



REPUBLIC OF KENYA



KENYA LAW
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**Bii v Chepkwony & another (Civil Appeal 11 of 2018)
[2022] KEHC 16452 (KLR) (16 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16452 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL 11 OF 2018
AN ONGERI, J
DECEMBER 16, 2022**

BETWEEN

MOSES ARAP BII APPELLANT

AND

JOEL KIPKEMOI CHEPKWONY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

1. The application coming for consideration in this ruling is the notice of motion dated November 8, 2021 seeking the following orders: -
 - i. That this application be certified urgent and its service dispensed with in the 1st instance.
 - ii. That the honorable court be pleased to revive this suit, enlarge time and grant leave to the applicant to apply for substitution out of time on behalf of the appellant.
 - iii. That the honorable court be pleased to order the substitution of the appellant in this suit with his wife, widow, next of kin and administrator ad-litem Naomi Chepkoech Bii.
 - iv. That the costs of this application be provided for.
2. The application is based on the grounds on the face of it and supported by the affidavit of Naomi C Bii sworn on November 8, 2021.
3. The applicant avers that Moses Arap Bii (deceased) and the appellant herein was her husband, he died on June 21, 2020. The applicant attached the death certificate.



4. The applicant avers that she is the wife, widow, next of kin, beneficiary and also legal administrator ad litem to the deceased's estate. The applicant attached a limited grant of letters of administration ad litem issued to her.
5. The applicant avers that the delay in filing the instant application was occasioned by family wrangles, COVID – 19, loss of income and court closure, she was therefore, seeking for time to be enlarged for filing the application.
6. The applicant avers that the cause of action subsists, survives and continues, that she wishes to be substituted in the matter to enable her prosecute the matter to its logical conclusion, failure to which, the respondent may take advantage of the circumstances to their prejudice.
7. The applicant avers that it is only fair and just that the suit be revived, time enlarged and leave granted for her to be substituted in the matter to allow it just and expedient determination.
8. The 1st respondent opposed the application and filed a replying affidavit sworn by Joel Kipkemoi Chepkwony and dated September 20, 2022.
9. The 1st respondent avers that the applicant was deceitful and concealing material facts to the court. The 1st respondent avers that the applicant filed a similar application vide ELC Civil Suit No 53 of 2018 at the Environment and Land Court at Kericho. The 1st respondent attached a copy of the said application.
10. The 1st respondent avers that the applicant and one Kenneth Tanui filed a fresh suit vide CM ELC No 24 of 2022 at the chief magistrate's court over the same subject parcel of land, seeking the same relief which was the subject of the appeal; after they obtained grant of letters of administration to the deceased's estate. The 1st respondent attached a bundle of documents consisting of the plaint, supporting documents and a copy of the grant.
11. The 1st respondent avers that the applicant obtained letters of grant ad litem in February 2021, the 1st respondent via a letter requested the applicant to move the court and take over the suit and /or appeal that was pending in court but she declined. The 1st respondent attached a copy of the said letter.
12. The 1st respondent avers that upon the lapse of the stipulated period the suit and/or appeal herein abated and the application herein ought to be dismissed and was an abuse of court process.
13. The parties filed written submissions which I have considered.
14. The applicant submitted that the instant application seeking revival of the appeal, enlargement of time and leave to apply for substitution out of time was filed under order 24 rule 1 & 3 Civil Procedure Rules and other enabling provisions of the law.
15. The applicant cited the following cases in support of the application; Issa Masudi Mwabumba v Alice K Mutunga & 4 Ors (2012) eKLR, Gladys N Mwaura v Daniel Kariuki (2018) eKLR, Mathenge N Ngari v Christopher W Ngatia & Anor Nyeri ELC No 652 of 2014 & Silas N Njiru & Ors v Mugo Mukere Embu ELC No 220 of 2014.
16. The applicant conceded that the delay in filing the relevant application was on account of family wrangles, COVID-19, loss of income and the closure of courts. Therefore, the applicant was seeking that the court if so inclined should enlarge the time for filing the application and substitution.
17. The applicant cited the provisions of order 24 of the Civil Procedure Rules that the death of a party to a suit shall not cause the suit to abate if the cause of action survives or continues.



18. The applicant contended that in the instant application the suit should not be allowed to abate due to the demise of the appellant as the cause of action certainly subsists, survives and continues.
19. The applicant argued that the instant application was not meant to prejudice the respondent or to inconvenience the court but to facilitate hearing and determination of the land dispute on merit.
20. The applicant highlighted the provisions of order 24 rule 7 sub rule 2, that give the court the discretion to revive an abated suit if the applicant for good reason was precluded from continuing with the suit and in that instance the court shall revive the suit or set aside such order of dismissal.
21. The applicant relied on the case *Mathenge N Ngari v Christopher W Ngatia & Anor Nyeri ELC No 652 of 2014* in which it was held that the good reason must be rational, plausible, logical, convincing, reasonable and truthful and should not be an explanation that leaves doubt on a judge's mind.
22. The 1st respondent reiterated that order 24 rule 2 clearly stipulates that in cases whereby no application is made within a year, the suit shall abate and further that after the lapse of a year the court may exercise its discretion for good reason on application to extend time.
23. The 1st respondent contended that the applicant had not adduced grounds which contain good reason to warrant the court to exercise discretion in her favour.
24. The 1st respondent contended that the applicant obtained limited letters of administration ad litem on February 3, 2021 before the appeal abated.
25. The 1st respondent contended that upon the lapse of one year, the applicant and one Kenneth Kipkoech Tanui obtained a grant of letters of administration intestate jointly. Thereafter they instituted a fresh matter in the chief magistrate against the 1st respondent and touching on the subject of the appeal.
26. The 1st respondent contended that by instituting a fresh suit it demonstrated that the applicant had abandoned the appeal which was an abuse of court process and therefore allowing the instant application would result in duplicity of suits.
27. The 1st respondent reiterated that the applicant had not demonstrated or given a good reason for the extension of time after the lapse of a year. The 1st respondent therefore sought to have the application dismissed with costs.
28. The issues for determination in this application are as follows:-
 - i. Whether the suit should be revived.
 - ii. Whether the deceased appellant should be substituted with his widow.
29. On the issue as to whether the suit should be revived, the appellant died on June 21, 2020.
30. There was no application for substitution that was made within 12 months of that date and the suit abated on June 21, 2021.
31. I find that once a suit has abated, the court can only have the suit revived for good reason.
32. Order 24 rule 3(1)(2) and order 24 rule 7 (2) of the Civil Procedure Rules, provide 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.

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.

33. The process to be followed in making an application under the foregoing provision was expounded by the Court of Appeal in the case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others Civil Appeal No 16 of 2015 [2015] eKLR* 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. 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.'

34. On the issue as to whether the deceased appellant can be substituted by his widow, the answer is in the negative since the applicant herein obtained limited letters of administration ad litem on February 3, 2021 just before the appeal herein abated but neglected and /or reneged to file the application for substitution as required by law.
35. The Court of Appeal in *Charles Wanjohi Wathuku v Githinji Ngure & Another Civil Application No 9 of 2016* stressed the importance of strict application of timelines set by the law stating that; 'timelines are not technicalities of procedure which may be accommodated under article 159 of the *Constitution* or section 3A and 3B of the *Appellate Jurisdiction Act*.'
36. The application dated November 3, 2021 is dismissed for want of merits. The appeal herein has abated.
36. Each party to bear its costs of the application and the appeal. Orders to issue accordingly.



DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF DECEMBER, 2022

AN ONGERI

JUDGE

