



Kariuki & another (Administrator of the Estate of Gitau Karanja Wainaina also known as Kariuki Wainaina – Deceased) v Wahoti & 2 others (Environment & Land Case 1 of 2021) [2023] KEELC 16921 (KLR) (24 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16921 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 1 OF 2021**

AE DENA, J

APRIL 24, 2023

BETWEEN

MWANGI KARIUKI 1ST PLAINTIFF

JOHN PETER KARANJA 2ND PLAINTIFF

**ADMINISTRATOR OF THE ESTATE OF GITAU KARANJA WAINAINA ALSO
KNOWN AS KARIUKI WAINAINA – DECEASED**

AND

LAND REGISTRAR KWALE DISTRICT 1ST DEFENDANT

KEZIAH WAMBUI WAHOTI 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. This ruling is subject of the Notice of Motion dated 21/10/2022 by the plaintiff (applicant) filed pursuant to the provisions of Order 24 Rule [3],7[2], Order 51 of the *Civil Procedure Rules*, sections 1A,1B,3 and 3A of the *Civil Procedure Act* and seeks for orders;
 1. Spent
 2. That this honourable court be pleased to revive the plaintiffs suit
 3. That upon issuance of prayer 2, this honourable court do extend time to substitute the administrators [now deceased] with Grace Wanjiru Njuguna the legal representative in this suit
 4. That Grace Wanjiru Njuguna be substituted in place of Mwangi Karanja and John Peter Karanja



5. That costs of this application be in the cause.
2. The application is premised upon grounds on its face and the supporting affidavit of Grace Wanjiru Njuguna. It is averred that the suit was filed by Mwangi Kariuki and John Peter Karanja who died in November 2015 and January 2021 respectively. That John Peter Karanja testified in 2019 and the plaintiffs case closed. It is stated that Grace Wanjiru Njuguna the surviving beneficiary to the estate of the deceased Gitau Karanja suffered stroke in July 2021 and was not able to file application for grant de bonis non until 24/1/2022. That the suit abated on 25/1/2022 but the cause of action survived the death of the administrators hence the need to substitute them. The affidavit in support of the application reiterates the contents of the grounds upon which the application is set. In addition, it is deponed that the delay in filing the present application was occasioned by her ill health and that no prejudice will be suffered if the orders sought herein are granted. The applicant prays that the suit is revived and the orders sought be granted.

Response

3. In response to the application, the 1st defendant filed a replying affidavit on 13/12/2022. It is averred that no good reason has been furnished why the Applicant did not secure a grant of letters of administration de bonis non in time. That to the best of the respondent's knowledge, the applicant is a person known to her and she has been fine for the time it is alleged that she was unwell. That in the event that she was unwell, she should have produced a medical report from the Mombasa Hospital and not a private doctor as annexed in her documents. The Respondent further states that the grant herein was obtained without involving most of the surviving beneficiaries and that an application for revocation of the same was pending before court in Mombasa P & A No 199 of 2010. The respondent states that it would be unsafe to issue any orders as the suit is anchored on letters of administration de bonis non that do not represent the interests of the other beneficiaries. Further that none of the beneficiaries gave consent for application of the said letters.

Supplementary Affidavit

4. The applicant filed a supplementary affidavit on 9/2/2022 denying the application is an afterthought. It is stated the present suit was for revocation and cancellation of a title to the defendant on grounds that it was obtained fraudulently in the absence of letters of administration for the estate of the deceased. That the delay for obtaining the grant herein was duly explained and the defendant was free to authenticate the same with the doctor who issued the medical letter produced by the applicant. The applicant further states nothing stops this court to entertain the present application unless the letters of administration de bon non are set aside in Mombasa P & A No 199 of 2010.

Submissions

5. The application was canvassed by way of written submissions and they complied.

Applicants submissions

6. The applicant submitted that the application for the grant herein was filed in January 2022 which was 2 days prior to abatement of the suit. That the application was heard on 18/7/2022 and grant issued in October 2022. That the present application was filed within the same month on 28/10/2022. The applicant reiterates she was unwell for a better part of the year 2021 and illness is a good enough reason for the delay. It is submitted that the applicant has demonstrated sufficient reason to allow the revival of the suit for a determination on merit and relies on the Court of Appeal case of *AG v the LSK & another* civil appeal no 133 of 2011 where sufficient and good cause in law was explained.



1st Defendants written submissions.

7. The 1st defendant's submissions are filed on 24/2/2023. It is submitted that no good reason has been given as to why the substitution of the deceased persons was not done within one year as required by law and or during the 7 months after the death of the last administrator before the applicant fell ill or by other members of the families. That the issue before court revolved around whether the suit property formed part of the deceased estate and who should have it and can be resolved within the probate and administration cause before the High Court. The defendants pray that the application is dismissed.

Discussions and Determination

8. A person may apply for revival of an abated suit under Order 24 Rule 7 (2) of the [Civil Procedure Rules](#) which provides as follows: -

7(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.

9. For the court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the Applicant was prevented by a sufficient cause from continuing the suit. In this regard the court refers to the cases of [Janet Wangari Mwangi v James Muchoki Kariuki & Bidco Oil Refineries Ltd](#) (2004) eKLR and the court held: - [Rukwaro Waweru v Kinyutho Ritbo & another](#) (2015) e KLR

... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. In the case of *Soni v Mohan Dairy* [1958] E A 58, it was held that: - for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period....".

10. From the above provisions of the law and authorities it is clear that the court has power, for good reasons to extend time for substituting the deceased. The Applicant herein states that after the death of the administrators of the estate of the deceased, she was the surviving beneficiary and was expected to take over and file for substitution. That she however fell ill and suffered a stroke and could not therefore file the application for substitution. The said allegations are denied by the 1st Respondent who states that the applicant is well known to her and she has at no time been taken ill. As a court I would not fathom why one would wish on themselves a serious ailment such as a stroke. I will leave that to the Applicant and her God. The court has perused the annexures to the application herein, in support of the alleged illness. The applicant has provided a letter by a Doctor Rishad A. S. a consultant physician & nephrologist who states that the applicant suffered a haemorrhagic stroke in July 2021 and was admitted at the Mombasa Hospital and to me this suffices as proof.
11. It has been submitted that the applicant ought to have filed the application for the grant within the 7 months after the death of the administrator when she was still well. But how would one know she would fall ill in the later part of the 7 months. I have noted the efforts put in by the applicant in filing the instant application. As evidenced by the annexed documents, the application for grant de bonnis non was filed on 24/1/2022 and heard on 18/7/2022 which date was not within the Applicants control. The grant was issued to the Applicant in October 2022 and the application filed within the



same month. Clearly the Applicant has demonstrated effort and consistency in obtaining the grant enabling her to file the application herein. It is also clear from the doctor's report that the Applicant was unwell and the failure to file the application in good time so as to avoid the abatement of suit has been sufficiently explained. I am guided by the holding in *Issa Mwabumba v Alice Mutunga & 4 others* Mombasa, Court of Appeal, Civil Appeal 287 of 2006 [2012] eKLR.

12. It has been urged by the defendants that the issues in the present suit can be resolved in the probate proceedings. However, this suit raises issues of the ownership of the suit property which is the jurisdiction of this court. I am further persuaded that the nature of the instant matter is one of those exceptional cases where this court will apply article 159 of the *Constitution* and sections 1A and 1B of the *Civil Procedure Act* on the overriding objective of the court in order to render substantive justice. I fully associate myself with the sentiments in the case of *James Mwaniki Kinuthia v Hemed Iddi Mukui & another* (2019) eKLR where Justice Kemei stated: -

I have seen a number of decisions of Courts in this country where suits have been revived outside the one-year period depending on the circumstances of the case. In all these cases the decisions were informed by the Court's cardinal duty to meet the ends of justice. In the case of *Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 others* [2012] eKLR, Koome, JA invoked those principles when dealing with an application for revival of an appeal "made two years and eight months" after the death of a party. After setting out the principles that guide the court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

"..... I am also guided by the provisions of section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the *Constitution* of Kenya, 2010 in particular article 159."

13. The upshot is the application herein dated 21/10/2022 is allowed as prayed conditional upon the applicant setting down the suit for further hearing within thirty (30) days of today's date failure to which the suit shall stand dismissed.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 24TH DAY OF APRIL, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Ms. Mango for the Applicants

No appearance for Mr. Odongo for the Respondents

No appearance for the Attorney General for 4th 5th & 6th Respondents

Mr. D. Dissii Court Assistant

