



Kotut v Kosgei & 2 others; Kibet & 2 others (Applicant) (Suing as the legal representative of Andrea Kibet Kotut) (Environment & Land Case 317 of 2014) [2022] KEELC 14682 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 317 OF 2014
EO OBAGA, J
NOVEMBER 10, 2022**

BETWEEN

ANDREA KIBET KOTUT PLAINTIFF

AND

ZACHARIAH KIMUTAI KOSGEI 1ST RESPONDENT

NATHAN TIROP KOECH 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

AND

HELENA JEPTARUS KIBET APPLICANT

JOSEPHAT KIMELI KOTUT APPLICANT

AMBROSE KIPCHIRCHIR KOTUT APPLICANT

SUING AS THE LEGAL REPRESENTATIVE OF ANDREA KIBET KOTUT

RULING

1. This is a ruling in respect of a chamber summons dated January 27, 2022 in which the applicants seek orders that the abatement of this suit be set aside and the suit be revived and that Hellen Jeptarus Kibet, Josephat Kimeli and Ambrose Kipchirchir Kotut, the administrators of the estate of the late Andrea Kibet Kotut be substituted in place of the plaintiff.
2. The 1st and 2nd respondents are sons of the late Thomas Yator. In or around October, 2005, the 1st and 2nd respondents filed a claim before Uasin Gishu Land Disputes Tribunal against Andrew Kibet Kotut vide Land Arbitration No 16 of 2005. Upon conclusion of the hearing, the tribunal found that Andrew Kibet Kotut had illegally taken land belonging to the father of the 1st and 2nd respondents. The



tribunal ordered that Andrew Kibet Kotut do surrender Eldoret Municipality/Block 21 (Kingongo) 48 to the family of Thomas Yator.

3. The 1st and 2nd respondents embarked on executing the decree which arose out of the tribunal verdict which was subsequently adopted as judgement of the court in accordance with the provisions of the Land Disputes Tribunal Act (now repealed). In the process of execution of the decree, there were a number of applications made one of which allowed amendment of the tribunal award. The application seeking to amend the tribunal award was allowed by N Shiundu SRM. This made Andrew Kibet Kotut to file Civil Appeal No 143 of 2011 Andrew Kibet Kotut –vs- Zachariah Kimutai Kosgei & 5 others. This appeal has since abated.
4. Andrew Kibet Kotut thereafter filed E&L case No 317 of 2014 against the 1st and 2nd respondents in which he sought to set aside the tribunal award. The trial of this case started and Andrew Kibet Kotut testified partly before he was stood down to enable him have certain documents certified. Andrew Kibet Kotut never came back to complete his evidence. He died on November 23, 2019. On December 3, 2019, the court was informed of the demise of Andrew Kibet Kotut. The court then directed that substitution be done within 30 days. The matter was set down for mention on February 4, 2020.
5. Come February 4, 2020, no substitution had been carried out. The court gave the counsel for the deceased 30 more days to enable him substitute the deceased. The matter was fixed for mention on March 23, 2020. On March 3, 2020, when the matter was set for mention, the parties did not appear before court. The court directed that there be a mention at the registry.
6. The file was mentioned again on February 22, 2021 when the counsel for the plaintiff indicated to court that's he had not received instructions to substitute. The court then proceeded to have the suit marked as having abated.
7. The applicants contend that this suit abated because they were not aware about it as the deceased had not told them about it. They state that they obtained a limited grant of letters of administration on November 17, 2021 after becoming aware of the suit. They state that the deceased is the registered owner of the suit property where they reside and there is therefore need to have the suit revived so that they can be heard.
8. The 1st and 2nd respondent's opposed the applicants' application based on a replying affidavit sworn on March 28, 2022. The 1st and 2nd respondents contend that the applicants' affidavit consists of falsehoods which are meant to mislead this court. The 1st and 2nd respondent's further contend that the applicants have all along known about the dispute herein since it started from the tribunal, all through to appeal and finally the present case.
9. The 1st and 2nd respondents further state that the advocate for the deceased had been given opportunity to substitute but never did anything. The 1st and 2nd respondents state that the deceased's family does not reside on the suit property as alleged and that this application has been brought in bad faith as no sufficient cause has been shown to warrant revival of this suit.
10. I have carefully considered the applicants, application as well as the opposition to the same by the 1st and 2nd respondents. I have also considered the submissions by the parties herein. There is only one issue for determination in this application. The issue is whether the applicants have shown sufficient cause as to why they did not make an application for substitution or why the suit should be revived.



11. 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 had abated or to set aside an order of dismissal; and, 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.

12. In the case of the Hon Attorney General –vs- The Law Society of Kenya & another Civil Appeal (application) No 133 of 2011, the court stated as follows: -

' Sufficient cause or good cause in law means:-

The burden on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Blacks 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 doubt in a judges mind. The explanation should not leave unexplained gaps in the sequence of events.'

13. The applicants were under obligation to show that they were prevented by a sufficient cause from proceeding with the case. In the Hon Attorney General case (Supra), it was clearly stated that the burden of showing sufficient cause is on the applicant. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful and should not leave any doubt in the judge's mind.

14. In the instant case, the applicants are contending that the deceased did not tell them about existence of this case. In all fairness, this is not logical. The deceased was involved in a tribunal case in 2005. This tribunal case triggered an appeal being Civil Appeal No 143 of 2011 before he finally filed the present suit. It cannot be said that none of his family members knew about all these cases.

15. In Civil Appeal No 143 of 2011 and in in this suit, the deceased was represented by counsel. The applicants cannot convince this court that the deceased's advocate did not inform them of the need to do substitution. The applicants claim that they came to know of this case in late 2021 and immediately applied for limited letters of administration. This is not truthful. The counsel who has made this application is the same who informed the court about the demise of the deceased. He was the same counsel who was given opportunity to do substitution. The applicants cannot therefore claim that they did not know about this suit or any other previous proceeding relating to the suit property.

16. This suit is seeking to set aside the tribunal award. Under the repealed Land Disputes Tribunal Act, there was a procedure for attacking such an award. This was by way of judicial review. I am also aware that there is nothing wrong in a party filing a suit for declaratory orders but in the instant suit the relief which is being claimed is setting aside the tribunal award which is not a declaratory relief. Even if I were to allow revival of this suit which is not the case, the revival would have been an exercise in futility as the suit would most likely not succeed.

17. I therefore find that the applicants' application is devoid of merit. The same is dismissed with costs to the 1st and 2nd respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 10TH DAY OF NOVEMBER, 2022.

EO OBAGA



JUDGE

In the virtual presence of;

Ms Chesoo for Plaintiff/Applicant

Ms Jepkemoi for 3rd Defendant.

Court Assistant –Albert

EO OBAGA

JUDGE

