



Chesire & 4 others v Kwambai & 3 others; Rono & 3 others (Interested Party); Sawe & another (Applicant) (Environment & Land Case 520 of 2012) [2022] KEELC 120 (KLR) (8 June 2022) (Ruling)

Neutral citation: [2022] KEELC 120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 520 OF 2012**

SM KIBUNJA, J

JUNE 8, 2022

BETWEEN

**ISAAC KIPKEMBOI CHESIRE 1ST PLAINTIFF
KIMUTAI CHESIRE 2ND PLAINTIFF
ISAAC KIMUTAI 3RD PLAINTIFF
MARY CHEPKOECH CHESIRE 4TH PLAINTIFF
JONAH KIBIWOTT CHESIRE 5TH PLAINTIFF**

AND

**JOSEPH KIMITEI KWAMBAI 1ST DEFENDANT
JOHN MALAN SAWE 2ND DEFENDANT
GROWELL FARM LTD 3RD DEFENDANT
LAND REGISTRAR, UASIN GISHU 4TH DEFENDANT**

AND

**ROSE CHERUIYOT RONO INTERESTED PARTY
HENRY BARMAO INTERESTED PARTY
KIBET KANGOGO INTERESTED PARTY
KIMAIYO RONO INTERESTED PARTY**

AND

**MARY TAPLILEI SAWE APPLICANT
MATILDA ROSE SAWE APPLICANT**



RULING

1. The Applicants filed the notice of motion dated the 12th April, 2021 seeking for orders that;
 - i. “Spent.
 - ii. The Applicants herein be granted leave to be enjoined as parties in this proceedings.
 - iii. The Applicants be granted leave to substitute the 2nd Defendant John Malan Sawe (dcd).
 - iv. The 2nd Defendant’s Defence and Counter Claim be reinstated.
 - v. Costs be provided for.”
2. The application is based on the nine (9) grounds on its face marked (1) to (9) and supported by the affidavits sworn by Matilda Rose Sawe and Mary Tapulei Sawe, the 2nd and 1st Applicants respectively, on the 12th April 2021.
2. The application is opposed by the 1st Plaintiff through the three (3) grounds of opposition dated the 8th March, 2022 inter alia that the application offends the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules, 2010 which prescribes that an application of this nature must be filed within one year; that as the 2nd Defendant died on the 13th September, 2018, this application ought to have been filed by 13th September, 2019; and that the Applicants obtained Limited *Grant Ad Litem* on the 13th May, 2020 and the delay in filing the application on the 12th April, 2021 is untenable, unreasonable and inordinate.
3. The application is opposed by the Isaac Kimutai, 3rd Plaintiff, through the replying affidavit sworn on the 11th May, 2021 in which he among others deposed that the Applicants were aware of the existence of this suit as Matilda Rose Sawe, vide the application dated 29th February, 2016 applied to be substituted but her application was dismissed; that when the beneficiaries of the 2nd Defendant failed to apply for substitution within 12months, their interests in the suit property ceased as the 2nd Defendant’s defence and counter claim have since abated.
4. The application is also opposed by Mary Chepkoech Chesire and Jonah Kibiwott Chesire, the 4th and 5th Plaintiffs, through their replying affidavits sworn on the 8th March 2022 and 7th March, 2022 respectively, in which they inter alia deposed that; the Applicants had knowledge of the existence of this suit as Matilda Rose Sawe had through the application dated 29th February, 2016 applied to be substituted but the same was dismissed on 29th April, 2016, that the Applicants’ interests in the suit land ceased after 12months from the 2nd defendant’s death when they failed to file an application to substitute the 2nd Defendant, and as a result his Defence and Counter Claim have since been abated and should not be reinstated; that the Applicants are dishonest in their assertion that they only learnt about the existence of the suit long after the 2nd Defendant had passed on, as the true position is that the Applicants were aware that this suit exists from February, 2016; that after the Applicants obtained a grant ad litem on 12th May, 2020 they filed this application for substitution April, 2021 and they have not given any explanation for the delay in filing the application; that the law provides that such an application be made within 1 year of the death of a party; that they will be prejudiced in the event that the Court allows the application as the matter has progressed greatly.



5. The 1st Defendant's counsel indicated to the Court that the 1st Defendant is not opposed to the application herein.
6. That after the court gave directions on filing and exchanging submissions on the application, the learned counsel for the Applicants filed theirs dated the 1st November 2021, and 18th March 2022. The 3rd and 4th Plaintiffs filed their submissions dated the 4th April 2022 and 22nd April, 2022 respectively. The learned counsel for the 1st Plaintiff indicated to the court that the 1st Plaintiff would not file submissions to the application, while that for the 1st defendant informed the court that his was not opposed to the application.
7. It is the Applicants submissions that the two (2) years delay in filing the instant application was occasioned by the fact that they were not aware of the existence of this claim after the 2nd Defendant's demise on 13th September, 2018. That after getting a special limited grant, the Applicants, who are wives of the deceased, filed the instant application seeking to substitute the 2nd Defendant, and to reinstate the 2nd Defendant's Defence and Counter Claim that had abated. The Applicants referred to Order 24, Rule 4 of the Civil Procedure Rules, which provides the procedure in case of death of one of several defendants or of sole defendant, and urged the court to allow their application on the strength of Order 24, Rule 3(2) which provides for the extension of time within which such an application may be filed in the event that the 12month period lapses. Their counsel referred to the decision in the case of Mbaya Nzalwa v Kenya Power & Lighting Co. Ltd (2018) eKLR, where the Court held as follows:

“In this matter it cannot be denied that the suit has abated. An abated suit is non-existent (sic) prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts & justification disclosed to have led to the delay and abatement.

I hold their (sic) view that under the provision to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived.

... I will not punish the applicant and the beneficiaries to the estate for failure by the delay as well as failure to seek revival of the suit. Rather I will adopt the court duty to sustain claim for purposes of them being heard on merits.

I invite the intrinsic owner of the court to administer justice devoid of technicalities as well' as the overriding objective of the court and understand the applicant to plead that he suit be heard on merits... I allow the application to have the applicant substitute for the deceased plaintiff. Having done so I further order that the suit be revived for purposes of being heard on merits.”

The Applicants submitted that the hearing of the main suit had not commenced, and failure to grant the orders sought in this application will result in a situation where the deceased's estate may be evicted without being granted a hearing, which action would result in the violation of the provisions of Article 159 of the Constitution of Kenya, 2010.

8. The 3rd Plaintiff submitted that the Applicants are misleading the Court by stating that they were not aware of the existence of this suit, yet the 2nd Defendant was represented by Counsel. That the Applicants had filed an application dated 29th February, 2016 seeking substitution, and further that the 3rd Plaintiff personally visited the late Sawe's family to ask the Applicants to hasten the substitution process after the suit was scheduled for hearing of the main suit on 12th, 13th and 14th February, 2019.



That the 3rd Plaintiff submitted that the case has really progressed, and as such the parties should not be held at ransom by the Applicants who want to unnecessarily delay the process in this suit that has been in Court for the last 13 years. That the Applicants assertion that they risk eviction from the family land without a hearing is misleading because the Deputy Registrar's Report after the site visit indicates that the Chesire Family is in effective occupation of the suit land.

9. The 4th Plaintiff submitted that the Applicants prayer for substitution is time barred as the same cannot issue after the lapse of 12 months. That the 4th Plaintiff further submitted that an order for substitution cannot be issued outside the stipulated period without an order of revival of the suit being made. That the 2nd Applicant was aware of the existence of the instant suit, as she deponed at paragraph 4(c) of her supporting affidavit sworn on 16th June, 2021 that she sought substitution on account of the 2nd Defendant's failing health, an indication she was aware of the existence of this suit. The 4th Plaintiff urged the Court to decline to grant the orders sought by the Applicants as they were issued with a grant ad litem on 12th May, 2020 but they did not apply to revive the abated suit until April, 2021 and they have not provided reasons for the delay in filing the instant application.
10. The following are the issues for the court's determinations;
 - a. Whether the Applicants have made a reasonable case for the prayers sought of reinstatement of the 2nd Defendant's Amended Defence and Counterclaim, and substitution to be granted.
 - b. Who pays the costs in the application.
11. The court has carefully considered the grounds on the application, grounds of opposition, affidavit evidence filed, submissions by the learned counsel, superior courts' decisions cited thereon, and come to the following determinations;
 - a. That from the record, I note that pursuant to the leave granted on the 17th April, 2013, the 1st and 2nd Defendants filed Amended Statement of Defence and Counter Claim dated 29th April, 2013. The existence of a counterclaim by the 2nd Defendant entitled him to be treated like a Plaintiff when prosecuting his counterclaim against the those named as defendant(s). The law that is operative in a situation where there is need to substitute a deceased Plaintiff or Defendant is Order 24, Rule 3 and Rule 4 of the [Civil Procedure Rules](#) that provides as follows.

Order 24, Rule 3

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

Order 24, Rule 4 (1) and (3)

- “(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) ...
- (3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

- b. That the Applicants stated that the reason they failed to file the application for substitution within the prescribed timeline is because they were not aware of the existence of the suit herein until late. The 3rd, 4th and 5th Plaintiffs submitted that the Applicants are not being truthful in claiming that they were not aware of the existence of this claim as they had filed an application in court earlier in 2016. The court has perused the notice of motion dated the 29th February, 2016 filed through counsel for the 1st and 2nd defendants plus the ruling delivered on the 29th April, 2016. The court takes judicial notice of the fact that there is nothing in that application and the ruling to confirm that the Applicants before the court in the current application were then aware of the existence of this case. That indeed the supporting affidavit to the application dated the 29th February, 2016 that sought for the 2nd defendant to be substituted by the 2nd Applicant had been sworn by counsel then on record for the 1st and 2nd defendants, and not by any of the Applicants now before the court. That the court is therefore, not persuaded that the Applicants were aware of the existence of this suit as at 2016, as alleged by the Plaintiffs.
- c. That the Applicants have sought for an order of reinstatement of the 2nd Defendant’s Defence and Counter Claim. Order 24, Rule 7 provides as follows:

Effect of abatement or dismissal [Order 24, rule 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.”



The Court of Appeal in *Attorney General v Law Society of Kenya & Another* [2013] eKLR made the following observation:

“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. 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.”

The Plaintiffs have urged the court to decline to grant the orders sought in the application as the Applicants filed their application approximately 3 years after the death of the 2nd Defendant. That such a delay was inordinate and inexcusable. That it is the responsibility of the courts to determine what is considered to be inordinate and inexcusable delay in filing an application like the instant one, on a case to case basis. That depending on the specific circumstances of a case, a delay of one month, or 3 years may be considered to be inordinate or otherwise.

- d. That it is not apparent as to the specific time the Applicants got to know of the existence of this case, and further the Applicants have not given sufficient explanation on why the application was not filed within 12 months after the 2nd Defendant’s death as required under Order 24, Rule 3 and Rule 4 of the Civil Procedure Rules, or soon after obtaining the limited grant in 2020, but even so, the court is of the view that this is an appropriate case to exercise its discretion under Articles 50 and 159(2)(d) of *the Constitution* to do substantive justice. To decline to grant leave to the Applicants to substitute the 2nd Defendant, and by extension to decline to grant an order for the reinstatement of the 2nd Defendant’s Defence and Counter Claim, shall have the effect of denying the Applicants an opportunity to have the 2nd Defendant’s counterclaim heard and determined on its merits. That in the case of Joseph *Kinyua v Go Ombachi* [2019] eKLR the court made the following observation:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of *the Constitution*. Article 50 coupled with article 159 of *the Constitution* on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such act are comparable only to the proverbial “Sword of the Dancles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

The court takes cognisance of the fact that the last oral testimonies were taken in 2016 when the 2nd Defendant was alive, as he is reported to have passed on later in 2018. The court is not persuaded by the Plaintiffs’/respondents’ contention that they would suffer prejudice if the court allows the instant application. The court finds no sufficient reasons have been presented



upon which to send the Applicants away from the seat of justice without granting them an opportunity to defend the Plaintiff's claim and to prosecute their counterclaim.

- e. That in the circumstances of this matter, the court is of the considered view that justice of the case will better be served by an order that the costs in the application be in the cause, the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
12. That having found merit in the Applicants application dated the 12th April 2021, the same is allowed in the following terms;
- a. That the 2nd Defendant's Amended Defence and Counterclaim dated the 29th April 2013 be and is hereby revived and/or reinstated.
 - b. That the Applicants be and are hereby allowed to substitute the 2nd Defendant who has since passed on.
 - c. That the Applicants are directed to file and serve a Further Amended Defence and Counterclaim and witness statements within the next twenty-one (21) days, limited to giving effect to order (b) above on the substitution.
 - d. That all the other parties to comply with Order 11 of the Civil Procedure Rules within 30 days after service.
 - e. That the costs be in the cause.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 8TH DAY OF JUNE, 2022

S.M.KIBUNJA,J.

ENVIRONMENT & LAND COURT - ELDORET

In The Virtual Presence Of;

Plaintiffs: 3rd Plaintiff present in person.....

Defendants:absent

Interested Parties:....Mr. Rotich for Njuguna for 1st Plaintiff and holding brief for Koech for 4th Plaintiff. Mr. Wafula for 1st Defendant, Mr. Odongo for 4 th and 5th Defendants, Mr. Momanyi for interested parties and Mr. Kipnyekwei for Applicant.

COURT ASSISTANT: ONIALA

S.M.Kibunja,J.

