



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.548 OF 2014

RUKWARO WAWERU.....PLAINTIFF (APPLICANT)

VERSUS

KINYUTHO RITHO.....DEFENDANT (DECEASED)

**PAUL KAINI KINYUTHO.....INTENDED SUBSTITUTED
DEFENDANT (RESPONDENT)**

RULING

1. By a plaint dated **16th July, 1993** and filed on **23rd July, 1993** the plaintiff filed the suit herein against the defendant, **Kinyutho Ritho** (hereinafter referred to as “the deceased) seeking the following reliefs/orders:-

- a) A declaration that the deceased holds the whole of L.R No.Thegenge/Kianjogu/175 (hereinafter “the suit property”) in trust for him;**
- b) A declaration that deceased’s dealings with the suit property were fraudulent;**
- c) An order of the cancellation of the title issued in the name of the deceased;**
- d) An order compelling the deceased to transfer the whole of the suit property to him;**
- e) In alternative to prayer 4 above a declaration that he (the plaintiff) has acquired the suit property by adverse possession.**
- f) The costs of the suit.**

2. Following the death of the deceased on **21st January, 2000** the suit herein, (by operation of law) abated on **21st February, 2001** (that is to say one year after the demise of the deceased and without him having been substituted as by law required).

3. On **22nd January, 2015** (nearly 15 years later), the plaintiff filed the notice of motion dated **21st January, 2015** seeking leave to revive the abated suit. Subject to grant of the leave sought, the plaintiff also seeks to substitute the deceased with his personal representative one **Paul Kaini Kinyitho** (the respondent herein).

4. The application which is brought under **Order 24 Rule 1, 4, (11), 7(2)** and **Order 51(1)** of the Civil Procedure Rules is premised on the grounds that the deceased who died on 21st January, 2000 has never been substituted; that the suit survived the deceased because the claim against him was based on trust.

The plaintiff contends that the deceased's beneficiaries deliberately refused to take out letters of administration with the intention of causing the suit to abate and that the deceased's beneficiaries took letters of administration in respect of the estate of the deceased in a court without jurisdiction.

5. The plaintiff argues that the respondent's intention of filing the petition for grant of letters of administration in a court far from where the suit property is situated was to make sure he (applicant) did not come to know about it.

6. The plaintiff explains that the respondent who appeared before the Land Registrar Nyeri for hearing of an application for removal of a caution he had placed against dealings with the suit property in 2008, failed to disclose to him that he had already become the administrator of the deceased's estate. For the foregoing reasons, the plaintiff contends that the delay leading to abatement of the suit was solely caused by the respondent and his family.

7. In support of the application, the plaintiff swore the affidavit filed alongside the application wherein he has deposed that he filed the suit herein because the deceased held the suit property in trust for him. He explains that following the demise of the deceased in 2000, his advocate made several attempts to have the deceased's beneficiaries substituted for the deceased in vain.

9. He explains that he later got to know that the deceased's family had filed succession proceedings in Naivasha Magistrate court in which proceedings, the respondent was appointed the administrator of the estate of the deceased. That following the appointment of the respondent as the administrator of the estate of the deceased, the respondent distributed the estate and got the caution he (plaintiff) had lodged removed without his knowledge. Thereafter, the respondent sold the suit property in disregard of the fact that he is in exclusive occupation of the suit property.

10. It is the plaintiff's case that he could not have proceeded with the suit because of factors beyond his control. In view of the foregoing, the plaintiff argues that the respondent should not be heard to say that the suit has abated or is time barred because he deliberately concealed what they were doing in order to defeat his interest in the suit property.

11. Explaining that he filed the current application immediately he got to know that the respondent had been appointed the administrator of the estate of the deceased, the plaintiff urges the court to allow the application.

12. In support of his case, the plaintiff has annexed to his affidavit the following documents:-

- a. **Copies of letters addressed to the deceased's advocates and his family members concerning the issue of substitution of the deceased, marked RW 1(a) (b) (c) and (d); and**
- b. **A copy of the confirmed grant, marked RW-2.**

13. In reply and opposition to the application, the respondent filed the replying affidavit sworn on **4th February, 2015** wherein he has, *inter alia*, deposed that he filed the succession cause in the Naivasha court because the deceased had properties in Nyandarua which falls within the jurisdiction of the Naivasha Senior Principal Magistrate Court; that no objection was filed against his petition for letters of administration of the estate of the deceased; that the question as to whether the letters of administration were obtained in a court without jurisdiction cannot be canvassed/discussed in the current proceedings and that after the grant issued to him was confirmed on **16th November, 2007** the estate of the deceased was shared amongst the sons of the deceased namely, Peterson Mbauni Kinyutho, David Gakara Kinyutho; Paul Kaini Kinyutho; Joseph Gakunga Kinyutho and John Ndungu Kinyutho.

14. The deponent has admitted that the suit property herein was subject of the said Succession Cause but deposed that he succeeded the said property in trust for himself and his brothers. Subsequently, he got registered as the proprietor of the said property in trust for himself and his brothers. That since 2000 when the deceased passed on, nobody has been substituted in his place and that the suit against the deceased abated after the expiry of one year from the date of his demise without the plaintiff making an application

for substitution as required by law.

15. With regard to the allegations that the plaintiff's advocate had written several letters to the beneficiaries of the estate of the deceased urging them to propose a person to be substituted with the deceased, the respondent contends that the plaintiff has not proved that the said letters were received by any of the deceased's beneficiaries. Further that the plaintiff had brought another application seeking to get him substituted (application dated 11th December, 2013) which he strongly opposed forcing the plaintiff to withdraw the same and file the current one.

16. Terming the current application defective, the respondent has deposed that **Order 24 Rule (11)** relied on relates to persons who have already been made party to the case and not persons intended to be made parties to the case as is the case in this application.

17. The respondent has also admitted that they have since disposed of the property and transferred it to the purchaser, **James Gichuki Kiretai**.

18. Pointing out that before they sold the suit property to the new proprietor there were no buildings thereon, but subsistence crops and/or any encumbrances affecting the property, the respondent argues that they lawfully disposed of the suit property.

19. Terming the delay in filing the current application quite inordinate, the respondent argues that the application militates against the spirit of the Limitation of Actions Act.

20. Concerning the allegation that the plaintiff is in exclusive possession of the suit property, the respondent has deposed that the plaintiff and his brothers stay on their father's piece of land at Wamagana Sub-location where they have settled with their families.

21. The respondent further argues that by acquiring and disposing of the suit property he did not commit any fraud.

22. With regard to the impugned grant, the respondent has deposed that the plaintiff has not applied to have it revoked or annulled.

23. In view of the foregoing, the respondent argues that the application is scandalous, frivolous, vexatious, devoid of merit and otherwise an abuse of the court process. For those reasons, the respondent urges the court to dismiss the application with costs to him.

24. When the matter came up for hearing, counsels for the respective parties agreed to have the application determined on the basis of the pleadings filed.

Law applicable to the application

25. **Order 24** of the Civil Procedure Rules which is the procedural linchpin of the application herein, provides in the relevant parts, as follows:-

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

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

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.

7(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(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.”

(emphasis supplied).

26. From the foregoing provisions, it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. See **H. J. Shah –versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd –versus- Kassam [1982] K.L.R. 458.**

27. In the case of **Soni –versus- Mohan Dairy [1958] E. A. 58**, it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period.

28. If I was to apply the reasoning of the Court in the above case, the Plaintiff in this case has to show sufficient cause why he did not apply for the substitution of the deceased Defendant within the period of one year provided by the law. In the instant case, the Plaintiff has stated that he was frustrated by the deceased’s beneficiaries who refused to respond to his advocates letters requesting them to nominate someone to be substituted for the deceased defendant. The plaintiff also blames the deceased’s beneficiary for having instituted the succession proceeding in respect of the suit property in a court without jurisdiction as far as the suit property is concerned.

29. Because of the said conduct of the defendant’s beneficiaries and/or representatives the plaintiff claims he could not bring the current application within the time contemplated in law or within a reasonable time.

31. In the case of **Phillips, Harrison & Crosfield Ltd –versus- Kassam [1982] E.A. 458, Hancox J** (as he then was) stated that where there is undue delay, an application for extension of time to revive an abated suit may be refused.

31. In the case of **Leonard Mutua Muteru vs. Benson Katela Ole Kantai & another (2014)e KLR F. Gikonyo J.**, stated:-

“...Now, the 1st defendant died on 2.1.2010. From the facts of and pleadings in this case, the 1st defendant is the principal party; the suit cannot be effectively proceeded with against the 2nd defendant alone. Accordingly, the personal representative of the 1st defendant ought to be made a party. That process is governed by rule 4 of Order 24 of the CPR. There are two important aspects of rule 4(1) of Order 24 of the CPR; 1) under rule 4(1) any party may apply; and 2) on such

application being made, it is the court which *shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.* The party applying just needs to establish the personal representative of the deceased defendant and the rest is left to the court's administrative mechanisms of case management. For purposes of rule 24 of the CPR, the personal representative of the deceased defendant is the one appointed in accordance with the Law of Succession Act. Rule 4(3) of Order 24 of the CPR, however, places a limitation period and consequences of failure to apply within the prescribed time.....”

Analysis and determination

32. Having considered the applicable law and the reasons advanced by the Plaintiff in this case, I do find that the Plaintiff has not shown sufficient cause why he was unable to make an application for the substitution of the deceased defendant within the period of one year as established by statute. The Plaintiff did not exercise due diligence to establish who the personal representative of the deceased were. Although there is evidence that letters of administration in respect of the deceased's estate were not obtained until sometime in 2007, that is not an excuse for the plaintiff to have failed to move the court within the time stipulated in law, at least for getting the deceased substituted or for extension of time within which the deceased defendant ought to have been substituted.

33. Although failure to revive the suit will have serious ramifications on the plaintiff who seemingly has been in occupation of the suit property, in that he is by dint of the provisions of **Order 24 Rule 7(1)** estopped from filing a fresh suit on the same cause of action, having found the explanation offered for the delay not to be persuasive, I can do no better than decline to grant the orders sought.

34. The upshot of the foregoing is that the application has no merit and is dismissed with costs to the respondent.

Dated and Signed at Nyeri this 26th day of March, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Ms Kahinga holding brief for Mr. Wachira for Applicant

No appearance for respondent

Lydia – Court Assistant