



Kemunto Okongo alias Truphena (Suing as the Legal Representative of the Estate of Peter Okong’o Kimuma) v Okong’o & another (Environment & Land Case 6 of 2018) [2022] KEELC 2650 (KLR) (20 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2650 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 6 OF 2018
JM ONYANGO, J
JULY 20, 2022**

BETWEEN

**KEMUNTO OKONGO ALIAS TRUPHENA PLAINTIFF
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PETER
OKONG’O KIMUMA**

AND

**ALEX MOGAKA OKONG’O 1ST DEFENDANT
GEOFFREY OMBOYE ONTERE 2ND DEFENDANT**

RULING

1. This ruling determines the Plaintiff’s application dated May 26, 2021 seeking the following orders:
 - a) That this Honourable Court be pleased to revive this suit which stood abated on the December 10, 2019.
 - b) That consequent to paragraph (a) above, this Honourable Court be pleased to enlarge time for substitution of the Applicant herein as the Plaintiff instead of Peter Okong’o Kimuma-Deceased
 - c) That Kemunto Okong’o alias Truphena be allowed to prosecute this suit in place and on behalf of the estate of Peter Okong’ Kimuma.
 - d) The costs of this application be provided for.
2. The application is premised on the grounds stated on the face thereof and the Supporting Affidavit of Kemunto Okong’o alias Truphena. The main grounds upon which the application is based are that the Plaintiff died on December 10, 2018 and the Grant of Letters of Administration in respect of the



estate of the deceased was not obtained until May 6, 2021. The Applicant has explained that the delay was occasioned by the fact that the Chief Gensonso Location, Kisii County had refused to issue the Applicant with the requisite identification letter to enable her file the Succession Case until she was summoned by the Court and directed to do so.

3. The application is opposed by the Respondents through the Replying Affidavit of Geoffrey Omboye Ontere, the 2nd Respondent herein. In his affidavit, he points out that the suit has abated and that the Applicant did not file the application for substitution within one year after the demise of the Plaintiff. He contends that the Applicant has not demonstrated that she did not know that the Plaintiff had instituted a suit in court to warrant the discretion of the court being exercised in her favour.
4. The court directed that the application be disposed of by way of written submissions and both parties filed their submissions, which I have considered.

Issues For Determination

5. There are two issues for determination:
 - i. Whether the court should revive the suit herein which has abated.
 - ii. Whether the Applicant should substitute the late Peter Okong'o Kimuma as the Plaintiff.

Analysis And Determination

6. Order 24 Rule 3 of the [Civil Procedure Rule](#), 2010 provides as follows:

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 to 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 costs which he may have incurred in defending the suit to be recovered from the estate of the deceased.

Provided the court may for good reason on application, extend time.

7. Order 24 Rule 7 further provides that:

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, 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 with 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.

8. In the instant case, it is not in dispute that the Plaintiff died on December 10, 2018, about 8 months after the suit was filed. Therefore, the application for substitution ought to have been filed before



December 10, 2019. The failure to file the application within one year means that the suit automatically abated on December 10, 2019. This application has been filed one and a half years after the suit abated.

9. In her Supporting Affidavit, the Applicant has explained that the reason for the delay in filing the application for substitution was that the Chief of Gensonso Location where the deceased hails from had refused to issue her with the necessary letter identifying her as the widow of the deceased to enable her file the Succession Case. It is only after the Court intervened and summoned the Chief that he was able to issue the said letter after which the Applicant obtained a Grant *vide* Kisii CM Succession Cause No. 620 of 2019.
10. Order 24 Rule 7 gives the court the discretion to revive an abated suit like the instant one upon sufficient cause being demonstrated by the Applicant as long as the cause of action survives the deceased. This being a land matter, the cause of action survived the deceased. The Respondent has not challenged the reason given by the Applicant for the delay and I find that the same is sufficient in the circumstances.
11. Consequently, I find merit in the application and I allow it and make the following orders:
 - a. The suit herein which abated on December 10, 2018 is hereby revived.
 - b. The time for substitution of the Plaintiff is hereby enlarged.
 - c. The original Plaintiff Peter Okong'o Kimuma - Deceased shall be substituted by his widow and legal representative Kemunto Okong'o alias Truphena.
 - d. The pleadings shall be amended to reflect the name of the new Plaintiff within 14 days.

The costs of the application shall be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

