



REPUBLIC OF KENYA



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Karangi v Kibetu (Deceased) & another; Mukami (Respondent) (Environment & Land Case 8 of 2021) [2023] KEELC 21393 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21393 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 8 OF 2021**

JA MOGENI, J

OCTOBER 31, 2023

BETWEEN

JULIUS WAWERU KARANGI PLAINTIFF

AND

BENSON MBENI KIBETU (DECEASED) 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

AND

AGATHA MUKAMI RESPONDENT

RULING

1. There are two applications before the court one dated 11/11/2022 and the one dated 4/07/2023.
2. The application dated 11/11/2022 seeks to have the suit against the 1st defendant revived and the time within which the legal representative of the estate of the 1st defendant may be substituted be extended. The application is supported by an affidavit sworn by Julius Waweru Karangi on 11/11/2022.
3. The grounds of the application are that the 1st defendant passed away on 14/05/2021 and by operation of the law the suit abated on 15/05/2022 and there was no application to revive the suit.
4. The plaintiff/applicant is seeking to have the suit revived and time extended within which the 1st defendant may be substituted. This will enable the plaintiff to pursue his claim against the 1st defendant and the 1st defendant's estate given a chance to defend the said claim by the plaintiff.
5. As regards the application dated 4/07/2023, the plaintiff seeks to have the Notice of Motion dated 11/11/2022 struck out under Order 24 Rule 4 (3) Civil Procedure Rules and Section 4 of the *Limitation of Actions Act*. Further he seeks a declaration that the suit against the 1st defendant abated and the final judgment having been entered on 19/09/2008 is time-barred and cannot be enforced.



- The application is supported by an affidavit sworn by Agatha Mukami the respondent/applicant on 4/07/2023.
6. The applicant has stated in support of their application dated 11/11/2022 that the 1st defendant died on 14/05/2021 and the suit against him abated one year later but the plaintiff only became aware of it in February 2022 when the plaintiff wanted to prosecute his case. When he realized that the 1st defendant was demised and there was no one interested in taking out the letters of administration against the estate of the demised 1st defendant, the plaintiff filed the application and Letters Ad-Litem were issued to the widow of the defendant on 9/05/2022.
 7. Further that there was an error that the plaintiff had made on the date of death of the defendant and this necessitated an application for rectification. The rectification was finally done and rectified Letters Ad-Litem were issued on 21/10/22.
 8. The Applicant is moving the court by stating that he has shown zeal in continuity of the suit and that he deserves of the exercise of the court's discretion in his favour.
 9. It is his contention that the court already issued judgment for he liquidated amount and what is outstanding is the execution of the decree against the estate of the deceased defendant. Further that the respondent will suffer no prejudice.
 10. In response, the respondent filed a replying affidavit dated 23/05/2023 where she avers that a judgment of a liquidated sum of Kesh 8,415,170 was entered on 19/09/2008 in full and final judgment. The 1st defendant passed on 14/05/2021 but the instant application was brought to court a year after the 1st defendant's demise contrary to the provisions of Order 24 rule 4 (4) (3). Further that the application is also brought 12 years after commencement of the suit and entry of final judgment.
 11. It is the respondent's contention that the plaintiff has been indolent in exercise of their rights and the action of seeking revival of suit and execution of judgment is time-barred and so is the action of trying to enjoin the respondent who is the legal representative of the 1st defendant to the suit and this action is barred by section 4 of the Limitation of Actions Act Cap 22. She contends that the plaintiff is trying to revive a suit that is already abated and she therefore asks the court to dismiss the suit with costs to the respondent.
 12. In response to the replying affidavit by the respondent, the advocate for the plaintiff filed a supplementary affidavit dated 30/06/2023. He averred that judgment that was entered in 2008 against the 1st defendant was an interlocutory judgment in default of appearance of the 1st defendant. As such it was not a final judgment thus it could not be executed and had to be set down for formal proof.
 13. He further averred that the interlocutory judgment was against the 1st defendant only. Therefore, the plaintiff had to set down the suit for hearing against the 2nd defendant since the prayers sought were jointly and severally against both the 1st and 2nd defendant.
 14. It was the Counsel for the plaintiff's contention that this suit was initially filed in the civil division of the High Court as HCCC 231 of 2008 and despite effort to have the matter heard this was not possible. The reason for this was that there were out of court negotiations to attempt a settlement between the plaintiff and 2nd defendant. Attached was a copy of the last correspondence marked as "HMW1" was attached and produced.
 15. It was the contention of the Counsel for the plaintiff that upon the transfer of the court file from the civil division to Environment and Land Court, the court file went missing for over one year and before



it was finally traced. All this time the plaintiff had tried to fix the sit for hearing thus he has been vigilant in prosecuting the suit.

16. He contends that Section 4 of the Limitations Act does not apply to this matter since time can only run when final judgment is entered and parties have gone for formal proof. Further that the application for substitution is brought under Order 24.
17. On her part, the 1st defendant in addition to filing the Replying Affidavit to the dated 11/11/2022, the respondent also filed an application dated 4/07/2023 seeking the following orders:
 - a. That the Plaintiff's/Applicant's Notice of Motion dated 11th November 2022 be struck out with costs.
 - b. A declaration that the suit against the 1st defendant has since abated and the final judgment on record having been entered on 17th September 2008 is time-barred and thus cannot be enforced.
 - c. Costs of this application be borne by the Plaintiff/Applicant.
18. The Application is supported by the grounds on the face of it and the affidavit of Agatha Mukami. She depones that the full and final judgment of Kesh 8,415,170 was entered in this matter on 17/09/2008. The 1st defendant passed on 14/05/2021 and so according to her the plaintiff has had sufficient time to follow up with execution of the judgment and enjoy its fruits.
19. She depones that the application dated 11/11/2022 has been brought to court more than a year after the deceased passed on contrary to Order 24 rule 4 (4) (3). Further, that the plaintiff has been indolent and the action required by the application filed is time-barred coming 14 years when the final judgment was entered. Further, she avers that the plaintiff seeks to reinstate the suit against the 1st defendant's estate which however was not a party to the proceedings of the abated suit. She avers that the plaintiff's action is time-barred as per section 4 of the Limitations Act, and 2 years have lapsed since the time the judgment was entered.
20. She urges the court to find that the application is unmerited and that it is frivolous, scandalous and vexatious and abuse of the court process.
21. The application is opposed by the plaintiff/respondent who filed a replying affidavit sworn by Harun Muturi Njoroge the Counsel for the plaintiff dated 24/7/2023 where he reiterated most of the averments made in the supplementary affidavit dated 30/06/2023.
22. He contended that the plaintiff/respondent has been diligent in exercising rights of prosecuting the matter at hand. Further that Section 4 of Limitation of Actions Act will only kick in once the final judgment is entered when parties go for formal proof.
23. It was his case that the application for substitution dated 11/11/2022 is competently before the court. The respondent/plaintiff reiterated the reasons for delay in making the application for revival and substitution as those stated in the supporting affidavit to the application of 11/11/2022.
24. He contended that the fact that he moved the succession court for Letters of Administration Ad Litem is testimony that he is a serious litigant committed to continuity of the suit against the estate of the 1st defendant till determination of the matter on merit. He argued that given the reasons he provided in this replying affidavit, then the Notice of Motion dated 4/07/2023 should be dismissed with costs to the respondent/plaintiff and the respondent/plaintiff's application dated 11/11/2022 be allowed.



25. Both Applications were canvassed by way of written submissions. The Applicant's submissions are dated 04/07/2023. The Applicant has rehashed the facts as in the Supporting Affidavit. In his submissions he identified three issues:-
- a. Whether the execution of the judgment entered in September 2008 is time barred.
 - b. Whether the court can grant extension of time within which the legal representative of the estate of the 1st defendant may be made a party to this suit and subsequently revive the suit against the 1st defendant.
 - c. Who bears the cost of this application
26. He submits that the judgment which was an interlocutory judgment pursuant to Order 10 Rule 4 (2) and therefore they await final judgment because the interlocutory judgment entered on 17/09/2008 could not give rise to a final decree and was therefore incapable of being executed.
27. That time will start to run as contemplated under Section 4(4) of the *Limitation of Actions Act* once a final judgment is entered.
28. The plaintiff on the second issue has referred to the cases of Mary Njeri Kabundi vs Christine Mithiri Mbugua & Another, Mabilia Bernard (Interested Party) [2021] on extension of time. The other case referred to is the case of Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Co. Ltd & 20 Others [2017] eKLR, in which it was held that a suit that abates due to effluxion of time should be revived through application for extension of time to allow the legal representative of a deceased party to be enjoined once time is extended.
29. The plaintiff has fixed this matter for formal proof on 3/11/2023. He stated that he learnt of the death of the 1st defendant in February 2022 and therefore the period being outside the one-year mark was by six (6) months which the plaintiff submits was not too inordinate. The applicant has also relied on the cases of Mary Waithera Gikima & Another vs Kariuki Wairagu & 3 Others [2020] eKLR, and Joseph Kahonge Muthondu vs John Ihuo Macharia & Elizabeth Muthoni Kahonge [2019] eKLR. He submits that the computation of time should commence on 21/10/2022 when the rectified grants were issued. The plaintiff prays that the court should be guided by Article 159.
30. On her part the respondent filed her submissions dated 24/10/2023 and stated that the Plaintiff/Applicant has not demonstrated sufficient cause to warrant revivement of the suit. That the matter is a liquidated claim and an interlocutory judgement was entered on 17/9/2008 of Kshs.8,415,170/=. That the plaintiff also acknowledged that Judgement is a final judgement, that it has been entered and that the Plaintiff be granted orders to substitute the personal representative to enable him execute the decree. She also submitted that the plaintiff had time for a period of 12 years to extract the decree and proceed with execution however, the plaintiff failed to proceed with execution. 12 years lapsed in 2020 and therefore the Plaintiff ought to have brought an action for execution within that timeline. The 1st Defendant died on 14/05/2021, after 12 years since the date of the Judgement.
31. It is the Respondent's submission that the Plaintiff had filed the application more than one year after the deceased had passed contrary to order 24 Rule 4 (4) (3).

The Issues and Determination

32. I have considered the pleadings and submissions made by the parties with regard to the Application dated 11/11/2022 and the application dated 4/07/2023.



33. On the first issue whether the execution of the judgment entered in September 2008 is time barred, I will refer to the case of M'Ikiara M'Rinkanya & Another vs. Gilbert Kabeere M'Mbijiwe [2007] eKLR in which the Court of Appeal held that:

“All post judgment proceedings including originating proceedings and interlocutory proceedings for execution of judgment are statute barred after 12 years”.

34. I have noted that there is no documented process presented before the court on commencement of the process of execution. The applicant has alleged that there were out of court negotiations but there is nothing laid before the court to attest to this fact. In essence the applicant did not initiate any action to extract and execute the judgment entered on 19/09/2008.

35. The argument that this was an interlocutory judgment and that he was awaiting final judgment falls flat in view of the decision made by the court of appeal in M'Ikiara M'Rinkanya & Another vs Gilbert Kaabere M'Mbijiwe (Supra). The distinguishable issue in this case was whether the Court had the discretion to grant extension of time.

36. In the case of Hudson Moffat Mbue vs. Settlement Fund Trustees & 3 Others, ELC No. 5704 of 1992 (OS) my brother Mutungi J held as follows:

“...the expression “An action may not be brought upon a judgment after the end of twelve years from the date on which judgment was delivered ...” means that unless an application has been brought for enforcement of the judgment and has been completed and/or the same has not been concluded by the time the 12-year period expires, no fresh action for enforcement of the judgment can be brought after the expiry of 12 years from the date of the delivery of the judgment.”

37. I do hold the same view as my brother Judge Mutungi that all post judgment proceedings, including interlocutory proceedings for execution of judgment are statute-barred after 12 years.

38. This leads me to the second issue whether the Court can grant extension of time within which the legal representative of the estate of the 1st defendant may be made a party to this suit and subsequently revive the suit against the 1st defendant.

39. Order 24 Rule 4 of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

“ 4.

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.



(3) Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.”

40. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit. The Court of Appeal in the case of *The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011* observed as follows as to the meaning of sufficient cause:

“Sufficient cause or good cause in law means:-

‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See *Black’s Law Dictionary*, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

41. In the instant application, the Plaintiff averred that he filed a succession cause to compel the 1st defendant’s wife to take letters of administration ad litem to represent the 1st defendant in the suit, after it became apparent that the 1st defendant’s family was not keen on taking out letters of administration.

42. This, in my view, is good reason to revive the suit against the 1st defendant, and also to extend time for the Plaintiff to make his application for substitution. But one cannot lose sight of the fact that by the time the applicant was moving the court to issue letters of administration ad litem the suit was already time-barred. The statutory 12-year period for execution of judgments had lapsed and the application was being made after a period of 14 years.

43. In the case of *Elizabeth Mutuku & Nzioka Mutuku & 6 others v Aimi Ma Kilungu Company Ltd [2019] eKLR* the court held as follows:

“That an order for abatement of suits is unnecessary was Dealing with the timelines prescribed under the above provision, Bosire, J (as he then was) in *Rawal vs. Rawal [1990] KLR 275* reiterated that:

The object of any limitation enactment is to prevent a plaintiff from prosecuting “stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”

44. I am aware even as I make this decision that Article 159 2 (d) of *the Constitution* enjoins this court to be focused on substantive justice as opposed to concentrating on procedural technicalities that may vitiate the course of justice. Further, that where a mistake has been made a party should not be made to suffer the penalty of not having his case heard on merits. However, in the circumstance of this case I find that the applicant has not provided any sufficient cause that can be said to have prevented him from executing the judgment issued before it became time-barred and the suit abated nor provided sufficient reasons for reviving the suit.



45. In *Mwangi S. Kimenyi vs Attorney General & Another* [2014] eKLR it was held thus;

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable...”

46. Given the foregoing I find no merit in the application dated 11/11/2022 and it is hereby dismissed. The application dated 4/07/2023 is granted as prayed and the cost the application shall be borne by the plaintiff/applicant.

47. Orders accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED IN VIRTUAL COURT AT NAIROBI THIS 31ST DAY OF OCTOBER, 2023.

MOGENI J.

JUDGE

In the virtual presence of ;-

Mr Kamau Muriuki for the 1st Respondent

Mr.Muturi for Plaintiff/Applicant

