

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA**

Civil Case 189 of 1989

BENJAMIN SIPITALI MUNGWANAPLAINTIFF (NOW DECEASED)

VERSUS

NORAH KHAOYA SHEM)

JENIPHER ACHINGO MUNGWANA) DEFENDANT

AND

SHEM NALIANYA SIBITALI APPLICANT

RULING

The Plaintiff in the suit herein died on 26th August, 2001. He had prior to his death instituted the suit against the Defendants claiming to have become entitled to be registered as the proprietor of the land title No. Kimilili/Kimilili/1725 by reason of his adverse possession to the title of the Defendant for a period of more that 12 years prior to the institution of the suit.

Mr. Kiveu, learned counsel for the applicant, Shem Nalianya Sibitali, informed the court that the latter, a son of the deceased, plaintiff filed a succession cause in the year 2004 seeking Letters of Administration in the estate of the deceased plaintiff. The Grant of Letters of Administration was admittedly issued to the applicant on 21.1.05. The Applicant sought in his application dated 10.2.05 an order that the suit, which abated one year after the Plaintiff's death, be revived and that the Applicant be substituted in the place of the deceased Plaintiff. The Applicant did not in his affidavit in support of his said application explain the cause or reason for the delay of three years before applying for the Grant of Letters of administration. Mr. Kiveu pointed out that after the grant of the Letters of administration, the Applicant moved with expedition and filed the application for the revival of the suit and substitution as aforesaid.

The suit herein abated after the expiry of one year of the death of the plaintiff. The effect of the abatement was that under Rule 8(1) of Order XXIII of the Civil Procedure Rules, no fresh suit could be brought on the same cause of action. However, under Rule 8(2) of the said Order, a person who is the legal representative of the deceased plaintiff in the suit could apply to revive it by showing that the applicant was prevented by any sufficient cause from continuing the suit, the court may revive it upon such terms as to costs or otherwise as it thinks fit. The applicant could not continue the suit before obtaining the Letters of Administration after the Plaintiff's death on 26.8.2001. He was mum about the three year delay on his part in applying for the Grant of Letters of administration. Do these facts constitute or show that the applicant was prevented by a sufficient cause from continuing the suit? Certainly, the Applicant cannot be said to have been prevented by any sufficient cause from continuing the suit during the period after the abatement of the suit in August 2002 to the year 2004 before the applicant applied for the grant of Letters of administration for the simple reason that he did nothing to enable him to continue the suit and the reason why he did nothing has not been explained. The subsequent application for and procumbent of the Grant of Letters did not explain, nor did it prove that there was any sufficient cause from continuing the suit. It is my finding that the applicant has failed to prove that he was prevented by any sufficient cause from continuing the suit.

In the circumstances, the application dated 10-2-2005 is dismissed with no order as to costs.

Dated at Kakamega this 3rd day of November, 2005.

G. B. M. KARIUKI

J U D G E