



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT BUNGOMA**

**CIVIL SUIT NO.128 OF 1994**

**ANDREW IRARU ABELLA (Suing as the Administrator Of the  
Estate of HABEL IRARU OKIMARU (DECEASED)).....PLAINTIFF/APPLICANT**

**VS**

**DAVID WANJALA WELIME.....DEFENDANT/RESPONDENT**

**RULING**

On 6/3/2009 this suit was dismissed for want of prosecution. It had been last in court on 12/11/2007 when it was adjourned because counsel for the Defendant had indicated that his client had passed on and the family had filed a succession cause to be able to obtain a grant before applying for substitution. On 25/11/2009 the Plaintiff filed the present application under Order 9 B rule 8 of the Civil Procedure Rules to have the order dismissing the suit for want of prosecution set aside and the suit reinstated for hearing and determination on merit. The affidavit in support was sworn by Alex George Etyang, advocate for the Plaintiff. The main ground was that the Plaintiff and his advocates had no notice of the fact that the suit had been listed for dismissal. It is clear from the replying affidavit sworn by Margaret Welime Wanjala that the fact that there was no notice is not contested. The dismissal of the suit was going to prejudice the Plaintiff who had filed it. He was entitled to the notice and without such notice the dismissal should be set aside as a matter of course.

It does not appear to be in dispute that the Defendant died on 13/11/2006 and had not been substituted by the time the suit was being dismissed for want of prosecution. Under Order 23 rule 4 of the then Civil Procedure Rules the suit abated as against the Defendant one year following his death, now that no application had been made for substitution.

It is also not in dispute that following the death of the Defendant his family failed to take out letters. The Plaintiff was on 4/10/2007 forced to cite one Mrs Margaret Welime Wanjala. Eventually, a consent was recorded that Margaret applies for a grant within one month and in default she be appointed as the legal representative of the estate. On 19/11/2008 she obtained a limited grant to be able to defend the suit. She, however, did not apply to be brought into the suit in place of the Defendant. The Plaintiff decided to file the application to have her come into the case. This is when he found the suit had been dismissed for want of prosecution. He, however, could not trace the file at the registry, despite various visits. When he found it he noted that the suit had been listed on the call over before the Deputy Registrar on 6/3/2009 and dismissed. He had not been served with the notice of the call over. Neither had his advocates been contacted.

It should also be pointed out that this suit begun on 11/11/1994. The Plaintiff claimed to be the registered proprietor of land parcel no.Kamukuywa Settlement Scheme/Naitiri/138 which the Defendant had allegedly unlawfully and forcefully occupied. The suit sought a declaration that the Plaintiff was the lawful owner of the parcel; the eviction of the Defendant there from; *mesne* profits; and a permanent injunction. The plaint was amended on 16/5/2006 after the Plaintiff had died and he was substituted by his son and personal representative. This is the new Plaintiff. The suit land measures about 15.5 hectares. The defence is basically that the Plaintiff sold the suit land to the Defendant and the land was formally transferred.

I have indicated that the order dismissing the suit for want of prosecution was made without notice to the parties and that the court has no discretion in the matter but to set aside the order. The application is allowed and the order dismissing the suit is set aside. Regarding the alleged futility of the order in view of the fact that the suit had abated, my view is that the law allows the revival of such a suit. I ask that the

Plaintiff be paid costs of the application.

Dated and delivered at Bungoma this 7<sup>th</sup> day of March, 2012 in the presence of the Applicant and Mr. Situma for the Respondent and Lilian Gimose the court clerk.

**A. O. MUCHELULE**  
**JUDGE**