



**Ndigirigi v Mithamo (Environment and Land Case Civil Suit  
11 of 2019) [2022] KEELC 13520 (KLR) (21 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13520 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 11 OF 2019  
SO OKONG'O, J  
SEPTEMBER 21, 2022**

**BETWEEN**

**JOSEPH MAINA NDIGIRIGI ..... APPELLANT**

**AND**

**ESTHER GATHONI MITHAMO ..... RESPONDENT**

**RULING**

1. What is before the court is the Notice of Motion application dated July 12, 2021 brought by Priscilla Wanjiru Ndungu (hereinafter referred to only as “the applicant”) the legal representative of the estate of the deceased appellant, Joseph Maina Ndigirigi. The applicant has sought the following orders;
  1. That the time limit for the substitution of the deceased appellant be extended.
  2. That the deceased appellant be substituted with the applicant.
  3. That the record of appeal be amended accordingly.
  4. That the costs of the application be in the cause.
2. The application which is supported by the affidavit of the applicant sworn on July 12, 2021 has been brought on the grounds that the cause of action in the appeal survived the deceased and that the applicant has been issued with a limited grant of letters of administration in respect of the estate of the deceased. The applicant has averred that the deceased died on April 27, 2020 and the limited grant aforesaid was issued to her on June 4, 2021 after a lapse of 1 year from the date of the death of the deceased. The applicant has averred that she is seeking leave for the substitution of the deceased appellant so that she can proceed with the appeal and that the respondent would not suffer any prejudice if the application is allowed. The applicant has averred that the delay in the filing of the application was not intentional. The applicant has averred that it would serve the interest of justice if the application is allowed.



3. The application is opposed by the respondent through a replying affidavit sworn on August 27, 2021. The respondent has averred that the application is frivolous, bad in law and an abuse of the process of the court since the suit has already abated. The respondent has averred that the applicant has failed to show sufficient reason for the delay in obtaining a limited grant of letters of administration. The respondent has contended that the delay on the part of the applicant to obtain a limited grant of letters of administration was deliberate and the same was intended to delay the conclusion of the appeal. The respondent has averred that she is 91 years old and that the delay in the conclusion of the appeal is affecting her emotionally and health wise. The respondent has urged the court to dismiss the applicant's application.
4. The application has been argued by way of written submissions. The applicant filed submissions on April 19, 2022. The applicant has submitted that the cause of action in the appeal survived the deceased appellant and that she has furnished the court with sufficient grounds to warrant the exercise of the court's discretion in her favour. The respondent filed submissions dated May 9, 2022. The respondent has submitted that the applicant has not shown sufficient cause for granting the orders sought. The respondent has submitted that the burden of showing sufficient cause or good reason was on the applicant and that the applicant failed to discharge that burden. The respondent has submitted further that the appeal having abated, it would serve no purpose to extend time within which the appellant should be substituted as such extension would not revive the appeal.

**Determination:**

5. Order 24 rule 3 of the [Civil Procedure Rules](#) provides as follows:
  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 subrule (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.”
6. Order 24 rule 7(2) of the [Civil Procedure Rules](#) 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.”
7. Order 24 rule 9 of the [Civil Procedure Rules](#) provides as follows:
  9. In the application of this Order to appeals, so far as may be, the word plaintiff shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.”
8. It is not disputed that the appellant died on April 27, 2020 and that he was not substituted within 1 year as a result of which the appeal abated on April 27, 2021 by operation of law. On the abatement



of the appeal, it ceased to exist unless revived under Order 24 rule 7(2) of the Civil Procedure Rules. The application before me is not seeking the revival of the appeal. It seeks the extension of time within which to apply for substitution of the deceased appellant under the proviso to Order 24 rule 3(2) of the Civil Procedure Rules. I am in agreement with the respondent that the suit having abated, it was necessary for the applicant to seek the revival of the same before seeking extension of time within which to apply for substitution. All the prayers could be sought in a single application. As things stand now, the court cannot make an order for substitution in an abated appeal. This court abhors technicalities. I am of the view that the applicant should have taken steps as soon as this defect in her application was raised to seek leave to amend the application and add a prayer for the revival of a suit. Since this was not done, I am in agreement with the respondent that the application is defective and incompetent.

9. The finding above would have been sufficient to lay the applicant's application to rest. For the completeness of this ruling, I will consider the merit of the application so that I am not accused of determining the application on a mere technicality. As stated earlier, the deceased appellant died on April 27, 2020. The applicant did not file an application for a grant for the purposes of substituting the deceased appellant until 2021. It is not clear in which month in 2021 the application for a limited grant was filed. The same was however not issued until June 4, 2021. Even after obtaining the grant, the applicant took more than a month to file the present application on July 12, 2021. It is not disputed that this court has a discretionary power to extend time within which an application for the substitution of a deceased appellant can be made. What is disputed is whether the applicant has shown sufficient cause to warrant the grant of the extension sought. Sufficient cause was defined in Attorney General v Law Society of Kenya & another [2017]eKLR that was cited by the respondent 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.

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."

10. I am not satisfied that the applicant has shown sufficient cause to warrant the extension of time within which to file an application for the substitution of the deceased appellant. From the history of the dispute both in the lower court and in the present appeal, appellant appears to have been dragging his feet at every stage. The orders sought are discretionary. This court cannot exercise its discretionary powers in aid of an indolent litigant. The applicant did not give any convincing reason why an application for a limited grant was not made in good time to enable the filing of the application for substitution within the prescribed time.
11. I am in agreement with the respondent that the orders sought if granted would be prejudicial to her. The dispute between the parties has been going on since 2010. At the age of 91, I am in agreement with the respondent that it would be in her best interest that there be a closure to the dispute. In order to satisfy myself that no injustice would be suffered by the applicant if the present application is disallowed, I have perused the record of appeal before the court. I have noted that in his claim in the lower court, the appellant had sought judgment for a sum of Kshs. 850,000/- plus interest and in the alternative, an order that the respondent surrenders to him a portion of Title No. Karatina/Block 1/398 measuring 0.0248 of a hectare. In a judgment delivered on March 24, 2016, the lower entered judgment for the appellant in the sum of Kshs. 800,000/- together with interest at court rates and costs of the suit. The lower court stated that since the appellant had succeeded in his main prayer in the suit, it was not necessary to consider the alternative prayer for specific performance.



12. The present appeal is all about the lower court's failure to grant the appellant the alternative prayer for specific performance. The respondent has contended that the decretal sum of Kshs. 800,000/- has been deposited in court and is available for collection by the appellant at any time. That having been the appellant's main prayer in the lower court, I am unable to see any serious prejudice that would be suffered by the applicant if the orders sought are not granted.
13. The upshot of the foregoing is that the applicant's application dated July 12, 2021 has no merit. The application fails both on merit and on the technical point that the orders sought cannot be granted on an abated appeal. The application is dismissed with costs.

**DELIVERED AND DATED AT NAIROBI THIS 21<sup>ST</sup> DAY OF SEPTEMBER 2022**

**S. OKONG'O**

**JUDGE**

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

Ms. Oele for the Applicant

Mr. Gikonyo for the Respondent

Ms. C.Nyokabi-Court Assistant

