



REPUBLIC OF KENYA



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Kamau (Suing as the Legal Administrator of the Estate of Kamau Gitau) v Mutisya & another; Kamau & another (Applicant) (Environment & Land Case 317 of 2017) [2023] KEELC 18246 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18246 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 317 OF 2017

OA ANGOTE, J

JUNE 22, 2023

BETWEEN

IRENE WANJIRU KAMAU (SUING AS THE LEGAL ADMINISTRATOR OF THE ESTATE OF KAMAU GITAU) PLAINTIFF

AND

NICHOLAS MUTISYA 1ST DEFENDANT

EMBAKASSI RANCHING COMPANY LTD 2ND DEFENDANT

AND

JOYCE WAIRIMU KAMAU APPLICANT

CHRISTINE WANGUI KAMAU APPLICANT

RULING

Background

1. Before this Court for determination is the Applicants' Notice of Motion application dated November 23, 2022 filed pursuant to the provisions of Article 159(2) (d) of the *Constitution*, Section 3A of the *Civil Procedure Act*, Order 1 Rule 10 (2), Order 24 Rule 4(3) and 7(2) and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* seeking the following orders:
 - i. Spent
 - ii. That this Honourable Court be pleased to order that this suit be revived despite having abated and be further pleased to set aside the orders issued on the November 15, 2022 dismissing the suit.



- iii. That the Plaintiffs' name be substituted with that of Joyce Wairimu Kamau and Christine Wangui Kamau as the Legal Representatives of the Estate of the deceased Plaintiff and be allowed to proceed with the suit.
 - iv. That costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of the Motion and supported by the Affidavit of Joyce Wairimu Kamau and Christine Wangui Kamau, the Applicants herein, who deponed that they are the daughters of the deceased and the legal representatives of the Estate of the late Kamau Gitau and Irene Wanjiru Kamau(deceased).
 3. The Applicants deposed that the deceased Plaintiff, who substituted the original Plaintiff died intestate on June 15, 2019 during which time he was domiciled in Kenya and his last known place of residence was Nairobi County; that they obtained limited grant ad litem in order to prosecute this matter on March 29, 2022 and that at the time of his death, the original Plaintiff was the sole Plaintiff and died leaving the suit pending.
 4. It was deposed that the deceased's widow, Irene Wanjiru Kamau, had been substituted in his place but she has since passed on; that her substitution was done pursuant to her appointment as Legal Administrator issued on the September 19, 2018 and that the outcome of the suit will have a direct bearing on the Estate of the deceased.
 5. The Applicants lastly deponed that the cause of action survived the deceased Plaintiff as the subject property forms part of the deceased's Estate; that they are still living on the suit land as the deceased's children and that the Defendants keep on trying to dislodge them from the suit property.
 6. According to the Applicants, on November 15, 2022, the Court marked the matter as having abated despite the cause of action having survived the deceased; that the delay in filing the application was occasioned by the delay in being issued with a grant and that it took unusually long to get the grant of representation as they were waiting for one of their siblings to sign the documents.
 7. There was no response to the application. No submissions were filed.

Analysis & Determination

8. By way of a brief background, the deceased Plaintiff, Kamau Gitau, instituted this suit vide a Plaint dated May 9, 2017 seeking inter alia a permanent injunction restraining the Defendants from dealing with the property known as V4475 Ruai Block C, Embakassi (hereinafter the suit property); an order for inhibition restraining any dealings with the suit property and; an order directed to the 2nd Defendant to cancel any transfer or illegal entries in favour of the 1st Defendant or any other person in the records of ownership and immediately rectify the same.
9. The Plaint was filed contemporaneously with an application for injunction both of which were responded to by the 1st Defendant. On October 21, 2017, the original Plaintiff passed on. Ms Irene Wanjiru Kamau, his widow, obtained letters of grant of administration ad litem on September 19, 2018 and vide an application dated November 6, 2018 sought to substitute the deceased. The application was allowed.
10. In the present application, the Applicants have averred that Ms Irene Wanjiru Kamau is now deceased and they want the suit to be revived and to substitute their deceased mother.



11. The legal framework on substitution of a deceased Plaintiff is contained in Order 24 Rules 1, 2, and 3 of the [Civil Procedure Rules](#) which provide as follows:

- “ 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
- 3(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.
- 3(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.”

12. It is apparent from the foregoing that a suit abates at the lapse of one year upon the death of a Plaintiff by operation of law. Looking at the evidence adduced, Ms Irene Wanjiru, the Legal Representative of the Plaintiff herein died on June 15, 2019. There having been no substitution in the manner envisaged under Order 24 above, the suit abated sometime on June 14, 2020. On November 15, 2022, the Court merely affirmed that no suit was in existence, the same having abated.

13. However, Order 24 Rule 7 (2) of the [Civil Procedure Rules](#) gives the court discretion to revive an abated suit. The said provision provides as follows;

- “7(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.
- (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.”

14. Having regard to the said provisions, the Court of Appeal in [Said Sweilem Gbeithan Saannum vs Commissioner of Lands & 5 Others](#) (2015) eKLR summarized the process thus;

- “ There are three stages according to these provisions. As a general rule, the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason"



determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

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."

15. Similarly, the Court of Appeal in *Rebecca Muide Mungole & Another vs Kenya Power & Lighting Company Limited & 2 Others* (2017) eKLR stated as follows:

"The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in *Said Sweilam* (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of *Joseph Gachuhi Muthanji* (supra) was therefore right in dealing with that aspect of the application in the manner he did.

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant



demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) “sufficient cause” has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.”

16. It is clear from the foregoing authorities that the first step in seeking joinder and revival of a suit as sought herein is a prayer for extension of time. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings.
17. Considering the application, it is clear that no such extension was sought either before or within the present application. Guided by the foregoing, I find the application to be incompetent.
18. For those reasons, the application dated November 23, 2022 is struck out with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mukonyi for 1st Defendant

Ms Swaka holding brief for Kirimi for Plaintiff

Court Assistant - Tracy

