



**Salman v Omar (Trustee of the Estate of Malim Bin Hero) & 5
others (Environment & Land Case 247 of 1964 & 265 of 1967
(Consolidated)) [2022] KEELC 15450 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15450 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 247 OF 1964 & 265 OF 1967 (CONSOLIDATED)
LL NAIKUNI, J
DECEMBER 7, 2022

BETWEEN

SALMIN KHAMIS BIN SALMAN PLAINTIFF

AND

**ABDULLA BIN OMAR (TRUSTEE OF THE ESTATE OF MALIM BIN
HERO) 1ST DEFENDANT**
MOHAMED BIN OMAR 2ND DEFENDANT
COMMISSIONER OF LANDS 3RD DEFENDANT
DIRECTOR OF SURVEY 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE 265 OF 1967

BETWEEN

SALMIN KHAMIS BIN SALMAN PLAINTIFF

AND

**SALMIN MOHAMED OMAR BASITY (THE ADMINISTRATOR OF THE
ESTATE OF MOHAMED BIN OMAR) DEFENDANT**



RULING

I. Preliminaries

1. By a notice of motion application dated and filed on November 23, 2021, the applicants herein, Mr Mohamed Salmin Khamis and Mr Ramla Salmin Khamis, formally moved this honorable court for its determination. The applicants brought the application under the provisions of sections 1A, 1B, 3, 3A of the *Civil Procedure Act*, cap 21 Laws of Kenya and order 22 rule 18 (2), order 24 rule 3 and order 24 rule 7 of the *Civil Procedure Rules*, 2010.

II. The Applicant's Case

2. The applicants herein sought for the following orders:-
 - a. That the court be pleased to revive the suit.
 - b. That the court be pleased to order re - construction of the court file from the copies of the documents exhibited in the affidavit supporting this application.
 - c. That the court be pleased to admit and substitute the applicant as plaintiffs in their capacity as the legal representatives of the estate of Salmin Khamis Bin Salman alias Salmin Mbiyo Salmin.
 - d. That the applicants cum plaintiffs be granted leave to execute the judgment and decree of the court issued on March 18, 1970.
 - e. Costs be in the cause.
3. The said application was based on the grounds that:
 - a. The plaintiff herein died on June 24, 2001
 - b. The applicants were the duly constituted legal representatives of the estate of the plaintiff pursuant to grant of letters of administration issued by the court in CM (Mombasa) Succession Cause No 138 of 2018: *In the Matter of the Estate of Salmin Mbiyo Salmin (Deceased)* as validated by the order of the High Court in Family (MSA) Miscellaneous Application Number 35 of 2018: *In the Matter of the Estate of Salmin Mbiyo Salim*.
 - c. The applicants were unable to move the court sooner because their quest to obtain the grant of letters of administration ended up in protracted litigation where the said grant of letters of administration were at one point revoked but later reinstated by the High Court.
 - d. Judgment in this matter was on March 18, 1970. No appeal was ever preferred against the said judgment.
 - e. Soon after the delivery of the delivery on March 18, 1970, the court file curiously disappeared. To date, the judgment and the decree remains unexecuted.
 - f. The plaintiff industriously followed up with the court registry regarding disappearance of the court file without much success.
 - g. The file was retrieved sometimes in the month of August 2011 where the court (hon Lady Justice A Okwengu) that dealt with an application dated August 30, 2022 but the file got lost shortly there after.



- h. The file was never found again and the Deputy Registrar of this court has issued a certificate confirming loss of file.
 - i. The pleadings, proceedings and Judgment exhibited in the affidavit supporting the motion represent a fair and accurate account of the court record.
 - j. No prejudice shall visit the respondents seeing as no appeal was ever preferred against the judgment.
 - k. It is in the interest of justice that the orders sought are granted.
4. It was supported by a 13 paragraphed supporting affidavit sworn by the Mr Mohamed Salmin Khamis Alias Mohamed Salmin Mbiyo, who had full authority of Ramla Salmin Khamis to swear the affidavit dated November 23, 2021. He averred that:
- i. The plaintiff herein died on June 24, 2001 and attached a copy of his certificate of death issued on March 21, 2002.
 - ii. Ramla Salmin Khamis and himself were the duly constituted legal representatives of the estate of the plaintiff pursuant to grant of letters of administration issued by the court in CM (Mombasa) Succession Cause No 138 of 2018. *In the matter of the estate of Salmin Mbiyo Salmin (Deceased)* as validated by the order of the High Court in Mombasa High Court Family Miscellaneous Application Number 35 of 2018: *In the matter of the Estate of Salmin Mbiyo Salmin* a copy of the grant issued and the order of the High Court dated 1st February 2019 marked as Annexure “MS - 2 (a) and (b)”.
 - iii. They were unable to move the court sooner because their quest to obtain the grant of letters of administration ended up in protracted litigation where the grant of letters of administration were at one point revoked but later reinstated by the High Court as exhibited by a copy of the order given on 18th October 2018 in Mombasa CM Succession Cause 138 of 2018 marked as “MS – 3”.
 - iv. Judgment in this matter was on March 18, 1970. No appeal ever filed against the judgment.
 - v. Soon after the delivery of the delivery on March 18, 1970, the court file curiously disappeared. To date, the judgment and decree remains unexecuted.
 - vi. The plaintiff industriously followed up with the court registry regarding disappearance of the court file without much success as exhibited by the bundle of letters to the registry marked as “MS – 4”.
 - vii. The file was retrieved sometime in the month of August 2011 where the court (Hon Lady Justice A Okwengu) dealt with an application dated August 30, 2022 but the file got lost shortly after.
 - viii. The file was never found again and the Deputy registrar of this court has issued a certificate confirming loss of file exhibited by annexure “MS – 5 (a)” and a copy of an order given on September 27, 2019 as annexure marked as “MS – 5 (b)”.
 - ix. The pleadings, proceedings and Judgment exhibited in the affidavit supporting the motion represent a fair and accurate account of the court record as annexed in “MS – 6”.
 - x. No prejudice visits the respondents seeing as no appeal was ever preferred against the judgment.
5. The application was unopposed. The parties did not file written submissions or make oral submissions.



III. Analysis And Determination

6. The court has keenly considered the said Notice of Motion application dated November 23, 2021 and the annexures thereof, the provisions of the Constitution of Kenya, 2010 and the statutes.
7. In order to arrive at an informed, just and fair decision in this matter, the honorable has framed three (3) issues for consideration. These are:-
 - a. Whether the notice of motion application dated November 23, 2021 by the plaintiffs/ applicants herein has any merit.
 - b. Whether the parties are entitled to the reliefs sought.
 - c. Who will bear the costs of the application.

ISSUE No. a). Whether the Notice of Motion application dated 23rd November, 2021 by the Plaintiffs/Applicants herein has any merit.

8. Before proceedings on with the analysis of the issues herein, the court wishes to summarize the main pith and substance of the application by the applicants herein. It is instructive to note that the applicants seeks for the an order of the re - construction of the court file from the copies of the documents exhibited in the affidavit supporting this application. Further to this, they urged court to admit and substitute the applicant as plaintiffs in their capacity as the legal representatives of the estate of Salmin Khamis Bin Salman alias Salmin Mbiyo Salmin. Finally, the applicants cum plaintiffs sought to be granted leave to execute the Judgment and decree of the court issued on March 18, 1970. The court will now proceed to deal with each of these issues herein below.
9. From the filed pleading the 1st and 2nd plaintiffs raised three (3) broad issues which this court wishes to deal with exclusively. These are namely:
 - a). The court be pleased to order re - construction of the court file from the copies of the documents exhibited in the affidavit supporting;
 - b). The court be pleased to admit and substitute the applicant as plaintiffs in their capacity as the legal representatives of the estate of Salmin Khamis Bin Salman alias Salmin Mbiyo Salmin and;
 - c). The applicants cum plaintiffs be granted leave to execute the Judgment and decree of the court issued on March 18, 1970.
10. With regard to the re – construction of the court file:- It is well established that matters of re – construction of skeletal files and consolidation are at the discretion of the High Court. The said discretion should be exercised judiciously and not capriciously. These orders are expressly granted upon court being moved through a substantive motion. The principles and parameters regarding the re – construction of files is done through a court order. The order is granted with utmost circumspect and prudence as it is one that is likely to be abused and/or misused by parties to the chagrin of the other party to defeat the wheels of justice or stealing the match. It is commonly known as sharp practice. Ideally, an applicant has to persuade court that the filed court file has completely gone missing and despite all efforts made through numerous correspondences and otherwise the file cannot be traced from its usual safe keeping place at the Court’s Registry.
11. Further, the applicant as part of the application, has to prepare a duplicate of all the pleadings within their custody and the ones envisaged to have been filed in the main court file without making any extra additions likely to prejudice the other party. The prepared duplicate bundle of documents have to be



filed and served for thorough scrutiny by court and the other party to ensure that these indeed were the documents and proceedings filed in the original court file. At this juncture, the other party is always at liberty to reject or even make additional document if they so wish. It is upon having gone through this intense process that the orders for the re – construction of the skeletal file would be allowed by the honorable court.

12. With regard to the substitution of the applicant as plaintiffs in their capacity as the legal representatives:
- There is no doubt that the plaintiff died in 2001. There is also no doubt that the applicants were issued with grant of letters of administration for the purpose of to be the legal representatives of the estate of the plaintiff in October 18, 2018. The record also shows that the file went missing around 2011 and the Deputy Registrar of this court issued a certificate confirming loss of life and an order was given on September 27, 2019.
13. The material provisions of order 24 rule 3 of the Civil Procedure Rules 2010 provides as follows;

“3 (1) where one of two or more plaintiff dies and the cause of action does not survive or continue against 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 sub rule (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”

ISSUE No. b). Whether the Parties Are Entitled To The Reliefs Sought.

14. It is apparent from a reading of the provision of order 24 3(2) that a suit may not abate if no application is made to court for substitution within one year upon the death of a plaintiff. That is the plain meaning of that provision. So, if the plaintiff died on June 24, 2001 and the application for his substitution was made on November 23, 2021 then the plaintiff’s suit could not have abated simply because it was not prosecuted within one year. The applicants’ claim that the delay was caused by the fact that their quest to obtain the grant of letters of administration ended up in protracted litigation where the grant of letters of administration were at one point revoked but later reinstated by the High Court but the order was given in the year 2018 what stopped them from applying for substitution immediately. The applicants also blamed their delay on the loss of the file which was confirmed by the certificate of confirmation of loss of file by the Deputy Registrar.
15. Be that as it may, even if the suit had abated in the first instance, the proviso to order 24 rule 3 provides that the period of one year limited by the rule may be extended by the court for good reason. Bearing in mind the circumstances of this case, the court would be inclined to grant an extension of time even upon expiry.
16. The real question for determination is whether or not the applicants have made out a case for the orders sought in the notice of motion dated November 23, 2021 for extension of time, revival of the suit and substitution of the 1st plaintiff. The material on record demonstrates that the applicants moved expeditiously to obtain a grant of letters of administration upon the death of the plaintiff. They also moved expeditiously with the application for substitution from the plaintiff to themselves. The only pitfall was that the said application was not prosecuted expeditiously, which was compounded by the



loss of the original file which the applicants are willing to compile and there was no objection from the respondents clearly with the lack of response to the application.

17. With regard to the applicants cum plaintiffs being granted leave to execute the judgment and decree of the court:-

The applicants have stated that the Judgment in this matter was delivered by this court on March 18, 1970. From the records, no appeal was ever preferred against the said Judgment. The applicants intend to execute the decree against the judgement debtors. Such an execution which has been for more than year from the date of issue is governed the provision of order 22 rule 18 of the Civil Procedure Rules, 2010. The provision of order 22 rule 18 (1) provides:-

“Where an application for execution is made:-

- a. More than one year after the date of the decree;
- b. Against the legal representative of a party to the decree; or
- c. For attachment of salary or allowance of any person under rule 43.

18. The court executing the decree shall issue a notice to the person against whom the execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

This provision requires where a decree is more than on year old, before executing it, the decree holder needs to first issue a notice to the judgement creditor or debtor to show cause why the decree should not be executed.

19. Nonetheless, the difficulties that the applicants may face in this matter is as regards the interpretation of section 4 (4) of the Limitation of Actions Act, cap 22 is concerned. The provision of section 4 (4) provides:-

“An action may not be brought upon a judgement after the end of twelve (12) years from the date which the judgement was delivered, or (where the judgement or a subsequent order directs any payment of money or delivery of any property to be made at certain date or at recurring periods) the date of default in making the payment or delivery in question, and no arrears of interest in respect of a judgement debt may be recovered after, the expiration of six years from the date on which the interest became due’.

20. Taking that this judgement was delivered over 12 years ago, this court may in the interest of justice, equity and conscience require the applicants to further address it on the issue of limitation of time and whether the same is statutory barred before it makes its final decision on the matter. The court has taken this position as the matter is still at a very toddler stage of the re – construction of the file. for now, although the court is aware that the applicant had amongst its reliefs was for leave for the execution of the decree, the court will leave the matter for the time being at that to avoid being adjudged of having jumped the que or the gun as it were.

IV. Conclusion And Disposal.

21. In conclusion, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application i find the notice of motion application dated November 23, 2021 by the applicants has merit and should be and is hereby allowed with costs to be in the cause and upon the fulfillment of the following pre-conditions: -



- a. That the notice of motion application dated November 23, 2021 be and is hereby found to have merit and thus is allowed as prayed to the following extent:-
 - i. The Environment & Land Court Case no 247 of 1964 be and is hereby revived.
 - ii. The Deputy Registrar be and is hereby instructed by this honourable court to help the applicants in the reconstruction of the court file from the copies of the documents exhibited in the affidavit supporting this application.
- b. That an order be and is hereby made to have the applicants, Mohamed Salmin Khamis and Ramla Salmin Khamis in their capacity as the legal representatives of the Estate of Salmin Khamis Bin Salman alias Salim Mbiyo Salmin are admitted and substituted as the plaintiffs in this case.
- c. That an order be made that the newly admitted plaintiffs/applicants to formally move this court within the next ninety (90) days from this date hereof specifically seeking for the leave of court to execute the judgment and decree of the court issued on March 18, 1970 pursuant to the provisions of order 22 rule 18 of the Civil Procedure Rules, 2010 and section 4 (4) of The Limitation of Action, cap 22 of the Laws of Kenya.
- d. That the costs of this application be in the cause.

22. It is so ordered accordingly.

RULING DELIVERED, SIGNED, DATED AND AT MOMBASA THIS 7TH DAY OF DECEMBER, 2022.

HON. MR. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT AT

MOMBASA

In the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Mureithi Advocate for the applicants.
- c. No appearance Advocate for the Respondents

