therefore there is nothing to pursue in the suit as the decision has already been implemented.

9. I have carefully considered the Applicant's application, the opposition to the same by the Respondents, the submissions of the parties as well as the authorities cited. The issues which emerge for determination are firstly whether the Applicant's suit has abated. Secondly whether the suit should be reinstated and thirdly which order should be made on costs.
10. There is no contention that the Applicant died on 30th July, 2021. An application for his substitution was filed on 5th April, 2022. This application for substitution though made within one year of the demise of the Applicant, the same was not prosecuted. The reason for this is that soon after the application was made, the previous advocate for the Respondents sought for time to file a response to the same as there was a prayer seeking to stop the implementation of the Minister's decision. Before a response could be filed, there was change of advocate on the part of the Respondents' advocates. On 22nd June, 2022, the Applicant's advocate informed the court that parties were negotiating an out of court settlement. It would appear the negotiations did not succeed and the application for substitution was never pursued.
11. The law is clear that even where an application for substitution is made within one year, if for one reason or the other substitution is not made, then the suit abates and there is no step which can be taken unless the suit is revived. There was no revival of the suit until the same was dismissed for want of prosecution or attendance. This being the case, it follows that the Applicant's application cannot be allowed in the manner it is.
12. Even if the court were to consider reinstating the suit to give the Applicant a chance for an application for revival of the suit, the suit itself has been overtaken by events in that the Minister's decision has been implemented. The Applicant did not seek to have the Minister's decision overturned in the manner provided for in law that is through Judicial Review. The Applicant wanted to have the proceedings leading to the decision by the Minister set aside on grounds that the Respondents had no locus standi to bring those proceedings on behalf of the Estate of their late father.
13. The Applicant and his counsel did not exhibit any intention to proceed with the case. The counsel had been given a number of adjournments but he was not ready to proceed. The reason given for nonappearance in court on 6th November, 2024 is not convincing. This coupled with the fact that the Minister's decision has been implemented makes this court arrive at a conclusion that reinstatement of this suit will not serve any purpose. I therefore dismiss the Applicant's application with no orders as to costs.

It is so ordered.

.....HON. E. O. OBAGAJUDGERULING DATED, SIGNED AND DELIVERED VIA
MICROSOFT TEAMS THIS 23RD JULY, 2025. In the absence of parties who were aware of the date
of delivery of ruling.Court assistant – Steve Musyoki

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