



Estate of Sheikh Ali Taib v Estate of Christopher Kuria Gichanga (Environment and Land Appeal 60 of 2021) [2023] KEELC 16504 (KLR) (22 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16504 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 60 OF 2021
NA MATHEKA, J
MARCH 22, 2023**

BETWEEN

ESTATE OF SHEIKH ALI TAIB APPELLANT

AND

ESTATE OF CHRISTOPHER KURIA GICHANGA RESPONDENT

JUDGMENT

1. The administrator of the estate of the above named appellant, appeals to the Environment and Land Court against the decision contained in the ruling and order to be extracted therefrom given by Honourable Maureen Nabibya dated 23rd of September 2021 in Mombasa CELC No 775 OF 1997 Sheikh Ali Tab versus Christopher Kuria Gichanga on the following grounds, namely;
 1. The learned Magistrate erred in Law and in fact in her ruling dated the 23rd of September 2021 in dismissing the notice of motion dated 13th of August 2018;
 2. The learned Magistrate erred in Law and in fact in her ruling dated the 23rd of September 2021 in dismissing the notice of motion dated 13th of June 2018, by holding that the appellant was guilty of inordinate delay, yet the said issue was not raised and or parties litigated upon the said issue;
 3. The learned Magistrate erred in Law in her ruling dated the 23rd of September 2021 by holding that the appellant was guilty of inordinate delay, yet the Court of Appeal and the Supreme Court *vide* various orders had stayed all land related matters filed and pending before the Chief Magistrates' Court which included the suit from which this appeal arises;
 4. The learned Magistrate erred in Law in her ruling dated the 23rd of September 2021 by holding that there was inordinate delay on the part of the appellant, yet the application was filed within the statutory period.



The Appellant Seeks For Orders That;

1. The aforesaid decision to be set aside with costs to the appellant.
2. The appellants' notice of motion dated notice of motion dated 13th of June 2018 be allowed.
3. The appellant be awarded costs of the Application in Mombasa CELC No 775 OF 1997 Sheikh Ali Tab v Christopher Kuria Gichanga
2. The appellant submitted that parties are not allowed to depart from their pleadings as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party meet the new situation. They refer to the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR and Civil Appeal No 105 of 2017 *David Rankai vs South Nyanza Sugar Co Ltd* [2018] eKLR when faced with a similar issue where an issue not raised by parties determined a suit held that such an action showed and indicated bias by the learned Magistrate. That what was placed before the court was whether the application dated the 13th of June 2018 was properly before the court, and whether it was filed before the lapse of a year from the demise of the Sheikh A Taib the plaintiff in the subordinate court, if this court finds that the application was properly filed they urged this court to allow the same.
3. The respondent submitted that, the appeal herein is incompetent and a nullity *ab initio* as it has not been filed by a legal person. The appeal is said to be filed by "The Estate of Sheikh Ali Taib" against another non entity called "The estate of Christopher Kuria Gichanga". The estate of Sheikh Ali Taib is not a body corporate that can sue or appeal by itself. Neither can the estate of Christopher Kuria Gichanga be sued in its own name.
4. The estate of a deceased person can only sue or be sued through a person duly authorized by the court to do so that is to say a personal representative who has obtained a grant of probate or letters of administration. In *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others* [2018] eKLR Mbogholi Msagha J. Secondly, that the suit before the lower court was between *Sheikh Ali Taib (as the plaintiff) v Christopher Kuria Gichanga (as the defendant)*, The respective estates of the parties were never joined to the suit. So this appeal is incompetent as it has not been filed by parties to the suit in the lower court.
5. The appeal herein is against the ruling and order of the lower court (honourable ML Nabibya) of September 23, 2021. By an application dated June 13, 2018 one Abdulla Ali applied to be made a party to the suit in place of Sheikh Ali Taib deceased. See paragraphs 12 - 21 of the record of appeal). The application was opposed by a replying affidavit sworn by Vincent Omollo (see paragraphs 22 and 23 of the record of appeal). In that affidavit Mr Omollo stated that the suit against the defendant had abated because the defendant died on February 22, 2017 as evidenced by a certificate of death duly exhibited. The lower court agreed with counsel for the defendant that as more than one year had elapsed after the death of the defendant and his legal representative had not been made a party the suit, the suit against the defendant had abated in conformity with the provisions of order 24 rule 4(3) of the *Civil Procedure Rules*. They cited the case of *Julius Maina Kabiru v Kabiru Kangara & Thomas Irungu Kigoi* [2022] EKLR L Gacheru J on this issue.
6. This court has considered the appeal and the submissions therein. The main issue for determination is whether the trial court erred in finding that the suit had abated and whether there was inordinate delay.



7. Order 24 rule 4 provides 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 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) 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 no application is made under subrule (1), the suit shall abate as against the deceased defendant.
 8. It will be seen from a reading of rule 4 (3) above, that a suit abates after one year of death. In this case, the 1st defendant is said to have died on February 22, 2017. The suit against him therefore abated on February 22, 2018. The application is dated June 13, 2018 after the abatement of the suit.
 9. Nevertheless, under order 24 rule 7, a court has discretion to revive an abated suit. That provision of law is drawn as follows;
 - (2) 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 an order of dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.
 10. It will be noted that a plaintiff is at liberty to apply to court for revival of an abated suit. appellant submitted that they were not guilty of inordinate delay, as the Court of Appeal and the Supreme Court *vide* various orders had stayed all land related matters filed and pending before the Chief Magistrates' court which included the suit from which this appeal arises. Indeed, the trial magistrate stated that she had no problem with the process and time taken to make an application for substituting the plaintiff since they were succession proceedings going on. I find that the courts were partly to blame on the issue of determining jurisdiction and issue of succession proceedings. I disagree with the Trial Magistrate that the delay was inexcusable and find that there was sufficient cause preventing the plaintiff from continuing with the suit. For these reasons I find that the appeal is merited and make the following orders;
 1. The ruling by the trial court dated September 23, 2012 is set aside.
 2. The appellants' notice of motion dated 13th of June 2018 be allowed as prayed.



3. Costs to the appellant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22ND DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

