



Tulip Properties Limited v Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka & Noor Mohamed Hassan & 3 others; Nur & 3 others (Plaintiff); Tulip Properties Limited & 3 others (Defendant) (Environment & Land Case 1403 of 2007) [2023] KEELC 22301 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22301 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1403 OF 2007**

**AA OMOLLO, J
DECEMBER 20, 2023**

BETWEEN

TULIP PROPERTIES LIMITED PLAINTIFF

AND

MOHAMMED KORIOU NUR, SIMON KIPRONO LABOSO, MACDONALD LIJOODI MARAKA & NOOR MOHAMED HASSAN 1ST PLAINTIFF

THE REGISTRAR OF TITLES 2ND PLAINTIFF

DAVID MWENJE 3RD PLAINTIFF

THE COMMISSIONER OF LANDS 4TH PLAINTIFF

AND

MOHAMMED KORIOU NUR PLAINTIFF

SIMON KIPRONO LABOSO PLAINTIFF

MACDONALD LIJOODI MARAKA PLAINTIFF

NOOR MOHAMED HASSAN PLAINTIFF

AND

TULIP PROPERTIES LIMITED DEFENDANT

THE RETIRED PRESIDENT H.E. D.T, ARAP MOI DEFENDANT

THE COMMISSIONER OF LANDS DEFENDANT

THE REGISTRAR OF TITLES DEFENDANT



RULING

1. This ruling is with respect to a Notice of Motion Application dated 21st June, 2023 brought by the 2nd Plaintiff/Applicant in the Counterclaim. He seeks the following orders:-
 - i. Spent
 - ii. That the Honourable Court be pleased to grant leave to the Applicants Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka and Noor Mohamed Hassan to revive the suit and/or Counterclaim dated 24th December, 2016 against Zehrabanu Janmohamed SC the Executrix of the Estate of Daniel Toroitich Arap Moi (Deceased), the 2nd Defendant in the Counterclaim and the time for substitution herein be extended.
 - iii. That upon the grant of prayer 2 above, that there be an order that Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka and Noor Mohamed Hassan are hereby granted leave to substitute Daniel Toroitich Arap Moi (Deceased) in this litigation with Executrix Zehrabanu Janmohamed SC.
 - iv. That upon substitution the Applicant be granted leave to make such filings, amend the Pleadings, file witness statements or such other filings to effect the substitution on the record.
 - v. That costs of this Application be in the cause.
2. The Application is supported by the grounds adduced on the face of it, as well as an Affidavit of Simon Kiprono Laboso, one of the 1st Defendants in the original suit and the 2nd Plaintiff in the Counterclaim. He deponed that Daniel Toroitich Arap Moi, the 2nd Defendant in the Counterclaim died on 4th February, 2020 and Zehrabanu Janmohamed was appointed as Executrix of his estate vide Nairobi High Court Succession Cause No. 405 of 2020, in the Matter of the Estate of Daniel Toroitich Arap Moi (Deceased).
3. He deposed that since the deceased passed on he was not substituted within a year as the law requires, the counterclaim abated under Order 24 Rule 7(2) of the Civil Procedure Rules. That the estate had been involved in the succession suit above-mentioned and the Applicants could not immediately establish that the executrix of the Estate of Daniel Toroitich Arap Moi had been appointed. He stated that litigation in this land case is still pending before the ELC where the Plaintiff has closed its case but the Defendants are yet to open their respective cases thus justice can still be done in the case. That it is in the interest of justice that the application be allowed as Daniel Toroitich Arap Moi occupied a central pivotal role in the suit, which seeks to unlock and settle rival claims over L.R. No. 14277.
4. The only party that opposed the Application was Zehrabanu Janmohamed SC the Executrix of the Estate of Daniel Toroitich Arap Moi by way of a replying affidavit sworn on 5th July, 2023. In the Affidavit, the said Respondent averred that the Defendant died on 4th February, 2020 which fact became a notorious public event, yet the 2nd Plaintiff took no steps to substitute the deceased with his legal representative. That the suit abated under Order 24 Rule 4(3) after no application was made to substitute within a year.
5. Ms Janmohamed deposed that the Application is misconceived for reason that it is brought over 3 years after the death of the deceased and her appointment as the Executrix which was in the public domain. She averred that no plausible reason has been given for failure to comply within time and further that the provisions of Order 24 Rule 7(2) have no relevance in this matter. In addition, that the matter



came up on various dates between 30th June, 2020 and 10th March, 2022 and the Plaintiffs have since closed their case, yet not once did the 2nd Plaintiff indicate he intended to substitute. Having elected to proceed with hearing of the case without substitution, the instant application is an afterthought.

6. On allegation that the 2nd Plaintiff and his counsel were unaware of her appointment as executrix is false, Ms Janmohamed deposed that Counsel filed an Affidavit of protest against Confirmation of Grant dated 26th April 2021 in Nairobi High Court Succession Cause No.405 of 2020, Estate of H.E Daniel Toroitich Arap Moi (Deceased) thus participating in the succession cause. She contended that the 2nd Plaintiff has not explained or justified the over 3-year delay and has failed in his duty of candour to the court.
7. She further stated that as an executrix without full knowledge of the case, she would be handicapped in her defence and right to fair hearing as she will be joined to proceedings that have proceeded for over 3 years. The prejudicial effect of the delay should be shouldered by the 2nd Plaintiff as he is the author of his misfortune. Further that the Application is devoid of merit as the 2nd Plaintiff has disentitled himself to this Honourable Court's discretion.
8. In response, the 2nd Plaintiff filed a supplementary affidavit on 24th July, 2023 stating that from the grounds adduced in support of the application, it met the threshold for the court to exercise its discretion in the interest of substantial justice. He deponed that the matter of the succession of the Deceased's estate was litigated elsewhere, it is not proved that it was a matter of public opinion or one where judicial notice is to be invoked. He denied knowledge of nor was he aware when the Executrix was appointed. That since the 2nd Defendant (Deceased) was alive when the counterclaim was filed and represented by Counsel, his estate could of its own motion equally have applied for the substitution, but it did not. That the averments in the Replying Affidavit are the act of a litigant who wants to benefit from his wrong.
9. He stated that the provision of law cited is relevant in dealing with the revival of an abated suit. Further that the parties are yet to conclude the original suit and the estate of the Deceased is yet to have a turn to advance their case in trial. In addition, both parties were obliged to pursue the substitution. The 2nd Defendant deposed that he did not speak for his Counsel Mr. Arusei but for himself that he was not aware of the appointment of the executrix having not been a party of the succession case and there is no proof that the said appointment was published in the Kenya Gazette or any newspaper.
10. The 2nd Plaintiff placed blame on the Executrix for being aware of this suit and failing to take the necessary steps to regularise though she equally had a duty under law to do so. That no party can be allowed to rely on his own wrongdoing to defeat the valid claim of another, and that the duty of candour fell on both parties. He deponed that had she been diligent, the Executrix would have moved to substitute and protect her client's interest. He further deponed that the Deceased had been represented in the suit by counsel since he was joined in 2013 and the alleged threat to right to fair hearing cannot arise.

Submissions

11. The Applicant filed submissions dated 26th July, 2023 and relied on the case of *Issa Masudi Mwabumba v Alice Kirenya Mutunga & 4 Others* [2012] eKLR where the court laid down factors to be considered in deciding whether to grant an extension of time. He also relied on *Wycliff Atieno Ogonji v Rose Awinja Ratemo* [2019] eKLR where the court allowed an application for substitution and extension after 5 years. The court explained that probable justification is balancing the interests of the parties lay in giving in allowing the application.



12. Counsel submitted that the reasons for the delay were set out in the submissions and they had no intention of defeating or obstructing the cause of justice. In addition, that Respondent's Replying Affidavit did not show any prejudice that they would suffer if the application was allowed. Counsel submitted that the Estate would get a chance to advance their case as the Defendants' case is yet to be opened. He argued that this being a dispute on land, it should be determined on merit as per the overriding objectives at Section 1A and 1B of the [Civil procedure Rules](#) which require court to render substantive justice.
13. Counsel also argued that the application for substitution can be made by any party to the suit ([Muriithi Ngenya v Gikonyo Macharia Mwangi & Another](#) ELC No. 221 of 2017 (eKLR). That under Oder 50 Rule 6 of the [Civil procedure Rules](#), the court had power to enlarge time whether on application or of its own motion as the justice of the case may require. Consequently, the Court has power to extend the time for substitution ([Mbaya Nzulwa v Kenya Power and Lighting Company Limited](#) (2018) eKLR). That in the instant motion, the Deceased held a central pivotal role as the root of the tile L.R. No. 14277 and the suit sought to unlock and settle the rival claims thereto.
14. On the contention that no man ought to be allowed to rely on his own wrong to defeat another's valid claim, the Plaintiff relied on the Court of Appeal's decision in [Abu Chiaba v Mohamed Bwana Bakari & 2 Others](#) [2005] eKLR. Counsel submitted that any inconvenience caused by the delay can be compensated by way of costs ([Commissioner of Income Tax v Kencell Communications Limited](#) [2013] eKLR).
15. The Plaintiff further submitted that procedural technicalities should give way to substantive justice. Relying on [Scooby Enterprise Ltd v Kisii County Assembly Service Board](#) [2016] eKLR and [Clerk Nairobi City County Assembly v Speaker Nairobi City County Assembly & Another; Orange Democratic party & 4 Others \(Interested Parties\)](#) [2019] eKLR.

Respondent's Submissions

16. The 2nd Defendant/Respondent filed submissions dated 26th July, 2023 wherein Counsel submitted that the suit against the Deceased Daniel Toroitich Arap Moi abated on 3rd February, 2021 with no explanation given for the inordinate delay in substituting the 2nd Defendant in the Counter-Claim.
17. Counsel submitted that from his analysis of the cases of [Bii v Chepkwony](#) (Environment & Land Case 53 of 2018) [2023] KEELC 16637 (KLR) (23 March 2023) (Ruling) [2023] eKLR, and [Aggrey Swaka Waswa v Patrick Omonge Khaemba; Thomas Mesback Omonge & 3 others \(Proposed Respondents\)](#) (2020) eKLR among other cases, he made the following observations: - The death of any Plaintiff does not cause the suit to abate if the cause of action survives. However, where a Defendant dies and the cause of action does not survive, an application must be made for the substitution of the said defendant(s) with their legal representative within one (1) year of such death, failure to which the suit automatically abates, and consequently the suit ceases to exist.
18. Upon abatement, no fresh suit can be brought on the same cause of action against the parties the suit abated. However, Order 24 Rule 7 (2) allows for the filing of an Application for extension of time for substitution of parties and for the revival of an abated suit, which is subject to the court's discretion. That an Applicant must satisfy the Court that he was prevented by sufficient, reasonable, convincing and truthful reason from seeking the substitution of a deceased litigant within the requisite period. The Applicant must come to court with clean hands as it is trite that those who come to equity must do equity.



19. Counsel was of the view that the Applicant's argument that the executrix and the Deceased's advocate on record were equally obliged to make the application for substitution was absurd. That the Plaintiff has a duty to sustain and prosecute a suit even where the Defendant chooses not to file a Defence (*Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 701). Consequently, Counsel cannot shift his obligation onto the executrix. That in any event participation by the Deceased's Advocate on record has been minimal at best. Counsel urged that compliance with the law and procedure that is mandatory for advancing claims is not a mere technicality, failure to do so can be fatal to the claim.
20. On the contention that the delay was a mistake that should be excused counsel submitted that, the requirement for Courts of law to exercise substantive justice as espoused under Article 159 of the [Constitution](#) is not a panacea for healing every sore in litigation. It is also not a licence for parties to ignore or contravene the law and rules of procedure and cited the Court of Appeal decision in [Nicholas Kiptoo Arap Korir Salat v IEBC](#) [2013] eKLR. It was counsel's submission that bringing this application after an inordinate delay is itself a prejudice, in addition to effect on her defence and right to fair hearing for lack full knowledge of the facts. ([Said Sweilem Gheithan Saanum v Commissioner of Lands \(being sued through Attorney General\) & 5 others](#) [2015] eKLR).
21. The Applicant then filed Supplementary submissions in response dated 2nd August, 2023. Counsel sought that the court expunge several paragraphs in the Respondent's submissions that he deemed an attack on Mr. Arusei and mentioned Mr. Arusei's name. Counsel submitted that the said Advocate was subject to Advocate-Client confidentiality at Sections 134 and 137 of the [Evidence Act](#). It was argued that the instant suit and the Deceased' Estate's Succession matter are two different suits which the said Advocate received instructions from separate clients. That the said Mr. Arusei was not a party to both suits and the Respondent's allegations totally disregard Advocate-Client privilege.

Analysis and Determination

22. This court has carefully considered all the arguments made in support of and against the application for revival of suits and for substitution of the deceased Defendant. The issue that arise for determination is:
 - a. whether the Application for revival of the suit and substitution is merited?
23. Despite the Applicant citing the wrong provision of the law, the court clearly has a duty to consider an application filed and deal with the substance. In any event, the situation here is not that he cited the wrong provision of the law, but that the Applicant failed to also cite Order 24 Rule 4 alongside Rule 7 as both of them are relevant in the instant application. For this reason, the court shall proceed to consider the application under both Order 24 rule 4 and Order 24 rule 7 of the [Civil Procedure rules](#).

Whether the Application for revival of the suit and substitution is merited?
24. The Deceased was joined to this suit by way of Counterclaim as the 2nd Defendant. It is not in dispute that he passed away on 4th February, 2020 and under Order 24 rule 4(3) of the [Civil Procedure Rules, 2010](#), since no application was made within one year made to cause the legal representative of the Deceased 2nd Defendant to be made a party to the suit, the claim against him abated.
25. However, Order 24 rule 7(2) under which the applicant has moved this court provides as follows;-

“The plaintiff or the person claiming to be the legal representative of the 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.”

26. The import of this provision is that if the Applicant shows sufficient cause why they could not continue the suit, the court has an obligation to revive the suit or set aside the dismissal order. In addition, Order 50 Rule 6, provides on the power to extend time thus:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

27. The Supreme Court in the case of *County Executive of Kisumu v County Government of Kisumu and 8 Others* [2017] e KLR set out the principles applicable in the consideration of an application for the extension of time, by stating that:

“It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the Nicholas Salat case to which all the parties herein have relied upon. The Court delineated the following as “the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”

28. The major reason given as the cause preventing or delaying the Applicant from substituting the Deceased is he could not immediately establish that the executrix had been appointed. The matter of the passing of the deceased was indeed well publicised, as was the appointment of the executrix of his estate. It is also clear that the Advocate on record for the Applicant was aware that a grant of probate had been issued and was pending confirmation, which he opposed on behalf of his client (in the succession proceedings).

29. This court was informed that another Advocate took over the matter from him and he is not aware of the present status. The Applicant has also informed this court that his Advocate was acting on behalf



of a different client in a matter very different from the instant suit. However, even if this court were to disregard the affidavit filed by the Applicant's counsel in the Succession cause, it still would not cost much to find out who the executrix was, and a simple google search would reveal who the legal representative of the estate was. There is also the gazette notice annexed to the Respondent's Affidavit regarding the application for Grant of probate, by which the parties would have had to or are presumed to know that the Deceased had appointed an executrix under his will.

30. Notably, the Applicant has been very evasive in letting the court know when he came across the information that Zehrabanu Janmohamed was the executor of the estate of the Deceased. That way, the court can consider whether the delay as between the date of obtaining that information and the date of filing the Application was reasonable.
31. This court has as shown above registered its doubts in the preceding paragraphs with regards to the reason given for its delay. Nevertheless, this being a matter involving land, and one where the root of title has been challenged, it is important that parties be heard and their cases be decided on merit. The Executrix has not denied the interest of the Deceased "in the root of the title" as averred by the Applicant.
32. The claim that the Executrix does not have the facts of the case and thus will be prejudiced is irrelevant, be it in this suit or in any other pending litigation where the Deceased was a party. Having taken over the matters of the Estate, she is now presumed to have brought herself upto speed and become aware of all matters relating thereto. Moreover, as has rightly been pointed out, the Deceased was always represented by Counsel in these proceedings. In any event, the hearing of the counter-claim is yet to commence.
33. Accordingly, for the reasons stated and in the interest of justice, this court is inclined to exercise its inherent powers by allowing for revival of the suit against the estate of the deceased defendant to ensure that the ends of justice are met. I am persuaded by the finding in the case of *Kenya Farmers Cooperative Union Limited v Charles Murgor* HCCC No. 1671 of 1994 the Court held that:

"It is to be noted that under Rule 8(2) of the same Order 23 the plaintiff can apply for an order to revive a suit which has abated; and if he proves that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit."
34. The upshot of the foregoing is that the application as allowed and orders granted:
 - i. That leave be and is hereby granted to the Applicants Mohammed Koriow Nur, Simon Kiprono Laboso, Macdonald Lijoodi Maraka and Noor Mohamed Hassan to revive the suit and/or Counterclaim dated 24th December, 2016 against Zehrabanu Janmohamed SC the Executrix of the Estate of Daniel Toroitich Arap Moi (Deceased), sued as the 2nd Defendant in the Counterclaim and the time for substitution herein is extended by a period of 21 days from the date of this ruling.
 - ii. That Daniel Toroitich Arap Moi (Deceased) is herewith substituted in this litigation with the Executrix of his estate, Ms Zehrabanu Janmohamed SC.
 - iii. That leave be and is hereby granted to the Applicants to make such filings, amend the Pleadings, file witness statements or such other filings to effect the substitution on the record within 21 days hereof.
 - iv. That the costs of this Application to the Respondent/Executrix.

RULING DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2023



A. OMOLLO
JUDGE

