



Koilel v Moshoro Group Ranch &12 others (Environment & Land Case 589 of 2017) [2022] KEELC 13567 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13567 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 589 OF 2017
CG MBOGO, J
OCTOBER 19, 2022**

BETWEEN

PARMERES OLE KOILEL PLAINTIFF

AND

MOSHORO GROUP RANCH &12 OTHERS DEFENDANT

RULING

1. Before this court for determination is a Notice of Motion application dated November 9, 2021 expressed to be brought under Order 24 Rule 3, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) seeking the following orders: -
 - i. That the plaintiff herein Parmeres Ole Koilel (deceased) be substituted with Seketo Ene Koilel who is the legal representative of the estate of the deceased.
 - ii. That the costs of this application be costs in the cause.
2. The application is premised on the grounds that the plaintiff died on August 17, 2013 and that Seketo Ene Koilel is the legal representative and is clothed with legal authority to represent the deceased's estate in these proceedings.
3. The application is supported by the affidavit of Seketo Ene Koilel sworn on even date. The applicant deposed that on October 13, 2021 she obtained a Special Limited Grant of the estate of the deceased (plaintiff) and is thus clothed with legal authority to represent the estate of the deceased in these proceedings which touch directly on the estate of the deceased and as such it is in the interest of justice that the said estate be adequately represented in these proceedings, for this reason she prays that she be joined as a party in place of the deceased who was the plaintiff.
4. The respondents filed grounds of opposition dated November 29, 2021 in opposition to the application on the following grounds: -



1. That the application is bad in law, invalid and statute barred having been filed over 7 years after the death of the plaintiff.
 2. That the purported grant of letters of administration Ad Litem was obtained on October 13, 2021 the court had given 60 days from the date of the ruling which was delivered on April 8, 2021 to obtain the required grant but that was not complied with.
 3. That the alleged application and the grant of letters of administration was presented to court on September 23, 2021 which was long after the expiry date of the order.
 4. That Order 24 Rule 7 states that where a suit abates or is dismissed under this order should not be reinstated therefore the application is defective ab initio, misconceived and frivolous.
 5. That the suit automatically abated after 12 months of the demise of the plaintiff hence there is no suit in which to substitute the applicant.
 6. That there is no prayer for revival of the abated suit in this application.
 7. That this application is made after an inordinate, unexplained and inexcusable delay of about 7 years since the demise of the Plaintiff. Equity aids the vigilant and not the indolent. It follows that this application must fail.
 8. That the orders sought herein are incompetent.
 9. That the application is guilty of laches.
 10. That the court lacks jurisdiction to issue the orders prayed for in the application.
 11. That the application had been filed by the applicant merely to delay the course of justice.
 12. That in light of the foregoing the respondents pray that the application be dismissed with costs to the respondents.
5. The respondents filed a replying affidavit sworn on December 6, 2021 by Kinki Ole Lekanuma koilele. The respondents deposed that the deceased sued the 2nd -13th defendants on July 13, 1998 and thereafter passed away on August 17, 2013. The respondents further deposed that the applicant claims to be the wife of the deceased all this time and never applied for letters of grant of administration until September, 2021. Further, that this court erroneously granted her 60 days to file the same but filed the instant application and annexed a grant obtained past the date given by the court. As such, the said application is opposed by the 2nd-13th defendants on grounds of opposition for the reason that the suit abated on August 17, 2014 and thus the applicant is not deserving of the court's discretion as no reason for delay has been given.
 6. The applicant filed written submissions dated June 3, 2022. The applicant submitted that in support of her application, she has produced a copy of death certificate and a limited grant for special purposes and that this being a land matter, the court ought to allow the substitution of the deceased with the wife and that this will not prejudice any party.
 7. The respondents did not file written submissions. Be that as it may, I have analysed the application, the grounds of opposition, the replying affidavit and the written submissions filed by the applicant and the issues for determination are as follows: -
 - a. Whether the application is bad in law, invalid and statute barred.
 - b. Whether an order for substitution can be made upon an abated suit.



8. I understand the respondents' grounds of opposition 4, 5, 6 and 10 to fault the application for failure to pray for revival of the abated suit in this application. The law as I understand is that the provisions on the inherent powers of the court under Section 3A of *Civil Procedure Act* can only be invoked where there is no specific provision of the Act and the rules appurtenant to the matter at hand. It is not a panacea for all ills intended to render otiose all else. That provision is only available in a situation where there is no specific provision to anchor the party's prayers to court.
9. That however, is not to say that an application by an applicant totally failing to seek any prayer would divest the court of the jurisdiction to answer to the calls of its very existence, look at a party's complaint and determine it according to the law whether that prayer be sought or misquoted. I think this to me is the natural and irrefutable character of the institution called the court of law. A court expects parties to guide it on the applicable prayer they seek but the dereliction of that duty by the party takes no bit of the courts duty to apply the applicable law and exercise its inherent powers. That to me is the justification for the provision of Order 51 Rule 10 of the *Civil Procedure Rules* which provides that: -
- “ 10. (1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule”.
10. Over and above the *Civil Procedure Rules*, the character and duty of the court is that it must find where the law lies and apply it to the letter. It is deemed and expected to know the law hence the Court of Appeal in *Kwanza Estates Ltd vs Dubai Bank of Kenya Ltd* [2016] eKLR has clarified the point when it said: -
- “ A judge in determining a dispute is not restricted only to the provision of the law cited by a party”.[2]
11. I have stated the foregoing, to underscore the fact that having been confronted with an application to substitute a deceased plaintiff, by a personal representative, I must apply the law that govern such application. Order 24 Rule 3 of the *Civil Procedure Rules* provides as follows: -
- “ (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.”
12. I understand the above provision of the law to say that upon death of sole plaintiff or the only surviving plaintiff and on application the court has the discretion to substitute the deceased plaintiff and that even after the suit abates, there is jurisdiction in the court to extend time. In this matter it cannot be denied that the suit has abated. An abated suit is non-existent 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 and justification disclosed to have led to the delay and abatement.



13. I hold the view that under the proviso to Rule 3(2) of Order 24 of the [Civil Procedure Rules](#) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit needs revival under Rule 7(2) of the same. The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits.
14. I invoke the intrinsic power 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 the suit be heard on the merits. Moreover, having perused the ruling delivered by my brother Kullow, J on April 8, 2021, the last paragraph in the said ruling to the best of my understanding granted the applicant a chance to have the suit heard in the interest of justice. The delay in obtaining limited grant for special purposes outside the timelines given i.e. 6 months later is excusable. In any case, the respondents have not demonstrated any prejudice suffered.
15. Arising from the above, I allow the application to have the applicant substituted for the deceased plaintiff. Having done so, I further order that the suit be revived for purposes of being heard on the merits. I hereby direct that the plaint be amended within 21 days from today to reflect the applicant as the plaintiff and the matter be mentioned on November 9, 2022 for further directions. Costs of the application shall be in the cause. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 19TH DAY OF OCTOBER, 2022.

HON. MBOGO C.G.

JUDGE

19/10/2022

In the presence of:

CA:Chuma

