



**Asiebela v Vigatsi (Environment & Land Case 23 of 2021)
[2022] KEELC 13557 (KLR) (18 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 23 OF 2021
DO OHUNGO, J
OCTOBER 18, 2022**

BETWEEN

MARY AKOMBA ASIEBELA PLAINTIFF

AND

ANDREW L. VIGATSI DEFENDANT

RULING

1. By Notice of Motion dated 29th May 2013, the plaintiff is seeking the following orders:
 1. That this Honourable Court be pleased to revive the suit herein.
 2. That this Honourable Court be pleased to order that Elizabeth Mujisa Vigatsi do substitute the deceased Defendant herein Andrew L. Vigatsi.
 3. That the proceedings in Kakamega HC Succession Cause No. 810 OF 2012 be stayed pending hearing and final determination of the suit herein
 4. That the costs of this application be provided for.
2. The application is supported by an affidavit sworn by Mary Akomba Asiebela, the applicant. She deposed that she instituted this suit against the defendant in 1998 claiming to have acquired title to land parcel number Isukha/Shitochi/498 by way of adverse possession. She further deposed that the defendant, Andrew L. Vigatsi who was her brother-in-law passed away on 27th June 2011 and was survived by a widow, Elizabeth Mujisa Vigatsi, who is the administrator of his estate pursuant to a grant issued to her on 17th April 2013 in Kakamega HC Succession Cause No. 810 of 2012.
3. The applicant further deposed that judgement was entered against the defendant on 5th October 1999 but on 5th February 2012 the defendant moved the court to have the same set aside. That unfortunately, the matter could not proceed for hearing since the defendant was hospitalised and later passed on before conclusion. She deposed further that Elizabeth Mujisa Vigatsi has included land parcel number



Isukha/Shitochi/498 as part of the deceased's estate and has excluded her from list of beneficiaries. That Elizabeth Mujisa Vigatsi pursued Kakamega HC Succession Cause No. 810 of 2012 only after she pressured her to do so by citing her in Kakamega HC Succession Cause No. 157 of 2012 and that Elizabeth Mujisa Vigatsi stands to suffer no prejudice if the orders sought are granted since she does not stay in the suit premises and will have a chance to defend the suit.

4. The applicant explained that the delay in bringing the application was occasioned by the family of the deceased who were unwilling to take out grant of letters of administration intestate and further deposed that she stands to suffer harm, loss and damage since the deceased's family are now moving with speed to have the succession cause in Kakamega HC Succession Cause No. 810 of 2012 confirmed yet her interest as a purchaser have not yet been catered for. She prayed that the succession cause be stayed pending hearing and final determination of this suit.
5. Elizabeth Mujisa Vigatsi opposed the application through a replying affidavit sworn on 22nd July 2013 wherein she deposed that the application is incompetent as it was filed a year after the demise of the defendant and further deposed that in any case if the applicant has an interest in the estate of the deceased, then she should raise her objection in the succession cause but not revive a matter that had long abated.
6. The application was canvassed through written submissions.
7. The applicant relied on Order 24 of the *Civil Procedure Rules* as well as the cases of *Timothy Limo & 2 Others v Joel Kinyanjui Muchiri (Suing as the legal representative of the late Jacob Muchiri Kinyanjui [2020] eKLR* and urged the court to allow the application with costs.
8. The respondent argued that Andrew Vigatsi died on 27th June 2011 while the present application was filed on 29th May 2013, after a period of 23 months and that an extension could be granted for good cause, the reason the applicant advances to explain the delay is that she had to go through a citation process, yet it is unclear how and when the case was concluded. That the prayer for staying succession cause No. 810 of 2012 ought not to be entertained by this court. She contended that the application lacks merit and ought to be dismissed with costs.
9. I have considered the application, the affidavits and the submissions filed by the parties. The issue that emerges for determination is whether the orders sought should issue.
10. From the material on record, there is no dispute that that the defendant passed away on 27th June 2011 and that Elizabeth Mujisa Vigatsi obtained grant of letters of administration intestate in respect of his estate on 12th April 2013 in Kakamega HC Succession Cause No. 810 of 2012. Elizabeth Mujisa Vigatsi is therefore a legal representative of his estate, in terms of Section 2 of the *Civil Procedure Act* which defines legal representative as meaning a person who in law represents the estate of a deceased person.
11. Order 24 Rules 1 to 3 of the Civil Procedure Rules provide that the death of a plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues and that where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff the court, on an application made, shall cause the legal representative of the deceased plaintiff to be made a party who shall then proceed with the suit. The substitution must be done within a period of one year from the death.
12. Order 24 Rule 4 of the *Civil Procedure Rules* provides as follows:
 - 4.



- (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) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.
13. The law is clear on what happens when one of a defendant dies and the cause of action survives or continues. Upon an application made, the court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case. The defendant herein having passed away on 27th June 2011 and there having been no substitution within a year of his death, the suit against abated by 28th June 2012. The present application was filed almost one year after abatement.
 14. Under Order 24 Rule 7(2) of the Civil Procedure Rules, if it is proved that the plaintiff was prevented by any sufficient cause from continuing the suit, the court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. The key consideration, therefore, is demonstration of sufficient cause. The Court of Appeal defined “sufficient cause” in the case of *Attorney General v Law Society of Kenya & another* [2013] eKLR 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.
 15. The applicant explained that the delay herein was occasioned by the family of the deceased defendant who were unwilling to take out grant of letters of administration intestate and that she had to pressure Elizabeth Mujisa by issuing a citation against her. She has availed the details of the citation cause which I note was filed in the year 2012. I further note that by 12th April 2013 when Elizabeth Mujisa Vigatsi obtained grant of letters of administration intestate in respect of the deceased defendant’s estate, the suit had abated almost 9 months earlier. Ordinarily, a plaintiff does not rush into issuing a citation with a view to substitution. It is only natural that the family of the deceased defendant be given time and space to get an administrator of their choice. In the circumstances, I find that the reasons advanced to explain the delay are plausible and the prayer for revival is merited.
 16. The applicant has also prayed that proceedings in Kakamega HC Succession Cause No. 810 of 2012 be stayed pending hearing and final determination of this suit. That it an order that should be sought before the court hearing the succession cause and not this court.
 17. In view of the foregoing, I make the following orders:
 - a. This suit is hereby revived.



- b. The deceased defendant herein Andrew L. Vigatsi is hereby substituted by Elizabeth Mujisa Vigatsi.
- c. The plaintiff to file and serve an amended plaint to reflect the substitution within 14 (fourteen) days from the date of this ruling.
- d. Costs of the application shall be in the cause.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 18TH DAY OF OCTOBER 2022.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistant: E. Juma

