REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL APPEAL NO. 235 OF 2013

BEATRICE WAKARIKO NGUMBA……..……APPELLANT

-VERSUS-

MILLICENT WANGECHI.....RESPONDENT

AND

JONATHAN MUGWERU KAGO……..……APPLICANT

RULING

1. There are two applications in this matter. The first application is dated 31st March, 2017 filed by the Respondent **Millicent Wangechi** seeking an order that this Court do dismiss this appeal as having abated. It is based on the grounds that this appeal was filed in the year 2008 by the Appellant Beatrice Wakariko Ngumba. The appellant however, passed away on 8th September, 2012 and the cause of action does not survive her. The appellant was not substituted and the beneficiaries are suffering great prejudice as the estate remains undistributed for nine years. It is in the interest of justice that the appeal be dismissed.

2. The second application is the one dated 15th May, 2017 which seeks to revive the suit and to substitute the appellant Beatrice Wakariko Ngumba with one Jonathan Mugweru Kago. It is based on the grounds that the Appellant Beatrice Wakariko Ngumba died on 8th September, 2012 and the cause of action was land and survived the death of the appellant. The applicant is desirous of proceeding with the matter. That no prejudice shall be occasioned on the part of the respondent if the orders are granted.

3. I have considered the applications. This matter relates to the Estate of Laban Kago (deceased). A petition of letters of administration was filed by Beatrice Wakariko Ngumba (now deceased) in Succession cause No. 292 of 2007. A grant of letters of administration was issued on 17th January, 2008 and confirmed on 27th November, 2008. A protest was filed by the Respondent Millicent Wangechi. An appeal was thereafter filed by Beatrice Wakariko Ngumba who passed on before the appeal could be heard and determined. She passed away on 8th September, 2012 and an application for substitution was filed on 2nd May, 2017 and dated 28th April, 2017 by the applicant Jonathan Mugweru Kago which was withdrawn vide a letter by his advocate dated 15th May, 2017.

4. The issue which arises for determination is whether the suit has abated. The issue is governed by **Order 24** of the **Civil Procedure rules Cap 21 Laws of Kenya.** It is provided:-

Order 24, rule 1 of the **Civil Procedure rules**:

"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

Order 24, rule 3 of the **Civil Procedure Rules**:

(1) Where one or two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or 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."

This provision is couched in mandatory terms. It means that where a party is not substituted within a period of one year, the suit automatically abates by the operation of the law.

5. It is not in dispute that the Appellant passed away on 8th September, 2012. No application was filed to substitute her with within one year. A year later on 8th September, 2013 this appeal abated.The applicant appreciates this fact because he applied to withdraw the application to substitute the applicant in favour of the present application to revive the suit. The Court has discretion to extend the time for a good reason. The applicant is however, not seeking to extend the time as provided under **Order 24 rule (3) (2) (Supra)**.

6. The suit having abated the other remedy available is revival of the suit which is provided under **Order 24 rule 7 (2) Civil procedure Rules**. It is provided:

"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."

7. The applicant ought to have applied for extension of time to substitute the appellant. In a persuasive decision of the High Court, **R.E. Amburili J in Tirus Kiragu -V- Jackson Mugo Mathai** C.C. 1661/1985 where the applicant applied to be substituted in a suit which had abated, the Court stated that *'the application for substitution of the defendant was incurably defective and fatally incompetent and this Court shall not assume wide discretion to grant orders that are not available to the plaintiff as that would be tantamount to arrogating itself the jurisdiction it does not possess'.*

I am in agreement with the finding.

So just like extension of time, for the Court to revive the suit, it is a matter of the exercise of discretion and the party seeking such order must show sufficient cause for failure to continue with the suit within the time provided. This is based on the fact that once the suit has abated it is the end. There is no suit and if there is no suit there is nothing to hold on to unless the suit is revived by an order of the Court.

8. This brings me to the second issue in this application which is revival of the suit. The applicant Jonathan Murgweru Kago at paragraph 2 of the supporting affidavit depones that the deceased who is the appellant was his mother. That upon her death he instructed the former advocate who promised him he would take the necessary action to ensure that he is substituted in place of his mother. The advocate failed to do so and the appeal abated. He contends that the cause of action survived the death of the

appellant and the mistakes of his former advocate should not be visited upon him. The grant of letters of administration *Ad Litem* were issued on 29th September, 2015 in Succession Cause No. 161 of 2015 High Court Embu. He is contending that the matter involves land and therefore the suit should be revived as there will be no prejudice.

9. The Respondent contends that the averments by the applicant are not true. That contrary to the averments by the applicant the deceased appellant is not his mother as his mother is one Julia Wakauni Kago. The deceased appellant is his sister and he has therefore not come to Court in clean hands. The Respondent contends that the deceased appellant has her own children who are alive and who rank in priority with regard to the estate of the deceased appellant. The respondent avers that the delay was unreasonable and no sufficient reason has been given. That it is four years since the appeal abated and she continues to suffer prejudice as there are interim orders in force which prevents her from taking possession of the suit land as ordered by the Court.

10. The Applicant has not denied that he has lied on oath that the Appellant is his mother. The Petition for the grant of letters of administration shows that he was a son of the deceased Laban Kago …….He has not come to Court in clean hands. The Applicant is blaming the advocate. My view is that he has not shown sufficient reason to warrant this Court to order that the suit be revived. He has not shown anything plausible, convincing or tangible or even truthful which amounts to sufficient reason as envisaged in the rule. A mere allegation is not sufficient.

11. The grant of letters of administration ad litem were obtained in 2015 two years after the suit abated contrary to the averment by the applicant that it was within one year. He slept on his rights for too long and as he depones he was prompted to file this application after an application to dismiss the suit was filed. Equity does not aid the indolent. The case of **Penina Ouma Otieno 2015 eKLR** is not binding and the facts are distinguishable to the present case.

12. The issue of revival of suits has been addressed by the Court of Appeal. In a binding decision in **Said Sweilem Gheithan Saanum V Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR** the Court of Appeal held:

> ***"The fact that the dispute involved land which is claimed to be the only asset of the deceased's estate and is of high value per se ought to have been the more reason for both the appellant and her counsel to be vigilant. Other reasons advanced for the revival of the suit, such as the appellant's lack of literacy, poor health, advanced age, bereavement, depending on the circumstances may be relevant considerations but do not in themselves constitute sufficient cause, particularly in view of the fact that the appellant was represented by counsel……***
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> ***"****Justice shall not be delayed****" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases……..We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The Court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them."***

13. The Applicant blames the advocate which is my in my view is not sufficient reason. A party does not sit back, it is his case and he is expected to follow up with his advocate to ensure that he is not caught up by the operation of the law which he is expected to know as ignorance of the law is not a defence. The applicant is guilty of latches. Though the Appellant died in 2012, the applicant did nothing until 2015 when he obtained the grant *ad litem*. He came to Court to substitute the deceased appellant two years after the suit abated. He took his sweet time two years later to seek revival of the suit. There is no sufficient reason given and to rely on the above Court of Appeal decision it is no longer 'fashionable for parties to blame their advocates'. The party has a duty to ensure the expeditious disposal of his case unless there are sufficient reasons to be shown. The alleged mistake by the advocate is not sufficient

reason, the applicant had a duty to ensure that his quest for justice was on cause but not wait until it is too late. It is now a constitutional requirement that justice must be done to all irrespective of status. The respondent has a right to expeditious disposal of her case. She has waited to enjoy the fruits of judgment for nine years. She has suffered prejudice and this Court should not prolong her suffering.

14. **In conclusion**

There is no dispute that this appeal abated. The applicant has failed to satisfy the requirements for this Court to revive the suit. I find that the application to dismiss the appeal for having abated has merits. The application to revive the suit is without merits and is dismissed with costs. There is nothing for the applicant to pursue for the deceased appellant as an abated suit is no suit. It is an exercise in futility for him to substitute the appellant. The application to revive the suit and to substitute the appellant is without merits and is dismissed with costs. I award the respondents the costs in the application for dismissal of the appeal.

Dated and delivered at Kerugoya this 25th day of January, 2018.

L. W. GITARI

JUDGE

Ruling read out in open Court Mr. Miano holding brief for M/S Thungu for Respondent. No appearance for Applicant, court assistant Naomi Murage this 25th day of January, 2018.

L. W. GITARI

JUDGE

25.01.2018