



Kiiru v Ndapana & another (Both as Personal Representatives and Administrators of the Estate of Ndapana Ole Kiriambu as well as Personal Representatives and Administrators of the Estate of Salome Warigia Ndapana) (Environment & Land Case 1616 of 2007) [2023] KEELC 19011 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19011 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1616 OF 2007**

JA MOGENI, J

JULY 19, 2023

BETWEEN

HARUN NG'ANG'A KIIRU APPLICANT

AND

JAMES MBURU NDAPANA 1ST RESPONDENT

ESTHER NJERI 2ND RESPONDENT

**BOTH AS PERSONAL REPRESENTATIVES AND ADMINISTRATORS OF
THE ESTATE OF NDAPANA OLE KIRIAMBU AS WELL AS PERSONAL
REPRESENTATIVES AND ADMINISTRATORS OF THE ESTATE OF SALOME
WARIGIA NDAPANA**

RULING

1. By a notice of motion dated December 22022, brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 Laws of Kenya, Order 45 & 51 of the [Civil Procedure Rules, 2010](#), Article 159 of the [Constitution](#) of Kenya and all enabling provisions of the law. The Applicant seeks the following orders;
 - a. That the orders granted on October 3, 2022 be reviewed and set aside the Court issued orders instantly reviving the suit and the Court issues orders for stay of execution pending hearing and determination of this application.
 - b. That the Court be pleased to extend time for substitution of the late Harun Ng'ang'a with the Administrator of his Estate and accord the said Administrator an opportunity to prosecute the Originating Summons filed on August 25, 2005.



- c. That the costs of this Application be awarded to the Applicant.
2. The said application was based upon the grounds shown on the face of the motion and supported by the affidavit of the Watetu Matu the advocated in conduct of this matter from the law firm Kirundi & Company Advocates, who are representing the plaintiff, sworn on December 2, 2022. It was averred in the said affidavit that the suit herein abated when the plaintiff did not prosecute it following a stay order issued by Justice Nyamweya (as she then was) on February 10, 2012 to allow for the proceedings in Succession Cause No 1284 of 2005. That Justice Ali Aron (as she then was) ordered that the file for the Succession Cause 1284 of 2005 be returned to the registry waiting the determination of ELC 1616 of 2007 by her order dated December 10, 2019.
 3. That the estate of the late Harun Ng'ang'a who passed on on January 16, 2013 sought to substitute the deceased by filing the Succession Cause 1284 OF 2005. Further that the estate of the late Harun Ng'ang'a made effort to trace the Court File for the instant suit in order to take directions following the demise of the late Harun Ng'ang'a and the fact that there were orders staying proceedings in the instant suit but their efforts did not bear fruit. The applicant attached copies of unsigned letters marked HNK2 to the supporting affidavit.
 4. That the applicant filed an application dated March 10, 2022 seeking extension of time to substitute the Harun Ng'ang'a with the administrator of the estate but it was dismissed on October 3, 2022. The applicant contends that the dispute about ownership of the suit property will only be resolved if both parties are given an opportunity to be heard. Further that it is the mistake of the counsel that the led to the dismissal of the suit since the Counsel who had conducted the matter failed to apply for substitution in time and this is what made the suit to abate yet the applicant's estate has a good claim.
 5. The Applicant contended that it would be fair and just to set aside the orders of October 3, 2022 so that the applicant is granted an opportunity to adduced evidence before this Honorable Court in support of Harun Ng'a ng'a' claim. Further that it is in the interest of justice that the applicant's estate is granted an opportunity to put across their claim. This will ensure that the interest of justice will be served.
 6. The Respondent filed a replying affidavit and a statement of grounds of opposition dated June 8, 2022 in response to the said application. The Respondent stated that the said application was frivolous and vexatious and indeed to derail the trial since the applicant is indolent and guilty of laches having been issue with *Ad Litem* in 2013 and having done nothing about the substitution. It was further contended that the Applicants had not met the threshold for revival of a suit that had abated by operation of the law. That the claim concerned property registered under the respondent's late father and the respondent contented that the transfer lacks legality, veracity and authenticity even the thumbprint is questionable. Further that the late Harun never claimed the alleged portion in the lifetime of the respondent's parents who died in the 1990s. That the instant application lacks competence and should be dismissed because it is an abuse of the court process.
 7. When the said application was listed for hearing on June 12, 2023, the advocates for the parties agreed to canvass it through written submissions. Consequently, the Applicants filed their submissions on June 26, 2023 whereas the Respondent filed his on June 23, 2023.
 8. In their submissions, the applicants reiterated their case as stated in their notice of motion and supporting affidavit. It was submitted that the parties made several attempts to trace the court file for the instant suit but they were not able to do it upon realizing that their advocate who had conduct of the matter had failed to apply for substitution upon the demise of Harun Ng'anga'. It was, therefore, submitted that it would be just to set aside the order made on October 3, 2022 and allow the Applicant to be heard on the merits of the suit.



9. The Applicant relied on the case of *Tokesi Mambili & Others vs Simion Litsanga Sabwa* (Civil Appeal 90 of 2001), *Shanzu Investment Limited vs Commissioner of Lands* [1993] eKLR, *Wangechi Kimata & Another vs Charan Singh* (C.A NO. 80 of 1985) and *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others* [2017] eKLR in support of their application.
10. *Burbhani Decorators & Contractors Vs Morning Foods & Healthy U 2000 Ltd*, NBI Civil Appeal No. 604 of 2012 [2014] eKLR and Muranga ELC No. 55 of 2017 *Allan Kamau Gichubi v. Samuel Gichubi Kimani & 2 Others* [2017] eKLR in support of their application.
11. The Respondent, on the other hand, submitted that the instant application instant application violated the provisions of Order 24 Rules 3 subrule 1 and 2 and Rule 7 of the *Civil Procedure Rules* and Order 24 Rule 4 which are emphatic that a suit abates after one year when the plaintiff dies and there is no substitution done and no reasonable cause is provided. The Respondent relied on the cases of *Titus Kiragu vs Jackson Mugo Mathai & Another* [2013] eKLR *John Mutai Mwangi & 26 Others vs Mwenja Ngure & Other* CA No. 126 of 2014, *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others*(supra) and *The Hon. Attorney General vs LSK & Another* CA No. 133 of 2011.
12. The respondent also opposed the said application on the basis that the applicant had failed to demonstrate any of the grounds for review of an order contemplated under Order 45 of the *Civil Procedure Rules*. It was submitted that no error of law apparent on the face of the record, discovery of a new and important matter, or any other sufficient cause had been demonstrated.
13. The court has considered the applicants' notice of motion dated December 2, 2023, the grounds of opposition thereto and the respective submissions of the parties. The court has also considered the ruling dated October 3, 2022 on the applicants' notice of motion dated February 17, 2021.
14. The court is of the view that the following issues arise for determination;
 - i. Whether the said application is an abuse of the process of court.
 - ii. Whether the applicant has made out a case for setting aside the court ruling made on October 3, 2022.
 - iii. Whether the applicant has made out a case for review of the ruling dated October 3, 2022.
 - iv. Whether the applicant has made out a case for substitution of the deceased party.
 - v. Who shall bear the costs of the application.
15. In the applicant's notice of motion dated February 17, 2021, they had sought an order for revival of the suit which had abated and for substitution of the deceased parties under the provisions of Order 24 of the Civil Procedure Rules (hereinafter the Rules). Vide the ruling dated October 3, 2022, the court held that the suit had abated and was dismissed for default of substitution at the demise of Harun Ng'ang'a. On that account, the court dismissed the said application in its entirety.
16. The provisions of Order 24 provide are that where a suit has abated but the subject matter still survives, the Court may upon application by the Plaintiff or administrator revive a suit where there is sufficient cause that prevented the party from filing the relevant application for substitution within 1 year.
17. In this case, it is on record that the plaintiff died on January 16, 2013 therefore substitution ought to have been done by January 15, 2014 after which the suit abated. The application for revival of this suit is therefore being brought on March 10, 2022 which is 8 years after abatement. The rules permit the



Court to revive the suit on application and on good reasons being tendered by the Applicant as to why the Court should extend time for substitution.

18. The consequences of abatement or dismissal of suit under this order are dire. Order 24 rule 7 (1) states that where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action.
19. The cause of action in this suit is a claim in land and therefore survived the death of the plaintiff. It is a claim for Adverse Possession. The claim of the applicant as can be gleaned from the suit is that the deceased Harun Ng'ang'a purchased land in 1972 from the late Ndapana Ole Kiriambu and took possession. It is the applicant's case that the deceased Harun Ng'ang'a established a claim of title under Adverse Possession against the estate of the deceased defendant for having been in occupation for over 30 years. According to the green card on record the defendant became registered as owner of the suit land in 1985.
20. The applicant explained to court that after the death of the late Harun Ng'ang'a his estate made efforts to trace the court file for the current suit for purposes of taking directions in view of the late applicant's demise and the existence of orders staying proceedings in the current suit but these were futile. He has attached copies of letters written to the Deputy Registrar to this effect.
21. The respondent has deponed that the delay is inordinate and highly prejudicial to them. They must demonstrate such prejudice that they stand to suffer in the event the suit is revived and substitution is allowed as prayed. They did not. There is also no evidence that such harm may not be compensated by way of costs.
22. Now to the issues, the 1st issue is whether the instant application is an abuse of the process of court. According to *Black's Law Dictionary* (9th Edition) abuse of process is the improper use of "a legitimately issued court process to obtain a result that is either unlawful or beyond the scope" of the process. According to *Bullen & Leake and Jacobs Precedents of Pleadings* (12th Edition), a pleading is considered to be an abuse of the court process where it is meant to misuse the machinery or process of the court.
23. The 2nd issue is about setting aside of the ruling for October 3, 2022. The court has considered the instant application. It is the first time that the Applicants are seeking the setting aside of the dismissal order made on October 3, 2022. A party seeking reinstatement of a dismissed suit cannot be said to abuse the court process this is within their right as provided under Order 45 of the Civil Procedure Rules.
24. There is no indication on record that the applicant is seeking to delay or obstruct the course of justice. There is no material on record to indicate that there is any mischief or ulterior motive in seeking the setting aside of the dismissal order. There is also no indication that the Respondent would suffer any prejudice which cannot be put right by an award of costs.
25. In the circumstances, the court is of the opinion that the interest of justice would be better served by setting aside the dismissal order of October 3, 2022 to enable the applicant to be heard on the merits of the suit. The court will make an appropriate order on costs of the application at the conclusion of this ruling.
26. The 3rd issue is whether the Applicant has made out a case for the review of the ruling dated October 3, 2022. The court has considered the material on record and finds that the Applicant has completely failed to demonstrate any of the grounds for review stipulated in Order 45 of the Rules. The applicant has not demonstrated any mistake apparent on the face of the record, or discovery of any new and important matter which was not available when the earlier application for revival of the suit was filed,



- or any other sufficient reason to warrant a review. The court, therefore, agrees with the respondent that there is no merit in the application for review even though it does not agree that “any other sufficient cause” in Order 45 Rule 1 should be construed *ejus dem generis* with the preceding grounds.
27. The 4th issue is whether the applicant has made out a case for substitution of the deceased party. The court is aware that the applicant has previously made a false start by seeking revival of the suit and substitution of the deceased party. In the court’s opinion, that does not prejudice their right to move the court appropriately upon the dismissal order of October 3, 2022 being set aside. As was held in the case of *Burhani Decorators & Contractors Vs Morning Foods Ltd & Another* NBI Civil Appeal No 604 of 2012 [2014] eKLR not every mistake or blunder by an advocate should be visited upon the client. A party should not be driven out of the seat of justice without a hearing on the merits on account of a default by his advocate.
28. 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 vs 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.”
29. Section 1A read together with section 3A of that *Civil Procedure Act* is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Guided by these principles read together with those set out in Art 159 of the *Constitution*, this Court is inclined to grant the application for the purposes of meeting the ends of justice to the parties in this case. The right to be heard is a Constitutional tenet under Art 48 and 50 and in paying fidelity to these principles this Court is inclined to allow the application to revive the suit and order for substitution of the Respondents in the suit so that the dispute may be heard and determined on its merits.
30. In the circumstances of this case, the court is inclined to allow the prayer for substitution of the deceased party. The court is satisfied from the circumstances of this case that such prayer ought to be allowed to allow the suit to proceed to full hearing.
31. The final issue is on costs of the application. The general rule on costs is that costs shall follow the event. A successful party is thus entitled to costs unless the court, for good reason, directs otherwise. The court is aware that it is the applicant’s counsel who did not make the application for substitution having been confused by the stay order that was issued by Justice Nyamweya (as she then was). The court is of the view that the applicant should be deprived of costs and instead ordered to pay the respondent costs of the application dated December 2, 2022 in the sum of Kshs 30,000/-.
32. The upshot of the foregoing is that the applicant’s notice of motion dated December 2, 2022 is hereby allowed in the following terms:
- a. Prayer 1 is partially allowed by setting aside the order dated October 3, 2022 and reviving the Originating Summons filed on August 25, 2005.



- b. Prayer 2 is allowed by allowing substitution of the late Harun Ng'ang'a with the Administrator of his Estate.
- c. The application for review of the ruling dated December 3, 2022 is hereby dismissed.
- d. The Applicants shall pay the respondent costs of the application in the sum of Kshs 30,000/-.
- e. In view of the circumstances and the age of this suit, the applicant is hereby directed to take steps to prosecute the suit within the next 90 days in default of which the suit shall stand dismissed for want of prosecution under Order 17 of the [Civil Procedure Rules](#).
- f. Parties are therefore referred to the Deputy Registrar for Pre-Trial Conference on August 21, 2023.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 19TH DAY OF JULY, 2023.

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MOGENI J

JUDGE

In the virtual Presence of; -

Ms. Kwamboka holding brief for Mr. Mose Nyambega for Defendant

No appearance for Applicant/Plaintiff

Ms. Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

