



Nduhiu (Deceased) v Nairobi City County & 2 others; Theuri (Applicant) (Environment & Land Case 842 of 2015) [2023] KEELC 19172 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19172 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 842 OF 2015
LC KOMINGOI, J
JULY 26, 2023**

BETWEEN

JAMES THEURI NDUHIU (DECEASED) PLAINTIFF

AND

NAIROBI CITY COUNTY 1ST DEFENDANT

HON. GRACE ONYANGO 2ND DEFENDANT

**MINISTRY OF LANDS, HOUSING AND URBAN DEVELOPMENT 3RD
DEFENDANT**

AND

ROBERT KIMAMO THEURI APPLICANT

RULING

1. The application dated June 30, 2022 is for determination before this Court.
2. It is brought under Order 24 Rule 3 (2), Order 50 Rule 1 and 6 of the [Civil Procedure Rules](#), Sections 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) and Article 159 of the [Constitution](#) of Kenya 2010. The Applicant; Robert Kimamo Theuri seeks orders;
 - a. That the Court be pleased to reinstate this matter which was dismissed by the Court on November 30, 2021.
 - b. That this Hon Court does extend time for substitution of the Plaintiff herein who died on December 28, 2017 the suit having been marked as abated by an order of the Court on March 11, 2021.



- c. That the Plaintiff; James Theuri Nduhiu be substituted with Robert Kimamo Theuri, the Legal Representative of the deceased Plaintiff as per the Grant of Letters of Administration ad litem dated March 29, 2021.
 - d. That this Honourable Court does grant leave for the Applicant to amend the plaint in consonance with the aforesaid substitution.
 - e. That costs of this application be in the cause.
3. The application is based on grounds on its face and on the supporting affidavit sworn on June 30, 2022 by Jackline N Maingi, counsel from the firm on record for the Plaintiff.
 4. She deposes that this suit was marked as abated on March 11, 2021 for failure to substitute the Plaintiff who died on December 28, 2017. She further deposes that attempts to file an application for substitution were frustrated by the fact that the Applicant was unable to obtain the death certificate of the deceased Plaintiff on time as most government offices had scaled down operations due to the covid 19 pandemic. She adds that it is only on March 29, 2021, that the Applicant herein obtained a Limited Grant of Letters of Administration and instructed their firm to file an application dated August 5, 2021 seeking an order for substitution of the deceased and an order to set aside the abatement orders issued on March 21, 2021.
 5. She avers that the said application was set for mention for directions before the Deputy Registrar on November 30, 2021 but her firm experienced technical hitches and was unable to log in and attend to the matter on time. Subsequently, it was dismissed.
 6. The application is opposed by the 2nd Defendant vide her replying affidavit sworn on May 11, 2022. She avers that the Applicant has not shown sufficient cause to warrant the setting aside of the dismissal order herein and reinstatement of the suit. She also argues that the delay in filing the application for reinstatement is a demonstration that the Applicant is not keen on prosecuting the matter.
 7. The application is also opposed by the 1st Defendant while the 3rd Defendant failed to file a response.
 8. On the July 7, 2022 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.
 9. In support of the application, the Applicant filed written submissions dated December 15, 2022. He relies on the case of Rebecca Mijide Mungole & another v Kenya Power and Lighting Company Ltd & 2 others [2017]e KLR to urge the court to allow the application for extension of time. He argues that there was no delay in bringing the application thus it should be allowed.
 10. The Applicant also put forward the case of *James Mwaniki Kinuthia Vs Hemed Iddi Mukui & another* [2019] eKLR, *Issa Masudi Mwabumba Vs Alice Kavenya & 4 others* [2012] e KLR as well as the case of *Kamau Kania v Patrick Rerimoi & 2 others* [2017]e KLR.
 11. The 1st Defendant filed written submissions dated September 20, 2022 in opposition. It points out that at paragraphs 7 and 8 of the Plaint herein filed in 2015, the Plaintiff informs the Court that the cause of action herein arose in 1972. It argues that even if the suit is reinstated, it shall fall on the principles of Limitation of Actions as the Plaintiff has been indolent in prosecuting this suit.
 12. It also submits that the Applicant was aware about the demise of the Plaintiff (deceased) thus he was in a position to follow up the matter. It also submits that the Applicant's contention that the delay in substituting the deceased was due to delay in obtaining his death certificate which was caused down



- by scaling of operations due to Covid 19 is untrue. It points out that there was no Covid in the year 2017 to November 2019.
13. It is also the 1st Defendant's submission that the Applicant does not meet the threshold for extending time and reviving the suit as he fails to show that he was prevented by a sufficient cause from continuing the suit. It relies on the case of *Rukwaro Waweru v Kinyutho Ritho & another* [2015]eKLR. It further submits that timelines are not technicalities of the procedure which may be accommodated under Article 159 of the *Constitution*.
 14. The 1st Defendant also relies on the Court of Appeal decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017]eKLR (supra) and the case of *William Muinde Kilundo v Peter K Wambua & 3 others* [2018] e KLR to submit that the application is defective for want of procedure as the Applicant ought to have sought extension of time before filing the application for revival of suit.
 15. The 1st Defendant also argues that the application as drawn is resjudicata. It points out that the Applicant had filed a similar application dated August 5, 2021 which was dismissed by this court for non-attendance thus best practice would have been to have it reinstated instead of filing the instant application.
 16. The 2nd Defendant also filed written submissions dated September 21, 2022 in opposition to the application. She submits that there is no explanation for the delay in obtaining grant ad litem, the deceased having died in 2017 and the letters having been issued in 2021. She further submits that for the Court to exercise discretion in favour of a person seeking to revive a suit, it must be satisfied that the Applicant was prevented by sufficient cause from form continuing the suit. She puts forward the case of *Charles Mugunda Gacheru v Attorney General & another* [2015]e KLR, *John Gitbinji Gichira v Bernard Minene Gichira* [2018]e KLR , *Rukwaro Waweru v Kinyutho Riho & another* [2015]e KLR as well as the case of *Mehta v Shah*[1965]EA 321.
 17. I have considered the Notice of Motion and the affidavit in support. I have also considered the responses thereto, the written submissions and the authorities cited. The issues for determination are;
 - i. Whether the suit should be revived and or reinstated.
 - ii. Whether the time for substitution ought to be extended.
 - iii. Who should bear costs of this application?
 18. The Plaintiff herein passed away on December 28, 2017 He was not substituted within a year as required under Order 24 Rule 4 of the Civil Procedure Rules. The suit ought to have therefore abated on December 29, 2018 as the law contemplates. However, the court marked this suit as abated March 11, 2021.
 19. Under Order 24 Rule 7 (2) of the *Civil Procedure Rules*, an abated suit may be revived if sufficient cause is established. In the instant case Limited Grant of Letters of Administration - ad litem of the Plaintiff's estate were issued on March 29, 2021. There is no satisfactory explanation as to why the said letters were not obtained within a year of the Plaintiffs death and neither is the 4 year delay explained. Covid` 19 which commenced in March 2021 is a mere excuse.
 20. After abatement orders were issued herein, the Applicant then filed an application for reinstatement of suit and substitution dated August 5, 2021 which was dismissed on November 30, 2021. Again, there was no explanation in the delay in filing an application for reinstatement of suit after letters of administration had been issued and after the abatement orders had been made. The Applicant also fails



to establish that he followed up the suit after the dismissal orders of November 30, 2021. His conduct in the matter is that of an indolent litigant who is not deserving of the discretion of this Court.

21. I find that this court had no jurisdiction to entertain this matter on March 11, 2021 the suit having abated in 2018.

Order 24 rule 3(2) of the [Civil Procedure Rule](#) provides that;

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.
- (2) Where within one year no application is made under sub rule (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.

22. Order 24 rule 7(2) of the [Civil Procedure Rules](#) provides that;

“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”.

23. I agree with the 2nd Defendant/Respondent’s counsel submissions that for the court to exercise 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 sufficient cause from continuing the suit.

In the case of [Charles Mugunda Gacheru Vs Attorney General & Another](#) (2015) eKLR the court stated as follows;

- “ 12. Whereas the applicant has made attempts to explain why he failed to substitute the plaintiff within the time stipulated in law, I am not satisfied with the explanation offered. My observation is that the cause of delay is the casual manner the applicant has handled the application”.

24. I agree with the 2nd Defendant’s/Respondent’s submissions that the delay of five years has not been explained and that the applicant has not established factors for revival or extension of time.

In the Case of [John Gitinji Gichira Vs Benard Munene Gichira](#) (2018) eKLR the court stated as follows;

“There are the factors the applicant must establish when seeking extension of time. This was not done by the applicant. All he stated was that the matter involves Land and Family and respondents will not be prejudiced. The delay of four years which was no doubt inordinate has not been explained. The applicant has not established the threshold for the exercise of discretion by this court to extend time. [Gopal Ramji Ladha Patel Vs City Finance Bank Limited](#) (2008) eKLR The Court of Appeal held while dealing with an application to extend time where a suit had abated. The appeal having abated way back



in 2005, there is no way that it can be revived under the Rules of the Court. It remains as dead as a dodo. This being the position, this application amounts to an exercise in futility since even if time to apply for substitution of a party was extended, that by itself would not revive the abated appeal. See *Vyatu Limited and Another Vs Public Trustee Nyanza Province* (2003) KLR 688 and *Samwel Nyoike Nduati Vs Republic*, Civil Application No Nai 292 of 2003 (Unreported). This court ruled that the appeal abated on September 8, 2013. Even if time for substitution was extended, it would be an exercise in futility the appeal has already abated. It would serve no purpose to extend time for substitution as the appeal to quote the Court of Appeal, is dead as a dodo as it has abated. There was inordinate delay in substituting the appellant as the application was filed on 15/05/17 four years after the suit abated. The application is without merits. I dismiss it”.

25. I agree with the 1st Defendants/Respondents counsel submissions that an application for revival of an abated suit has to be preceded by an application seeking extension of time to revive the said suit. In the case of *Rebecca Mijide Mungole & Another Vs Kenya Power & Lighting Company Ltd & 2 Others* (2017)eKLR the Court of Appeal stated thus;

“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 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....”

26. In conclusion I find that the Applicant herein has not given sufficient cause to warrant this court to exercise discretion in his favour.
27. I find that the Applicant has not placed any material before this court to persuade this court to allow the instant application.
28. I find no merit in this application and the same is dismissed with costs to the Defendant’s/Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF JULY 2023.

L. KOMINGOI

JUDGE.

IN THE PRESENCE OF:

N/A for Plaintiff.

N/A for Defendants.

N/A for Intended Interested Party.

Court Assistant - Mutisya

