



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO 363 OF 2013

COSMAS KANJA MBUTETI (DECEASED).....1ST PLAINTIFF

JANET THIGUKU KANJA.....2ND PLAINTIFF

VERSUS

JACKSON MURAGE.....1ST DEFENDANT

NAHASHON KIMOTHO.....2ND DEFENDANT

PAUL KABINGO.....3RD DEFENDANT

DANIEL GACHOKI.....4TH DEFENDANT

RULING

Summary of facts

Vide a Notice of Motion Application dated 2nd March 2020, the 2nd Plaintiff herein applied to Court for the following orders:

(a) That the Court be pleased to revive the suit against the 3rd Defendant.

(b) That the Court be pleased to extend the time within which the deceased 3rd Defendant should have been substituted.

(c) That the Court does substitute Beatrice Njoki as the appointed legal representative of the 3rd defendant in place of the deceased 3rd defendant Paul Kabingo.

The Notice of Motion was supported by the 2nd Plaintiff's supporting affidavit. In it, she avers that she, together with her deceased husband, the 1st Plaintiff filed the present suit in 2008 against the defendants claiming adverse possession of a parcel of land No. INOI/NDIMI/86. That the 3rd Defendant had passed away, on 13th February 2014. That she disclosed this fact to her advocates then, being Morris Njagi & Co Advocates, who did not substitute the 3rd Defendant for his legal representative. That the suit against the 3rd Defendant therefore abated within a year for failure of substitution. That on these grounds, she withdrew the services of her advocates and acted in person, filing a citation in Succession Cause no.383 of 2019 in which Beatrice Njoki was thus issued with a grant of letters of administration ad litem, for the purpose of defending the present suit. She thus prays that the orders sought in her application for reviving the suit against the 3rd Defendant's legal representative be granted.

The Defendants in the matter filed their grounds of opposition against the application noting that the application for substitution has been made with inordinate delay as it was not made within the 1 year window provided in law. They therefore pray to the court to dismiss the application with costs.

On 9th November 2020, the parties agreed to dispose of the application by way of affidavit evidence and written submissions.

Submissions

The 2nd Plaintiff filed her submissions on 12th November 2020. She submitted that she had been in occupation of L.R. INOI/NDIMI/86 from 1960 and she is aged over 80 years. That the case against the defendants for adverse possession was filed in Embu High Court CC 120 of 2008 and was later transferred to this court as Kerugoya ELC 363 of 2013. She admits the mistake of continuing suit against a deceased

person and failing to apply for substitution within the period allowed in law, but ascribes the mistakes to the negligence of her advocates. That on 2nd October 2018 she decided to act in person but the Defendant's Advocates when appearing in court always stated that they did not have instructions to act on behalf of the 3rd Defendant's family. That on 20th February, the Court granted leave for the substitution of the 3rd deceased Defendant as well as the 2nd deceased Defendant. Citing the case of *Lucy Bosire v Kehancha Div. Land Dispute Tribunal & 2 Others (2013) e K.L.R.*, she submitted that mistakes of an advocate ought not to be visited upon the client. She further submits that the court is empowered to enlarge the time allowing for substitution of a deceased party, where the time has abated under *Order 24 Rule 7 of the Civil Procedure Code*.

The 1st and 4th Defendants filed their submissions on 9th December 2020. They submit that indeed the Plaintiffs herein filed suit against the 4 Defendants vide an Originating Summons on 28th July 2008 on a claim of adverse possession. That the 2nd Defendant passed away on 8th May 2004, while the 3rd Defendant passed away on 13th February 2014. They submit that the Originating summons were defective in suing a deceased person, being the 2nd Defendant herein who had passed away four years before the suit was filed. They cite *Order 24 of the Civil Procedure Rules* on the procedure and applicable timelines for substituting a deceased Defendant. That an enlargement of time for substitution is only allowed where sufficient cause for the delay is proved. That in the present case, it has taken 6 years since the 3rd Defendant passed on and the filing of this application for substitution. They cite the case of *Charles Wanjohi Wathuku Vs Githinji Ngure & Another, Civil Application No.9 of 2016* in stressing the importance of adhering to the timelines set out in law. They therefore pray for the application to be dismissed with costs.

Issues for determination

- a. *Whether the Court can extend the time within which the deceased 3rd Defendant should have been substituted?*
- b. *Whether the Court can revive the suit against the 3rd Defendant?*
- c. **Whether the Court can substitute Beatrice Njoki as the appointed legal representative of the 3rd defendant in place of the deceased 3rd defendant Paul Kabingo.**

Legal analysis and opinion

The procedure to be followed in the event of the demise of one or more Defendants in a suit is set out under **Order 24 Rule 4 of the Civil Procedure Rules, 2010**. The provision is as follows:

[Order 24, rule 4.] *Procedure in case of death of one of several defendants or of sole defendant. 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 sub rule (1), the suit shall abate as against the deceased defendant”.*

The 2nd Defendant passed away on 8th May 2004, four years before the institution of the Originating Summons, while the 3rd Defendant passed away on 13th February 2014. The Notice of Motion Application seeks to revive the suit against the 3rd deceased defendant. In keeping with the provisions of **Order 24 Rule 4(3)**, an application for the substitution of the deceased Defendant ought to have been made by 13th February 2015. This was not done, which caused the suit against the 3rd deceased Defendant to abate.

In the case of *Titus Kiragu Vs Jackson Mugo Mathai (2015) e K.L.R.*, it was held that:

“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”

Order 24 Rule 7 (2) of the Civil Procedure Rules however allows the court discretion to revive an abated suit. The section 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 has abated or to set aside an order of dismissal; and, if 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.”

In the case of *Rukwaro Waweru Vs Kinyutho Ritho & Another (2015) e K.L.R.*, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. In *Charles Mugunda Gacheru Vs Attorney General & Another (2015) e K.L.R.*, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. The Court of Appeal in the case of *The Hon. Attorney General Vs the Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011* is instructive on the contours of the requisite sufficient cause:

“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 doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

Now the 2nd Plaintiff only filed an application for the substitution of the 3rd Defendant on 2nd March 2020. The 3rd Defendant having passed away on 13th February 2014, the delay therefore is one of six (6) years. The reason given for the delay was that the Plaintiff’s advocate’s refusal to apply for substitution, against the Plaintiff’s own instructions to do so. Given the number of other advocates available to the Plaintiff, there is no question that she would have quickly found another diligent advocate to represent her. She submits that she took matters into her own hands on 2nd October 2018. The four-year delay is simply unjustifiable and cannot be pinned on her advocate’s negligence, seeing as she had a choice to find another advocate or to make the decision she made four years later of representing herself. The Plaintiff also submits that the 3rd Defendant’s family was lax in applying for letters of administration, causing her to file a citation in Succession Cause No. 383 of 2019 which precipitated in an award of grant of letters of administration ad litem to one Beatrice Njoki. Several decisions have held that where the delay is occasioned by the persons entitled to apply for grant of letters of representation in the estate of a deceased Defendant, that would usually constitute sufficient cause for enlargement of time. See **Geoffrey Mwangi Kihara Vs Mwioko Housing Company Ltd & 3 others [2015] e K.L.R**

“In the instant application, the Plaintiff averred that he filed a succession cause to compel the deceased 2nd Defendant’s wife to take letters of administration ad litem to represent the deceased in the suit, after it became apparent that the 2nd Defendant’s family was not keen on taking out letters of administration. This, in my view, is good reason to revive the suit against the 2nd Defendant, and also to extend time for the Plaintiff to make his application for substitution, noting that it was indeed the delay by the deceased’s family to take out letters of administration that caused the suit herein to abate as against the 2nd Defendant.”

It is my view that the four-year delay however is inexcusable and the court has not been shown sufficient cause upon which to apply its discretionary power of reviving the abated suit against the 3rd Defendant. In the premises, I find no merit in the plaintiff’s application and the same is hereby dismissed.

On the issue of costs, I am guided by the decision in **Bushasha Lucheri Vs Joseph Langat Sitienei & Another [2012] e K.L.R**

“That leaves me with the issue of costs. The defendants have asked for the costs of this suit. Order 24 Rule 2(3) provides that the Court may award the defendant costs of an abated suit. The word “may” rather than “shall” are used which means that the court has discretion on the award of costs. I think the courts should be slow in awarding costs of an abated suit to the defendant unless it is apparent that the suit was frivolous or that the plaintiff had a wholly unmeritorious claim. The plaintiff herein appears to have had a fairly legitimate claim and I think it would not be just for me to order his estate to shoulder the costs of this suit. In the unfortunate circumstances of this suit, justice will best be done if each party bears its own costs.’

Part of the delay having been occasioned by the persons entitled to take out letters of administration of the deceased’s estate, I hereby order each party to bear its own costs.

READ, DELIVERED physically in open Court at Kerugoya and SIGNED this 5th day of March, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Mr. Otuke holding brief for Muriuki Muriithi**
- 2. Defendant/Advocate – absent**
- 3. Kabuta – Court clerk.**