



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Suit 178 of 1996

1. VINCENT OKWIRY AKUMU

2. RISPER ANYANGO OTWALA..... PLAINTIFFS

VERSUS

PASKALIA AWUOR OMONDI DEFENDANT

RULING

JOHN OGINA OTWALA who has described himself as the 2nd Plaintiff/Applicant brought this application seeking the court to revive the suit which had abated. He prayed to court to thereafter join him as the 2nd Plaintiff in place of RISPER ANYANGO OTWALA and then have JOHN ODHIAMBO LEO whom he has described as a Defendant/

Respondent as the defendant in place of PASKALIA OWUOR OMONDI who was the defendant. He then prays that he be allowed to amend the plaint and also an injunction be issued against the defendant in respect of land No.KANYAMKAGO/KAWERE I/1815.

He also prays for an inhibition restricting any dealing with the register in respect of that parcel.

The back ground of the matter is that on 28th May 1996 VINCENT OKWIRY AKUMU and RISPER ANYANGO OTWALA filed this suit against PASKALIA OWUOR OMONDI seeking an order of specific performance to compel the defendant to subdivide parcel no.KANYAMKAGO/KAWERE I/1505 and transfer a portion of 1.6 ha. to the 1st Plaintiff, and a declaration that the 2nd Defendant has acquired ownership of a portion of 2.5 Acres of the same land by way of adverse possession. The suit dragged on for sometimes and on 23rd September 1997 the suit was dismissed for want of non-attendance.

The plaintiffs filed an application dated 28/9/98 seeking to set aside the dismissal order. This was allowed on 2nd October 2000 in the absence of the defendant.

Mr. Okoth submitted that the defendant died in 1997. The 2nd plaintiff died in January 2000 and as such the suit abated after one year.

He told the court that the cause of action summoned the plaintiff should be revived and the orders sought granted. He said the delay in bringing this application is because the Letters of Administration in the Estate of the defendant were taken sometimes in 2005 by the respondent.

The application was opposed and Mr. Ogutu submitted at length.

I have considered the application. It is bad in law and has no merit.

First there is the issue of whether the suit has abated or was dismissed.

It is agreed that suit was dismissed on 23rd September 1997 but was reinstated by my predecessor on 2nd October 2000 on an application made on 28th September 1998. Though there is no application to review that reinstatement order that reinstatement was obtained through fraud and cannot stand. In his affidavit the applicant in para. 5 states that PASKALIA OWUOR who was the defendant died in 1997. Thus in 1998 when the application for reinstatement of the suit was made the defendant was already dead. She had not been substituted. No application therefore should have been made against a dead person. However that aside and to compound the issue, that application made in 1998 was presented and granted on 2nd October 2000. Risper of course was not present as she had died three years earlier. However even RISPER ANYANGO the 2nd defendant whom the applicant want to be substituted for was also dead. She had died on 31st January 2000. These facts were never brought to the Judge and he gave the orders. Those orders were of course not proper and if he knew the parties were long dead he would not have given them.

As it were orders were given for and against people who were not alive and as such were a nullity.

The suit therefore still stands dismissed for non-attendance. There was no suit which was alive to abate when the 2nd plaintiff died. Both she and the defendant died when the suit had been dismissed. The order of dismissal was still in force.

The applicant JOHN OGINA OTWALA is not a party to this suit as yet. He cannot therefore apply for the suit to be revived, the respondent to be made a party or to amend the plaint or for an injunction. He should have first filed a separate application to be enjoined as a party. He has however in prayer 2 prayed to be joined as a party and I would wish to deal with that.

Risper Anyango whom he want to be substituted for died on 31st January 2000. Applicant obtained letters of Administration in respect of her Estate on 20th November 2000. This application was filed on 28th February 2006 almost six years later. There is no satisfactory explanation why he took all those years to make this application.

His averment that respondent had intimidated that he will settle the matter is not convincing. He even knew that the defendant had died in 1997 almost 10 years before he brought this application. The delay is inordinate and there is no reasonable excuse.

True Order 23 rule 8(2) CPR provides for the court alleging revival of a suit which has abated or dismissed but the prayer is discretionary.

In this instant the applicant has not satisfied the court why it took him all those years to come to court. Further his hands are not clean one cannot rule out that he was involved in presenting the application to reinstate the suit when the 1st defendant and 2nd Defendant were already dead. The claim may be involving land but that alone does not atone for the laches of the applicant.

From the above therefore I find application has no merit.

It is dismissed with costs.

Dated 5th October 2006

KABURU BAUNI

JUDGE

cc. Mobisa

Mr. Otieno for Applicant.

Mr. Nyakundi for Respondent.