



**Njuki v Njoroge (Environment & Land Case 850 of 2007)
[2022] KEELC 99 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 99 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 850 OF 2007**

**SO OKONG'O, J
APRIL 21, 2022**

BETWEEN

GEORGE KIMANI NJUKI PLAINTIFF

AND

HANNAH NJOKI NJOROGE DEFENDANT

RULING

1. What is before the court is the Plaintiff's Notice of Motion application dated 18th January 2021. The Plaintiff (hereinafter referred to as "the Applicant") has sought the following orders;
 1. The Court be pleased to enlarge the time within which to make, file, hear and consider the application.
 2. The application be deemed to have been filed within the time stipulated under provisions of law.
 3. The Court be pleased to revive ELC No. 850 of 2007.
 4. Amos Njoroge Kimani and Peter Muthee Kamau be substituted as Defendants in place of Hannah Njoki (deceased).
 5. The suit proceeds for hearing on its own merit.
 6. Any other relief the court may deem fit to grant.
2. The application is supported by an affidavit sworn by the Applicant, George Njuki Kimani on 18th January 2021. In the affidavit, he has stated as follows: Sometimes in 1981, he purchased land measuring 3 acres from the Defendant, Hannah Njoki Njoroge, deceased (hereinafter referred to only as "the deceased") out of all that parcel of land known as Dagoretti/Mutuini/268 (hereinafter referred to as "the suit property"). The deceased and he were registered as co-owners of the suit property. He



owned 6/19 share in the suit property while the deceased owned 13/19 share. He took possession of his 6/19 share of the suit property and built his home thereon. In 1983, the deceased agreed to sell to him additional 1-acre portion of the suit property at a consideration of Kshs. 60,000/-. He added the additional land to the 3 acres that he purchased earlier and fenced the entire land. He has since then been in occupation of the entire portion of the suit property that he purchased from the deceased.

3. In the current suit, he seeks to be registered as the proprietor of the said additional 1-acre piece of land. He learnt that the deceased died on 16th October 2018. No one from the deceased's family was willing to substitute her in the suit. The suit was declared as having abated on 3rd December 2019. The only relative of the deceased known to him was Jane Wanjugu Kimani who was the deceased's daughter in law. His advocates filed a citation on 13th December 2019 calling upon the said Jane Wanjugu Kimani (hereinafter referred to as "the Citee") to accept or refuse Letters of Administration Intestate in respect of the deceased's estate. On 3rd December 2020, his advocates were served with the Citee's replying affidavit to which a grant of Letters of Administration Intestate in respect of the deceased's estate was attached. In the said Grant of Letters of Administration, the Respondents who are sought to be substituted as defendants herein in place of the deceased were appointed as the administrators of the estate of the deceased.
4. The Applicant has contended that he was not aware of the existence of the said Grant of Letters of Administration until 3rd December 2020 and has asked the court to grant the orders sought so that he may expeditiously prosecute the suit.
5. The response to the application:

The Respondents filed a Notice of Preliminary Objection dated 22nd June 2021 and a replying affidavit in opposition to the application. In the Notice of Preliminary Objection, the Respondents have urged the court to strike out the Applicant's application on the following grounds;

1. That the suit has abated by virtue of Order 24 Rule 4 (3) the [Civil Procedure Rules](#) since the Defendant died on 16th October 2018 and as such there is no valid suit before the court in which the Respondents can be substituted as Defendants.
 2. The suit which is sought to be revived is based on contract and is already time barred under Section 4 (1) of the [Limitation of Actions Act](#).
 3. The entire application is an abuse of the court process and a waste of the court's time and is solely meant to defeat the overriding objectives set out in Sections 1A and 1B of the [Civil Procedure Act](#).
 4. The application is misguided, bad in law, void ab initio, fatally defective and otherwise an abuse of the court process.
 5. The application is frivolous and vexatious and as such ought to be struck out.
6. The Respondents, Amos Njoroge Kimani and Peter Muthee Kamau swore a replying affidavit on 22nd June 2021 in which they averred as follows: The deceased died on 16th October 2018. The Applicant who is also a relative of the deceased was aware of the death of the deceased and participated in the funeral arrangements. During the funeral, it was agreed that the Respondents would file an application for Grant of Letters of Administration which they did and a Grant was issued to them on 9th December 2019. Apart from knowing of the death of the deceased, the Applicant also knew the deceased's immediate relatives. The Applicant did not have to wait for the suit to abate to seek its revival or to file Citation. The Applicant could also have contacted the deceased's advocate to find out the status of the administration of the estate of the deceased.



7. The Respondents have contended that two years and five months delay in bringing the present application is inordinate and deliberate. The Respondents have contended further that it is clear from the court record that the Applicant has not been keen to prosecute the suit having instituted the same in 2002 over a 1983 contract. The Respondents have pointed out that the suit had previously been dismissed for non-attendance but was reinstated.

The Submissions:

8. The application was argued by way of written submissions. The Applicant filed his submissions dated 19th July 2021. Relying on Order 24 Rule 4(1) of the *Civil Procedure Rules*, Section 2 of the *Civil Procedure Act* and *Trouistik Union International & Another v Jane Mbevu & another* [1993] KLR 230, the Applicant argued that a suit against a deceased defendant can continue against the deceased defendant's legal representative appointed by the court if a cause of action has survived a deceased defendant. The Applicant argued that since the Respondents were issued with Grant of Letters of Administration Intestate to the estate of the deceased, the suit herein should continue against them as legal representatives of the deceased.
9. The Applicant submitted further that the court has a discretion to extend time within which an application for substitution of a deceased party to a suit is to be made. The Applicant argued that the time for substitution of the deceased with her legal representatives lapsed as a result of no fault on his part as it was the family of the deceased who failed to apply for Grant of Letters of Administration Intestate. Relying on *Soni v Mohan Dairy* [1958] E.A 58, the Applicant argued that he had established sufficient cause to warrant the revival of the suit since the appointment of the deceased's legal representative was beyond his control.
10. The Applicant relied on Order 24 Rule 3(2) and Order 50 Rule 6 of the Civil Procedure Rules and *Ignatius Ndirangu v Njuguna Jesse Kuria* [2018] eKLR, *Francis Mureithi Gituku v Stephen Musa (Deceased) & 3 others; Joyce Wangui Iguanya & 2 others (1st Intended Defendant)* [2021] eKLR, *Mbaya Nzulwa v Kenya Power and Lighting Co. Ltd.* [2018] eKLR and argued that the court has a discretion to allow revival of an abated suit. The Applicant submitted further that no prejudice would be suffered by the Respondents if the application was allowed while the Applicant would suffer injustice should the application be refused. Further, relying on *James Mwaniki Kinuthia v Hemed Iddi Mukui & another* [2019] eKLR and Articles 50 and 159 of *the Constitution*, the Applicant argued that the court has a duty to act judicially to ensure fair hearing and to do substantive justice to the parties. The Applicant urged the court to allow the application.
11. In their submissions dated 24th June 2021, the Respondents argued that the Applicant is not entitled to the orders sought for various reasons. Relying on Order 24 Rule 7(2) of the *Civil Procedure Rules*, the Respondents argued that for the Applicant's suit to be revived he has to show sufficient cause to warrant such action. They relied on *Attorney General v Law Society of Kenya & another* [2017] eKLR, *Rukwaro Waweru v Kinyutho Ritho & another* [2015] eKLR and *Charles Mugunda Gacheru v Attorney General & another* [2015] eKLR for the definition of sufficient cause. It was submitted that the Applicant had not met the threshold set out in the cases aforesaid. This, it was argued was because the Applicant was a relative of the deceased Defendant and was well aware of her death and of her immediate relatives. He therefore did not have to wait until the suit had abated to pursue substitution. Further, he had the legal remedy of Citation available to him but did not pursue it within the stipulated period.
12. It was further submitted by the Respondents that the 2 years and 5 months delay in filing the present application for substitution was inordinate and deliberate. It was contended that the Applicant had



not been keen to prosecute the suit having filed the same in 2002 and despite knowing that the deceased was old and sickly. Relying on *Rebecca Mijide Mundoli & another v Kenya Power & Lighting Company Limited & 2 others* [2017] eKLR, *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR and *Joan Yatich Kilele v Daudi Cheptum Sawe* [2016] eKLR the Respondents argued that an order for revival of a suit should not be granted where the delay in substitution is occasioned by deliberate action on the part of the Applicant. Further, the Respondents submitted that in the instant case, reviving the suit would unduly prejudice the Respondents. They submitted that the matter was old and the deceased Defendant was the only one who could give a detailed account of the alleged sale and purchase of the subject property. The Respondents submitted that during her lifetime, the deceased had intimated that the matter was taking too long to her detriment since she was old and suffering from memory loss.

13. The Respondents submitted further that the Applicant's suit was time barred. The Respondents submitted that the suit herein was filed in 2002 and that the same was based on a 1983 contract. The Respondents submitted that pursuant to Section 4 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, the suit was time barred. Relying on *Dickson Ngige Ngugi v Consolidated Bank Ltd (Formerly Jimba Credit Corporation Limited & another)* [2020] eKLR, *Kenya Civil Aviation Authority v WK & 2 others* [2019] eKLR and *Nelson Machoka Keraro v Land Registrar Kisii & 3 others* [2019] eKLR the Respondents argued that where a court finds that a case is time barred, the same ought to be struck out.

Determination:

14.

Order 24 rule 4 of the Civil Procedure Rules provides as follows:

“ 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 subrule (1), the suit shall abate as against the deceased defendant.”

15. Order 24 rule 7(2) of the Civil Procedure Rules on the other hand provides as follows:

“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.”

16. Order 50 rule 6 of the Civil Procedure Rules provides that:

“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:

17. Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
18. It is not disputed that the deceased Defendant died on 16th October 2018 and that she was not substituted within 1 year as a result of which the Plaintiff’s suit against her abated. It is also not in dispute that the court has discretionary power to revive an abated suit and to extend time within which a deceased party to a suit is to be substituted. What is in dispute is whether the Applicant has shown sufficient cause to warrant the grant of the orders sought.
19. Sufficient cause was defined in *Attorney General v Law Society of Kenya & another* (Supra) that was cited by the Respondents as follows:

“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.
20. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”
21. I am satisfied that the Applicant has established sufficient grounds to warrant the grant of the orders sought. The Respondents were aware that this suit was pending. If they are to be taken seriously in their claim that delay in the prosecution of this suit is prejudicial to them, they should have taken the first opportunity to file an application for substitution of the deceased Defendant. There is no evidence that the Applicant was aware that the Respondents had been issued with a Grant in respect of the estate of the deceased. The mere fact that the Applicant was a relative of the deceased could not make him privy to the application for Grant that was made by the Respondents. There is no evidence that the Respondent’s brought to the Applicant’s attention the fact that they had obtained a Grant in respect of the estate of the deceased until after the Applicant had taken out a citation against a person whom the Applicant thought was entitled to a Grant. The present application was brought soon after the Applicant learnt of the Grant that had been issued to the Respondents. The filing of a Citation is evidence that the Applicant was keen on prosecuting the suit herein. In the circumstances, I am not persuaded that there was a delay in the filing of the present application. I am also not persuaded that justice cannot still be done to the parties in this matter. Since the Applicant’s claim is based on adverse possession, I find no merit in the Respondent’s claim that the suit is time barred. In any event, that issue goes to the merit of the claim and can only be determined after the suit is revived and the Respondents joined in the suit.
22. The upshot of the foregoing is that I find merit in the Applicant’s application and the same is allowed on the following terms;
 1. The suit herein is revived and the time within which the Applicant was to file an application for the substitution of the deceased Defendant is extended to and including the date when the application herein was filed.



2. Amos Njoroge Kimani and Peter Muthee Kamau as the legal representatives of the estate of the Defendant, Hannah Njoki, deceased are substituted as Defendants in this suit in place of Hannah Njoki (deceased).
3. The Applicant shall amend the plaint within 14 days from the date hereof to effect the substitution.
4. The new Defendants shall be at liberty to file an amended defence within 14 days of service of the amended plaint.
5. The costs of the application to be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 21ST DAY OF APRIL 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. J. P. Machira for the Applicant

Ms. Kamotho h/b for Mr. Kihika for the Respondents

Ms. C. Nyokabi - Court Assistant

