Mageka v Good News Mission Kenya (Environment & Land Case 18 of 2019) [2024] KEELC 669 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 669 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 18 OF 2019

M SILA, J

FEBRUARY 14, 2024

BETWEEN

JOHN THOMAS IBONGIA MAGEKA .... PLAINTIFF

AND

GOOD NEWS MISSION KENYA .... DEFENDANT

RULING

(Application for substitution of the deceased plaintiff; requirement that such application be made within one year of death; application herein made after one year of death; no explanation offered by the applicant as to why the application was filed after one year; court of the opinion that the applicant has not given any sufficient cause or good reason to have the application allowed out of time; timelines provided by law considered not to be mere technicalities; application dismissed)

1. The application before me is that dated 20 September 2023 filed by one Tabitha Gesare Ibongia who seeks orders for the substitution of the deceased plaintiff. The applicant states that she is wife of the deceased plaintiff. She avers that the plaintiff died on 3 July 2022 upon which she applied for and obtained a grant of letters of administration ad litem. She has displayed the said grant which shows that it was issued on 11 July 2023. She states that being wife of the deceased, she is conversant with the issues concerning this case.

2. The application is opposed by the defendant who filed Grounds of Opposition. It is contended that this suit has already abated by dint of Order 24 Rule 3 of the *Civil Procedure Rules*, 2010 and an extension of time to revive the abated suit has not been sought. It is urged that there is no basis for the exercise of discretion in favour of the applicant and that the application is an abuse of the court process.

3. Both Mr. Nyanchoga, learned counsel for the applicant, and Ms. Kebungo, learned counsel for the respondent, filed written submissions towards the application.

4. Inter alia, in his submissions, learned counsel for the applicant did not dispute that the suit has abated, but invoked Article 159 (2) (d) of the *Constitution*, which more or less prescribes that justice ought to be administered without undue regard to procedural technicalities. He submitted that the dispute herein relates to land ownership which is greater than the stricture of procedure. He also invoked the overriding objective under Section 1A of the *Civil Procedure Act*, Cap 21, Laws of Kenya. He submitted that the court has discretion to extend time so as to revive an abated suit. He proceeded to submit that the application for grant of letters of administration ad litem was filed on 26 April 2023 and allowed on 11 June 2023 just eight days after the lapse of one year. He submitted that the delay arose in the issuance of the grant of letters of administration ad litem, and not due to the applicant's laziness and/or negligence, and therefore the applicant meets the threshold of 'sufficient cause' contemplated in Order 24 Rule 7 (2) for the revival of an abated suit. He relied *inter alia* on the case of *Silas Njeru Njiru & 2 Others v Mugo Mukere & Others* (2022) eKLR where it was held that a plaintiff can make an application for revival of a suit that has abated.

5. On the other hand, learned counsel for the respondent urged that the suit has already abated since one year after death had lapsed before the application herein was filed and placed reliance on Order 24 Rule 3(1) of the *Civil Procedure Rules*, 2010, which requires that an application for substitution be made within one year of death. She submitted that the applicant has not sought to enlarge time and the court therefore lacks jurisdiction to entertain the application. Among the authorities she referred to is the Court of Appeal decision in the case of *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Limited & 2 others* (2017) eKLR where it was held inter alia that it is only upon extension of time that an abated suit can be revived and further it was opined that timelines are not technicalities of procedure which may be accommodated under Article 159 of the *Constitution*.

6. I have taken into account the above submissions before arriving at my decision. Before I go to the applicable law I think it is prudent that I lay out the background of this suit.

7. The suit herein was commenced by way of a plaint which was filed on 20 May 2019 with the deceased being the sole plaintiff. He averred that he was the registered proprietor of the land parcel Central Kitutu/Daraja Mbili/3250. He pleaded that in November 2011 he discovered interference with his title, and claimed that the defendant had fraudulently excised a portion thereof, and registered this portion as Central Kitutu/Daraja Mbili/3896. The plaintiff pleaded fraud on the part of the defendant. Among the particulars of fraud alleged are that the defendant falsified an application for Land Control Board consent and the consent; that the defendant presented to the plaintiff blank forms for signatures; that the plaintiff forged the signature of the plaintiff in the transfer forms; that the defendant purported that the plaintiff gifted her this portion; that the defendant misled the Land Registrar to issue her with a fraudulent title deed; and that the defendant took advantage of the plaintiff's ailments to acquire his land. He pleaded that he was ailing at the time the defendant committed the alleged fraudulent acts and further alleged that the defendant took advantage of his illness, by purporting to pray for him to recover, but with the hidden agenda of conning him of land. In the suit, the plaintiff asked for the cancellation of the title Central Kitutu/Daraja Mbili/3896 and 3897 and for the land to revert back to the title Central Kitutu/Daraja Mbili/3250 in his name.

8. The defendant filed a defence and refuted all the claims of the plaintiff. It is her defence that the plaintiff owned the land parcel Central Kitutu/Daraja Mbili/3250 and that he voluntarily subdivided it into two parcels, being Central Kitutu/Daraja Mbili/3896 and 3897, and transferred the former portion to the defendant. It was also pointed out that the deceased transferred the other parcel of land, that is Central Kitutu/Daraja Mbili/3896, to a third party.

9. The dispute was referred to mediation, which failed, but before the case could proceed in court the plaintiff died on 3 July 2022 and this application was subsequently filed on 25 September 2023.

10. . Applications for substitution are addressed under Order 24 of the *Civil Procedure Rules*. Order 24 Rule 3 provides as follows in relation to substitution of a deceased sole plaintiff :

    3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 3.]

        (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to 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 subrule (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.

11. From the above, it will be seen that where the cause of action survives the death of the deceased plaintiff, then his legal representative can be allowed to continue the suit on behalf of the deceased plaintiff upon filing an application for substitution. Under subrule 2 above, the application needs to be made within one year. Where such application is not made within one year of death, the suit abates. The court however has discretion, for good reason, to extend time. What this means is that the court may allow an application to extend time so that the application for substitution is lodged after one year of death, but this must be subject to "good reason" being provided.

12. I think the proviso to Rule 3 needs to be read together with Order 24 Rule 7 which allows for the revival of an abated suit. The same is drawn as follows :

    7. Effect of abatement or dismissal [Order 24, rule 7.]

        (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

        (2) 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.

13. From subrule 2 above, a legal representative may apply to revive an abated suit. However, he needs to prove that he was prevented by "sufficient cause" from continuing the suit. What this simply means is that when a legal representative to a deceased plaintiff seeks to lodge an application for substitution after one year of death, i.e after a suit has abated, he needs to convince the court that he has sufficient reason for not filing his application within one year of the death of the deceased plaintiff. Thus, as much as the court has discretion to revive an abated suit, it needs to do so only after the applicant demonstrates good reason for not being able to file his application within the prescribed time, which as we have seen, is within one year of death. Again, what this means is that if no sufficient cause is shown, so as to revive an abated suit, then the court ordinarily ought to decline an application to revive the

abated suit. Thus, the onus is on the person making an application after one year of death to convince the court that he was prevented by some sufficient reason from lodging his application for substitution within one year of death.

14. An applicant who files an application for substitution after one year of death needs to exercise caution and needs to demonstrate the sufficient cause or the good reason for not filing his application within the specified time otherwise he risks dismissal of his application. Such applicant ought never to approach court casually and ought never to imagine that the application for substitution will be allowed as a matter of course. In other words you cannot casually walk into court with an application for substitution which has been filed more than one year of death and expect to be automatically granted the order without giving good reason or demonstrating sufficient cause why you did not file your application within the prescribed period of one year.

15. In our case, the applicant has only brought her application under Order 24 Rule 3 of the *Civil Procedure Rules* and did not specifically quote Order 24 Rule 7 on revival of an abated suit. That probably is the reason why counsel for the respondent, urged that the application is a non-starter. Nonetheless, I opt to look at the application holistically and will also consider it as one also made under Rule 7 despite the said Rule not being explicitly cited. What I need to ask myself is whether the applicant has demonstrated sufficient reason for not filing the application within one year of death.

16. I have carefully gone through the grounds in support of the application and also carefully combed through the supporting affidavit, and I do not find a single word, sentence, or paragraph, which attempts to give an explanation as to why the application has been filed beyond one year of death. The applicant says absolutely nothing as to why she did not file her application within the prescribed one year. In essence she has not bothered to give any explanation for her tardiness, and without such explanation being provided, this court cannot speculate and can only deduce that no sufficient cause and no good reason has been provided for the late filing of the application. A person cannot come to court out of time, offer no explanation, and expect the court to exercise its discretion in his/her favour. It is the duty of that applicant to adequately explain his/her circumstances to court and it is not for the court to go on a fishing expedition to look for reasons on behalf of the applicant.

17. I nevertheless observe that in his submissions, Mr. Nyanchoga, learned counsel for the applicant, mentioned that the application for the grant ad litem was filed on 26 April 2023, but regretfully, this is a mere statement from the bar. There is no such averment in the grounds in support of the application and no deposition in the supporting affidavit. The application for the grant ad litem was not even annexed to show exactly when the same was filed. I am afraid that I cannot take the statement from the bar into consideration. Such, if indeed is the scenario, required to be deposed by the applicant herself in support of her application. Apart from that, I note that the grant ad litem was given on 6 July 2023 and issued on 11 July 2023. We already know that this application was made on 25 September 2023 which is over three months since the grant was issued. Again, there is no explanation at all as to why the applicant waited for more than three months after receiving the grant before filing this application. You would expect that being in the knowledge that she was already late in obtaining the grant ad litem, then she would hasten the filing of her application for substitution, or at least offer an explanation as to why she did not file her application shortly after receiving the grant ad litem.

18. In essence, the applicant has failed to satisfy court that she was prevented by sufficient reason to lodge her application for substitution within one year of death and I am not persuaded that she has demonstrated that she deserves the discretion of this court to allow her application for substitution.

19. In his submissions, Mr. Nyanchoga tried to hide behind Article 159 (2) (d) of the *Constitution*. The whole of Article 159 (2) provides as follows :-

159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) justice shall be done to all, irrespective of status;

(b) justice shall not be delayed;

(c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

(d) justice shall be administered without undue regard to procedural technicalities; and

(e) the purpose and principles of this *Constitution* shall be protected and promoted.

20. It can of course be noted that under Article 159 (2) (d) the court is enjoined to administer justice without undue regard to procedural technicalities. But in the same Article, (2) (b) in particular, the court also ought to consider the principle that justice ought not to be delayed. But is the one year provided for revival of an abated suit a technicality? This was addressed by the Court of Appeal in the case of *Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Limited & 2 Others*, Court of Appeal at Nairobi, Civil Appeal No. 283 of 2015 (2017) eKLR which case was cited by Ms. Kebungo. In this case, the plaintiff was engaged by the 3rd respondent to take measurements of an existing billboard. While returning to the car, the ladder that he was using caught liv electricity wires laid by the 1st respondent inflicting upon him severe burns. He sued for compensation before the Magistrates' Court but died before the case was heard. A grant ad litem was applied for and issued in 2012, about five years after death, and on 12 October 2012, the application for substitution was filed. The same was allowed by the trial Magistrate eliciting a first appeal to the High Court. At the High Court, the appeal was allowed and the order for substitution set aside. It was now the turn of the applicants to appeal to the Court of Appeal. In assessing the application, the Court of Appeal stated as follows :

> A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.

21. Within the same decision, the Court of Appeal cited with approval the dictum in the case of *Charles Wanjohi Wathuku v Githinji Ngure & Another*, Civil Application No. 9 of 2016, where it was stated as follows :

> "Timelines are not technicalities of the procedure which may be accommodated under Article 159 of the *Constitution* or Section 3A and 3B of the *Appellate Jurisdiction Act*."

22. The Court of Appeal declined to allow the appeal on the reason that there was inordinate delay in filing the application for substitution.

23. There is indeed a purpose as to why there are timelines set and this is so that justice may be served without unreasonable delay which is one of the principles outlined in Article 159 (2) of the *Constitution*. It cannot therefore be argued that the timeline of one year set out in Order 24 is a procedural technicality that can be ignored at whim even where sufficient reason has not been provided. It was said that this is a land matter and that in the interests of justice the application ought to be allowed. It should not be forgotten that justice cuts both ways. In the case of substitution, where no substitution has been made within one year, the defendant is entitled to consider the case as abated. After one year, he is vested with the right that the suit against him has abated, and that there is nothing left for him to defend. It would be unfair to wrestle away such right from a defendant when a person applying to substitute the deceased plaintiff fails to give reason as to why he/she has not filed that application within the time provided. The defendant is also entitled to his right of abatement and also deserves justice. It will be unjust to drag him back to the arena of litigation, without good reason being given to him, when he has already hung his gloves.

24. I think I have said enough to demonstrate that in the instance of this case, the applicant has failed to give sufficient reason why she did not file the application for revival of suit and substitution of the deceased plaintiff within the prescribed time of one year. I therefore proceed to dismiss this application with costs to the defendant. The suit is declared as abated. In my discretion I make no order as to the costs of the abated suit. It means that this case file is now closed and the chips lie where they lay.

25. Orders accordingly.

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

In the presence of: -

Mr. Nyanchoga instructed by M/S Nyamweya, Osoro & Nyamweya Advocates.

Ms. Kebungo instructed by M/S Nyamurongi & Co. Advocates.

Court Assistant – Lawrence Chomba