



REPUBLIC OF KENYA



Kathilu v Kamau (Sued as the Liquidator for Drumvale Co-operative Society Limited) & 18 others; Kathuli (Applicant) (Environment & Land Case 16 of 2018) [2023] KEELC 18390 (KLR) (29 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 16 OF 2018
CA OCHIENG, J
JUNE 29, 2023
FORMERLY NAIROBI ELC. NO. 431 OF 2016**

BETWEEN

NICHOLAS MUINDE KATHILU PLAINTIFF

AND

PETER WANJOHI KAMAU (SUED AS THE LIQUIDATOR FOR DRUMVALE CO-OPERATIVE SOCIETY LIMITED) 1ST DEFENDANT

MATHEW MUSAU KATHILU 2ND DEFENDANT

CHRISTOPHER KIMAMO MUCHIRI 3RD DEFENDANT

SAMUEL ONYANGO KEPHER 4TH DEFENDANT

PURITY WAIRIMU GITAU 5TH DEFENDANT

EVAH MUTHONI MUCHEMI 6TH DEFENDANT

LINCOLN MWNAGI NJOROGE 7TH DEFENDANT

NEREAH ONYANGO ONGANGA 8TH DEFENDANT

PATRICK MBOGO KIBUNYA 9TH DEFENDANT

JOSEPH MAINA GACHOYA 10TH DEFENDANT

JAMES NDIRANGU MURAYA 11TH DEFENDANT

NAOMI NDUITA KAMAIRU 12TH DEFENDANT

JOHN NJERU NJAGI 13TH DEFENDANT

RUTH WAMAITHA CHEGE 14TH DEFENDANT

DENNIS PAUL MANOT 15TH DEFENDANT



CATHERINE WAMUYU MUGO 16TH DEFENDANT
JOHN HARAMBEE GIKINGO 17TH DEFENDANT
EMMA NJAMBI GITEE 18TH DEFENDANT
MANSUKH KANJI 19TH DEFENDANT

AND

COSMAS MUINDE KATHULI APPLICANT

RULING

1. What is before Court for determination is the Applicant Cosmas Muinde Kathilu's Notice of Motion Application dated the 2 August 9, 2022, where he seeks the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to re-instate the suit herein for disposal on its merits.
 - c. That the Plaintiff's suit against the 1st- 19th Defendants be revived.
 - d. That this Honourable Court be pleased to extend time for the Applicant (cosmas Muinde Kathilu) To Be Substituted As The Plaintiff Herein (nicholas Muinde Kathilu) who is now deceased.
 - e. That subject granting prayer 2, 3 and 4 hereinabove, this Honourable Court be pleased to substitute the Plaintiff herein who has been shown to have died on 2nd February, 2019 with Cosmas Muinde Kathilu (the Applicant Herein) And The Said Cosmas Muinde Kathilu be deemed in prosecuting this suit in his capacity as the legal representative of Nicholas Muinde Kathilu (Deceased).
 - f. That this Honourable Court be pleased to review, vary and/ or set aside its orders made on November 11, 2021 dismissing the suit file herein and all consequential order thereto.
 - g. That subject to prayers 4 and 5 hereinabove being granted, the parties be granted leave to amend their pleadings.
 - h. That subject to granting prayers 2, 3, 4, 5, 6, and 7 hereinabove, and, owing to the age of the matter, this Honourable Court be pleased to prescribe timelines within which the matter can be heard and dispensed with expeditiously in the interest of justice.
 - i. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Cosmas Muinde Kathilu where he deposes that the Plaintiff died on the February 2, 2019 and that he is the legal representative of the Estate of the deceased by virtue of a Grant of Letters of Administration Ad-Litem conferred upon him on June 17, 2022. He avers that the deceased acquired the suit property from the 1st Defendant herein by virtue of being a member of Drumvale Co-operative Society Limited



And Having Been Allocated Land Parcel No. Mavoko Town Block 12/141 measuring 2.00Ha or thereabouts hereinafter referred to as the ‘suit property’. He explains that due to family squabbles he had been precluded from taking up this matter earlier but having been now officially appointed as the deceased Plaintiff’s legal representative he is able to do so. He avers that in a Ruling dated the January 25, 2019, before the death of the Plaintiff, the court confirmed that the Plaintiff had established a prima facie case and granted interim orders of injunction restraining the Defendants herein from entering or interfering with the suit property pending the determination of this matter. He explains that they later learnt that this suit had been dismissed for want of prosecution on November 11, 2021. Further, he denies that notices to show cause were ever served upon his advocates. He states that the official e-mail address for the Plaintiff’s advocates firm until the month of June 2021 was agrosskenya@yahoo.com but the said email changed to nzeiadvoates@gmail.com from June 2021. He insists that the notice to show cause was neither received by agrosskenya@yahoo.com or by nzeiadvoates@gmail.com, nor was the said notice physically served upon the advocates’ offices.

3. To oppose the instant Application the 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th and 18th Defendants filed a Preliminary Objection which was premised on the ground that the suit had abated one year after the death of the Plaintiff and that the substitution ought to have been done before the abatement.
4. In response to the objection, the Applicant filed a Further Affidavit where he reiterates his averments and insists that the instant Application was not opposed as at October 12, 2022. He confirms to have been advised that substitution ought to have taken place within one (1) year of the death of the Plaintiff but argues that the death had taken the family by surprise and that the mourning including healing had taken very long especially after the striking of the Covid-19 pandemic around that time. He contends that as soon as he had been granted Letters of Administration Ad litem, he immediately engaged his advocates who prepared the instant Application but faced some financial challenges leading to some delays in filing it but eventually managed to do so.

The Application was canvassed by way of written submissions.

Submissions by the Applicant

5. The Applicant in his submission argues that this suit should be reinstated. Further, that the orders issued on November 11, 2021 should be reviewed and/or set aside. He insists that a Notice to Show Cause was not served upon the Plaintiff’s advocate prior to dismissal of this suit for want of prosecution. He explained that even though dismissal of a suit for want of prosecution was at the discretion of the court, it should be exercised on the basis of interest of justice. Further, that his non-attendance of the court was hence excusable. He contends that the instant suit ought to be revived as the deceased Plaintiff was the bona fide owner of the suit property and none of the Defendants has demonstrated the prejudice they stand to suffer. He relied on Order 24 rule 7(2) of the *Civil Procedure Rules* and the following decisions to buttress his averments: *Nilesh Premchand Mulji Shah & Another t/a Ketan Emporium v M.D Popat and others & another*; *Harry Wanjohi Wambugu v Felista Waiganu Chege & another* (2013) eKLR; *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR; and the *Hon. Attorney General vs the Law Society of Kenya & another* Civil Appeal (Application) No. 133 of 2011.

Submissions by the Respondents

6. The 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th and 18th Defendants in their submissions insisted that the Applicant should not be granted leave to substitute the deceased Plaintiff. Further, that orders dated the 11th November, 2021 should not be reviewed and/or set aside, nor the suit reinstated for hearing. They made reference to Order 24 Rule 3 and 7 of the Civil Procedure Rules on abatement of suits as well



as late substitution of a deceased party. They argued that the representatives of the Plaintiff had clearly demonstrated that they had no interest in the suit as they had taken over two (2) years since the demise of the Plaintiff before they could file the Application. They challenged the annexed Grant of Letters of Administration marked as CMK2 which indicated that the same was issued on June 17, 2022, yet on the face of it, it shows it was issued on September 7, 2022. Further, that it shows that the deceased died on June 22, 2022, hence the death of the Plaintiff has not been sufficiently proved as no Death Certificate nor burial permit is attached. On the reason for the delay given by the Applicants, they argued that there was no proof of family squabbles and that the Applicant had not provided sufficient reasons for delay. They relied on Order 45 rule 1 and Order 17 rule 2(1) of the Civil Procedure Rules and reiterated that the Applicant had taken almost three years since they were last in court in January 2019. To buttress their arguments, they relied on the following decisions: Republic vs Public Procurement Administrative Review Board & 2 others (2018) eKLR; Thathini Development Company Limited vs Mombasa Water & Sewerage Company & another (2022) eKLR and Fran Investments Limited v G4S Security Services Limited [2015] eKLR.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, Notice of Preliminary Objection and rivaling submissions, the issues for determination is whether the abated suit should be reinstated and if the Orders issued on November 11, 2021 should be reviewed and or set aside.

I will deal with the issues jointly.

8. Revival of an abated suit is a matter of the court's discretion. Section 3A of the Civil Procedure Act gives the court wide discretion over matters and issues that are before it and stipulates thus:

“Saving of inherent powers of court. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

9. This discretion must however be judiciously applied so that justice is served to both sides of the divide. The Plaintiff, having instituted the suit, is mandated to take all the relevant action to diligently prosecute the suit without undue delay. On the other hand, an excusable delay ought to be accommodated so that a suit is heard and determined on its merit. The factors to be put into consideration in an Application for reinstatement of a dismissed suit are well laid down in the case of Ivita vs. Kyumbu [1984] KLR 441 (Chesoni J), where the court stated that:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the Plaintiff and Defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The Defendant must however satisfy the court that it will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay, the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time.”



10. In this instance, the Applicant insists that the Plaintiff's Advocate was never served with the Notice to Show Cause why the suit should not be dismissed for want of prosecution. I have had a chance to peruse the notice that was sent out to different advocates via an email on 1st November, 2021 and I note indeed the aforementioned email addresses were missing in the said email. Further, I note by the time the suit was being dismissed for want of prosecution on November 11, 2021, it had actually abated. In that regard, I find that indeed there was an error apparent on the face of record and in relying on the provisions of Order 45 Rule 1 of the Civil Procedure Rules, I opine that there is need to review and or set aside the order issued on November 11, 2021. Be that as it may, I note the Applicant has explained that he was unable to substitute the deceased Plaintiff on time due to family squabbles as they had not agreed on an administrator. Further, he was later chosen as the deceased legal representative wherein he obtained Grant of Letters of Administration Ad litem after which he filed the instant Application. The Applicant further blames the Covid-19 pandemic as well as the mourning of the deceased Plaintiff, for the delay in moving the court to substitute him. He insists that the delay is excusable. On perusal of the court file, it reveals that the matter was in court on January 25, 2019 when the court did issue interim injunctive orders against the Defendants and the Plaintiff died on February 2, 2019 before the matter could be heard. It is trite that the Plaintiff should have been substituted by February, 2020 but the family failed to do so. Further, the court takes judicial notice that by mid-March 2020, the courts had been closed as a result of the Covid-19 pandemic. The Respondents have vehemently opposed the instant Application and contend that there is no proper evidence on proof of death. Further, that this suit already abated. I note there was a mistake in the Grant of Letters of Administration Ad Litem but from the Burial Permit annexed as 'CMK1' to the instant Application, it confirms that the Plaintiff died on February 2, 2019.
11. The Court of Appeal in Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR stated as follows:
- “We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice. We have considered the reasons that were offered by the appellant regarding their failure to attend court on the June 10, 2013 with anxious minds. We have asked ourselves whether failure to attend court on June 10, 2013, constituted an excusable mistake, an error of judgment regarding counsel's failure to diarize the date properly or was it meant to deliberately delay the cause of justice.”
12. While in the case of Said Sweilem Gbeithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR the Court held that:
- “Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. 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.”
13. See also the case of Moses Maina Ndegwa v Agnes Wangui Nguni & 2 others [2021] eKLR.
14. In associating myself with the decisions I have cited and relying on the facts before me, I opine that the Applicant has demonstrated sufficient cause to warrant the reinstatement of this suit. From the Ruling



in respect to the application for injunction which was delivered on January 25, 2019, it emerged that the Plaintiff was the one on the suit property, hence I find that the Respondents will not suffer any prejudice if this suit is reinstated and determined on merit. It is my considered view that the Plaintiff's Estate will suffer great prejudice if the suit is not heard and determined on its merit. Further, this being a matter on land ownership and guided by Articles 40, 50 and 159 (2) (d) of the Constitution, I find that it will be in the interest of justice if the Plaintiff's representative was granted a right to be heard.

15. In the circumstance, I find the Notice of Motion Application dated the August 29, 2022 merited and will allow it in the following terms:
- a. That the plaintiff's suit against the 1st - 19th defendants be and is hereby revived.
 - b. The orders issued on November 11, 2021 dismissing this suit for want of prosecution be and is hereby set aside.
 - c. The applicant Cosmas Muinde Kathilu be and is hereby substituted with the deceased plaintiff Nicholas Muinde Kathilu.
 - d. The plaintiff is directed to set the suit down for hearing within sixty (60) days from the date hereof failure of which this suit stands dismissed for want of prosecution.
 - e. Costs of this application is awarded to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

JUDGE

