



**Bii v Chepkwony (Environment & Land Case 53 of 2018)
[2023] KEELC 16637 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 53 OF 2018
MC OUNDO, J
MARCH 23, 2023**

BETWEEN

MOSES ARAP BII (DECEASED) PLAINTIFF

AND

JOEL K. CHEPKWONY DEFENDANT

RULING

1. Before me for determination is the Applicant's Application by way of a Notice of Motion dated the 2nd June 2022 where he seeks *inter alia* to revive this suit which abated upon the death of the Plaintiff, as well as to substitute the deceased Plaintiff with his legal representative one Naomi Chepkoech Bii.
2. The Application is brought pursuant the provisions of Section 1A, 1B, 3, 3A and 63 (e) of the Civil Procedure Act and Order 24 Rules 1, 3 and 7, Order 50 and 51 of the Civil Procedure Rules.
3. The Application is supported on the grounds on the face of it as well as by a sworn affidavit of Naomi C. Bii the Applicant herein, dated the 3rd June 2022 to the effect that the cause of action still subsists, survives and continues as the Applicant and other survivors and beneficiaries of the deceased were still beneficiaries of the suit land and the Respondent could take advantage of the circumstances to their prejudice.
4. That her inability to file the Application on time was due to family wrangles, confusion, Covid-19 issues including loss of income and closure of courts. That it was only fair and just that the suit be revived, time enlarged and leave granted to her to be substituted in this matter to facilitate a just and expedient determination. That the application was made in good faith, any delay was regrettable and was not intended and that she would facilitate the quick, just and expedient disposal of this matter.
5. The application was opposed by the Respondent, in his Replying affidavit dated the 18th July 2022 to the effect that the intended Applicant was not honest as she had been aware of this matter and other matters over this suit parcel of land from the year 2014 and had concealed material facts essential to



this matter/dispute. That the Application was defective and lacked merit as there was no suit to give life to. That the Plaintiff died on 21st June 2020 and after the Applicant obtained a Grant of Letters of Administration to the deceased Plaintiff's estate on 3rd February 2021, one Kenneth Tanui had filed a similar suit at the Chief Magistrate's court over the same subject parcel of land, seeking the same relief as what had been sought in the current suit. (Reference was made to annexure "JC 2" which was a Plaint together with a copy of the Grant.)

6. That by filing a new matter upon the lapse of 1 year, the Applicant had abandoned this matter and opted to file a new subsisting suit. That notwithstanding, the court had dismissed a similar application and the same application cannot therefore be filed.
7. That it had been before the lapse of one year that he had asked the intended Plaintiff/Applicant, through a letter herein annexed as "JC 1," to move the court and take over the Plaintiff's pending matter before the court, to which she had declined. That the application herein was not filed in good faith as by filing a fresh matter after the elapse of 1 year, the intended Applicant had abandoned this suit.

The Respondents/Defendants had sought for the dismissal of the application for being an abuse of the court process.

8. Subsequently, directions were taken on the 28th July 2022 that the application be disposed of by way of written submissions.

Applicant's Submissions.

9. In support of her application the Applicant submitted that she was the deceased Plaintiff's widow, next of kin and administrator Ad-litem. That the Plaintiff died on the 21st June 2020 as per the annexed death certificate, but the cause of action subsists. That the slight delay in the filing of the relevant application was due to family wrangles, Covid -19 issues including loss of income, and closure of courts. That she applied for the letters of administration Ad-litem on the 26th January, 2021 and obtained the same on 3rd February 2021, as herein annexed. That the application was filed in good faith and ought to be allowed pursuant to the provisions of Order 24 Rule 1 and 3 (sic)
10. That Order 24(sic) was clear that the death of a party to a suit shall not cause the suit to abate if the cause of action survived or continued. That Order 24 Rule 3(2) was clear that where no application was made under Order 24(1), the suit shall abate as far as the deceased/Plaintiff is concerned provided that the court may for a good reason, on application extend the time. The Applicant pleaded that though the suit had abated, the cause of action subsists and due to the reasons aforementioned, that the Honorable Court finds that the same were good reasons to extend time. That the delay was not inordinate and intentional but was excusable.
11. That the application was entirely upon the discretion of the Honorable Court upon finding that there was sufficient cause shown which sufficient cause should be construed to advance substantive justice.
12. That the deceased Plaintiff had filed his suit way back on the 26th June, 2018 against the Defendants and due to the unavoidable circumstances as enumerated above, parties ought to be reasonably accommodated so that the Respondents should not in any feasible manner take advantage of the demise of the Plaintiff, and the matter can be determination on merit.
13. That as was held in Nakuru HC ELC No.253 of 2013 where an Applicant seeks to be substituted in place of the Plaintiff where a suit has abated, such an Applicant must as a first step, seek to have the abated suit revived and then seek to be substituted. That it was usually proper and in order in the same application to seek an order for revival of the suit, for leave to bring the application for substitution out of time and for an order of substitution in that sequence. Reliance to buttress their submission



was placed on *Issa Masudi Mwabumba vs. Alice K. Mutunga & 4 Others* 2012 eKLR and in the case of *Gladys N. Mwaura vs. Daniel Kariuki* (2018) eKLR.

14. That land matters were emotive and required proper ventilation of facts in court and therefore the Honorable Court should allow the application and proceed to issue directions on the hearing and determination of the appeal (sic) with costs be in the cause.

Defendant's submissions.

15. The Defendant gave a background of the matter in issue and in opposition to the Applicant's application to the effect that he had requested the Applicant *vide* a Notice herein annexed as "JC 2" and dated 14th September 202(sic) to come on board in this proceeding but she had declined despite service.
16. That the current application has now been filed after a new suit was filed after the matter had abated. That there was no suit to be revived or an Applicant to substitute the deceased Plaintiff.
17. That pursuant to the provisions of Order 24 Rule (2) (sic) after a suit has abated, that it was the discretion of the court, for good reason, on application to extend time. That the Applicant had not come to court with clean hands and neither had she given/adduced grounds which contained good reasons or justifiable reasons for the court to exercise discretion in her favour. That the Applicant had concealed the fact that she had been summoned by the Defendant/Respondent before the elapse of one (1) year to join the proceedings but she had declined and therefore she could not now say that she was not aware of the existence of this suit.
18. That before this application was filed, the Applicant jointly with one Kenneth Kipkoech Tanui had obtained Grant of Letters of Administration intestate and proceeded to file a fresh matter at the Kericho Chief Magistrate's Court being CMELC No. 24 of 2022 which is subsisting and wherein the relief sought therein was the same as that which had been sought in the current suit and therefore the current application was an abuse of the court process. The inference which can be drawn with the said filed new suit was that this suit had died and could not be revived.
19. That as at on 3rd February 2021, the Applicant had obtained the Letters of Grant *Ad Litem* but decided not to move the court before the lapse of one (1) year wherein no sufficient reason had been adduced as to why she did not move the court expeditiously.
20. That the Applicant was a high school teacher, by profession and therefore well informed and aware of this suit yet she had decided to sleep on her rights and was now trying to mislead the court that there were family wrangles when she had already obtained the Limited Grant of Letters of Administration *Ad Litem* before the appeal (sic) abated.
21. That since there had been another suit filed in the Magistrate's court, by allowing this application, it would create duplicity of suits in which the Defendant would be answering over the same subject matter, and hence the application was misplaced and frivolous.
22. That the non-disclosure of the presence of another suit was a suppression of essential material, hence the Applicant was guilty and should not obtain advantage over the Respondent in the proceedings. That the Applicant had not demonstrated and/or given a good reason for the extension of time after the lapse of one (1) year and the application should be dismissed with costs.



Determination.

23. I have considered the pleadings and submissions made by both the Applicant herein and the Defendant. The issue is whether the suit by the deceased Plaintiff should be revived, and if so, whether the deceased Plaintiff should be substituted out of time.
24. Order 24 Rule 3 of the [Civil Procedure Rules](#) provides for the applicable procedure upon the death of one of several Plaintiffs or of a sole Plaintiff as follows:
- (1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff or sole surviving Plaintiff 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 Plaintiff to be made a party and shall proceed with the suit.
 - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff:

Provided the court may, for good reason on application, extend the time.

25. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Plaintiff. However, Order 24 Rule 7(2) of the [Civil Procedure Rules](#) gives the court discretion to revive an abated suit if there is sufficient proof that the Applicant was prevented by any sufficient cause from continuing the suit. The Court of Appeal in the case of [The Hon. Attorney General v The Law Society of Kenya & Another](#) – Civil Appeal (Application) No. 133 of 2011 observed as follows as to the meaning of sufficient cause:

“Sufficient cause or good cause in law means:-

“The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See *Black’s Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

26. In the instant application, the intended Plaintiff averred that following the death of the original Plaintiff, who was her husband, on the 21st June 2020 the “slight” delay in the filing of the relevant application was due to family wrangles, Covid -19 issues including loss of income, and closure of courts. That she had however applied for the Letters of Administration Ad-litem on the 26th January, 2021 wherein she had obtained the same on 3rd February, 2021. That the application was filed in good faith and therefore ought to be allowed.
27. I find the Plaintiff has not given a good reason to revive the suit since it is clear that the Letters of Administration Ad-litem were issued on the 3rd February, 2021 in the Chief Magistrates Court Kericho in *Ad Litem* E022 of 2021, which was more than 6 months before the suit fell due for abatement. I have also gained sight of the a letter dated the 28th August 2020 by the Defendant’s Counsel asking the Applicant to take out Letters of Administration in respect of the Plaintiff deceased’s estate, wherein no action had been taken.



28. Of interest to note is that the Applicant herein again obtained other letters of Administration on the 10th January 2022 in the High Court Kericho in Succession Cause No. E043 of 2021, jointly with another by the name of Kenneth Kipkoech Tanui.
29. I also considered the prayers that the original Plaintiff had sought in his Plaint to wit that eviction orders do issue against the Defendant, his servants, employees and agents from land parcel No. Kericho Municipality Block 5/701. In the suit filed before the Kericho Chief Magistrate being CM ELC No. 024 of 2022, the Applicant's joint administrator has again sought the same orders against the Defendant herein.
30. I find that the Applicant is on a fishing expedition to find a court that will deliver orders that would be suitable to her. This suit abated on the 21st June 2021 and was pronounced as such by the court on the 16th December 2021. The Applicant having knowledge of the court's pronouncement and in cohort with her co-administrator then filed a fresh suit in the Magistrates court, via a Plaint dated 17th March 2022, on the 6th March 2022 seeking the same orders over the same parcel of land against the same Defendant. If this is not an abuse of the court process and gross misconduct then I don't know what is.
31. The revival of an abated suit according to the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules is at the court's discretion and an Applicant seeking such discretion must come to court with a good and sufficient cause which must be rational, plausible, logical, convincing, reasonable and truthful and should not be an explanation that leaves doubt in a judge's mind. Above all, the said Applicant must come to court with clean hands as it is trite that those who come to equity must do equity.
32. In the present instance, I find that the Applicant has cunningly come to court with soiled hands and is therefore undeserving of the court's discretion. Besides there is an existing matter before the Chief Magistrates Court being Kericho Chief Magistrate being CM ELC No. 024 of 2022 and therefore by allowing this application, a similar suit in this court would be offending the provisions of Section 6 of the Civil Procedure Act which provides as follows:
- 'No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.'
33. This, in my view, this not a good case to revive the Plaintiff's suit and also to substitute the Plaintiff with the Applicant herein. To this effect thereof the Applicant's application dated 2nd June 2022 is accordingly dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 23RD DAY OF MARCH 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

