



**Nguyo & another (As Legal Representative of the Estate of Simion Nderi
Nguyo – Deceased) v Gitari & another (Environment and Land Appeal
10 of 2023) [2024] KEELC 679 (KLR) (8 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 679 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL 10 OF 2023
YM ANGIMA, J
FEBRUARY 8, 2024
[FORMERLY OF NYAHURURU ELCA E008 OF 2023]**

BETWEEN

**MICHAEL MAINA NGUYO 1ST APPELLANT
JOACHIM GITONGA NGUYO (AS LEGAL REPRESENTATIVE OF THE
ESTATE OF SIMION NDERI NGUYO – DECEASED) 2ND APPELLANT
AS LEGAL REPRESENTATIVE OF THE ESTATE OF SIMION NDERI NGUYO –
DECEASED**

AND

**MAURICE NGUYO GITARI 1ST RESPONDENT
MARTIN MANUTHU GITARI (AS LEGAL REPRESENTATIVE OF THE
ESTATE OF ATANASIUS GITARI GITONGA – DECEASED) 2ND RESPONDENT**

JUDGMENT

A. Introduction

1. This is an appeal against the ruling and order of Hon. P. Gichohi (CM) dated 01.12.2022 in Nyahururu CM ELC No 278 of 2018 Simon Nderi Nguyo & 2 others v Atanusius Gitari Gitonga & 2 others. By the said ruling and order the trial court dismissed the Appellant’s application dated 02.11.2021 which sought, inter alia, revival of the suit before the trial court and substitution of the deceased original Defendant.



B. Background

2. The material on record shows that vide a notice of motion dated 30.08.2019 the advocates for the original Defendant before the trial court sought an order declaring the suit to have abated on account of his demise. It was contended that the original Defendant had died on 25.03.2017 and that no steps had been taken by the Appellants to apply for substitution for more than one year since his demise. It was thus contended that the suit had abated under the provisions of Order 24 of the Civil Procedure Rules. It would appear that there was no response to the said application hence the same was allowed as prayed on 06.11.2019 by the subordinate court.
3. The record further shows that vide a notice of motion dated 02.11.2021 the Appellants sought, inter alia, an order for variation or setting aside of the order of 06.11.2019; leave for substitution of the deceased Defendant; and an order for revival of the abated suit. The said application was heard before the Hon. P. Gichohi CM (as she then was) who vide a ruling dated 01.12.2022 dismissed the same for lack of merit. The trial court found that the Appellants had not been diligent in the prosecution of their suit even before the demise of the Defendant in the suit; that they had previously failed to comply with pre-trial directions; and that the Appellants had taken about 4 years to apply for revival of the abated suit without rendering a reasonable explanation for the delay. The trial court was not satisfied that the Appellants had shown sufficient cause within the meaning of Order 24 rule 7 of the Civil Procedure Rules to warrant revival of the suit and the substitution of the deceased Defendant.

C. Grounds of Appeal

4. Being aggrieved by the said decision, the Appellants filed a memorandum of appeal dated 16.02.2023 raising the following 11 grounds of appeal:
 - a. That the learned magistrate erred in law and in fact by failing to appreciate though the matter was filed in the year 2007 at the High Court at Nyeri, it has been transferred from one court to another and this might have caused the delay in conclusion of the same and that the Appellants are not entirely to blame.
 - b. That the learned magistrate erred in law and in fact by stating that the Appellants herein had entirely caused the delay in determination of this matter.
 - c. That the learned magistrate erred in law and in fact by failing to appreciate that the Appellants have always been vigilant in prosecuting the matter and they have never gone to slumber as stated by the trial magistrate.
 - d. That the learned magistrate erred in law and in fact by not considering that the Appellants herein have always been vigilant in pursuing this matter and they even instructed their former advocates to file citation proceedings against the beneficiaries of the deceased Defendant which was done vide Nyeri High Court Citation No 86 of 2018.
 - e. That the learned magistrate erred in law and in fact by failing to consider that the matter was transferred to Nyahururu High Court and then to the Chief Magistrate's court, the matter has never been dormant as can be deciphered from the court's records as the Appellant had initially filed an application to amend the plaint vide their application dated 5th February, 2020, when they were of the belief that their former advocates had successfully substituted the deceased Defendant only for them to find that the matter had already been dismissed from the Respondents' reply to the application.



- f. That the learned magistrate erred in law and in fact by not considering that after the Appellants discovered that the suit had been marked as having abated, they moved swiftly the court and filed the application dated 2nd November, 2021 and that application was eventually withdrawn before the same could be determined when the 1st Plaintiff who had sworn an affidavit to that application passed on 13th May, 202 and the Appellants eventually filed the application dated 19th August, 2022.
 - g. That the learned magistrate erred in law and in fact by failing to appreciate that the period from when the Defendant passed on to filing of the present application had been sufficiently explained and the Appellants herein were all along pursuing the matter including filing of citation proceedings against the beneficiaries of the estate of the deceased person only to discover that the beneficiaries had secretly filed the succession proceedings in Nairobi.
 - h. That the learned magistrate erred in law and in fact by failing to appreciate the delay was further caused by the Applicant's previous advocates who made them believe that after he filed the citation, he was able to substitute the deceased Defendant and he further failed to attend court when he was required as can be deciphered from the several notices that were sent to their former advocates and the mistakes of an advocate should not visited upon them.
 - i. That the learned magistrate erred in law and in fact by stating that issues of non service of the pleadings by the Defendant's advocates was only raised in the submissions which fact is not true as the issue of service was raised in the application and also in the supporting affidavit in support of the application.
 - j. That the learned magistrate erred in law by stating that the deceased Defendant and the Appellants herein were step-brothers which fact is not true and was true misapprehension of facts.
 - k. That the learned magistrate erred in law by holding that the delay in substitution was not sufficiently explained by the Appellants and that the Appellants have always been vigilant in pursuing their interest on their land and land being a very emotive issue in country would have allowed the same to be heard and decided on merit and not on technicalities.
5. As a result, the Appellants sought the following reliefs in the appeal:
- a. That the appeal be allowed.
 - b. That the ruling and order of the trial court dated 01.12.2022 be set aside.
 - c. That the Appellants be awarded costs of the appeal.

D. Directions on Submissions

6. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their respective submissions. The record shows that the Appellants' submissions were filed on 30.11.2023 whereas the Respondents' submissions were filed on or about 14.12.2023.

E. Issues for Determination

7. Although the Appellants raised 11 grounds in their memorandum of appeal, the court is of the view that the grounds may be summarized into the following 3 issues:



- a. Whether the trial court erred in law in dismissing the Appellants' notice of motion dated 02.11.2021.
- b. Whether the Appellants are entitled to the reliefs sought in the appeal.
- c. Who shall bear costs of the appeal.

F. Applicable legal principles

8. It is evident from the material on record that in considering the Appellants' notice of motion dated 02.11.2021, the trial court was exercising judicial discretion. It was within the discretion of the trial court to grant or decline the orders sought. However, such discretion has to be exercised judiciously and upon reason.
9. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR it was held that an appellate court should not readily interfere with the exercise of judicial discretion by the court appealed from unless:
 - i. The judge misdirected himself in law; or
 - ii. The judge misapprehended the facts; or
 - iii. The judge took into account considerations which he should not have taken into account; or
 - iv. That he failed to take into account considerations of which he should have taken account; or
 - v. That his decision albeit a discretionary one, was plainly wrong.

G. Analysis and Determination

a. Whether the trial court erred in law in dismissing the Appellants' notice of motion dated 02.11.2021

10. The court has considered the material and submissions on record on this issue. The court has also taken note of the authorities cited by the parties in support of their positions. Whereas the Appellants faulted the decision of the trial court in every aspect, the Respondents fully supported the decision.
11. The Appellants' application dated 02.11.2021 before the trial court was essentially based upon Order 24 rule 7(2) of the Rules which stipulates 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.”
12. The Appellants contended before the trial court that they were misled by their previous advocates into believing that substitution of the deceased Defendant was done upon issuing a citation to his family members in 2018. It was further contended that they were not aware of the application dated 30.08.2019 for a declaration of abatement and that it took them a long time to discover that the Respondents had taken out letters of administration in Nairobi High Court Succession Cause No 676 of 2019. The Appellants' therefore, considered that they had established sufficient reason to warrant revival of the suit and substitution of the deceased party.



13. The court has considered the ruling of the trial court dated 01.12.2022 and delivered on 30.01.2023. After considering the submissions of the parties and the authorities relied upon the trial court concluded as follows:
- “ 38. After considering both decisions cited, I note that the emphasis is on whether sufficient cause has been shown by the Applicant for the delay in filing such an application. The circumstances in Ngotho Commercial Agencies (supra) are very different front the circumstances herein.
39. I am therefore guided by this Court of Appeal judgment and I am satisfied that in this case, no sufficient cause was given for the extremely inordinate delay in filing this application. There is no justification whatsoever for having this case which has been pending since 2007 being revived in the circumstances herein. Litigation must surely come to an end. I find no merit in this application.”
14. It is evident from the ruling of the trial court that it had in mind the correct principles to be considered in an application for revival of an abated suit and substitution of a deceased Defendant. The main question for consideration is whether or not the trial court erred in law in finding and holding that the Appellants had failed to demonstrate that they had been prevented by sufficient cause from continuing with the suit. There is no doubt from the material on record that the original Defendant before the trial court died on 25.03.2017. There is also no doubt that the Appellants were aware of his demise since they were close relatives. The record further shows that the Appellants even caused a citation to be issued to the family members of the deceased in 2018.
15. It is also clear from the material on record that a grant of representation to the estate of the deceased Defendant was issued to the Respondents on 29.10.2019. It is a matter of public notoriety that before such a grant is made by the court, a notice of such application has to be published in the Kenya Gazette at least 30 days in advance for notification of the general public. It was upon the Appellants and their advocates to be on the lookout for such notification especially given that they had issued a citation in 2018. They cannot be heard to feign ignorance of matters published in the official Kenya Gazette. The law presumes that they had at least constructive notice of the publication.
16. The court is of the opinion that even though the Appellants may have had sufficient cause for failing to continue with the suit between 25.03.2017 and 29.10.2019 during which the deceased Defendant had no legal representative, there was nothing which prevented them from applying for revival of the suit and substitution of the deceased Defendant between 30.10.2019 and 02.11.2021 when they took steps to revive the abated suit. The Appellants did not render a reasonable explanation for the delay of over 2 years in their application dated 02.11.2021.
17. It is not sufficient for the Appellants to simply blame their previous advocates for their indolence. If, as they contended in their application before the trial court, they were misled into believing that the issue of substitution had been resolved in 2018 or 2019 then why didn't they take step to prosecute their suit expeditiously? The Appellants have also attempted to blame the Covid-19 pandemic for their failure to take steps between October 2019 and November 2021. This issue was raised in the Appellants' written submissions for the first time. It was not contained in the Appellants' application and supporting affidavit before the trial court. The Appellants are simply seeking to expand the scope of their application by casting their net wider than they had done before the trial court. This is not legally permissible.
18. The court has noted that the trial court took into account the conduct of the Appellants in failing to diligently prosecute their suit even prior to the demise of the Defendant. The record shows that the



Appellants had survived an application for dismissal of the suit for want of prosecution in 2015. The Appellants were thereupon granted 14 days to comply with Order 11 of the *Civil Procedure Rules* and prepare for trial but they never complied. It is also evident from the material on record that they were not diligent in seeking revival of the suit and substitution of the deceased Defendant.

19. The court is thus of the opinion that even though the trial court may have erred in reckoning the period of delay as 4 years whereas in reality the delay was for 2 years that did not occasion a miscarriage of justice. The Appellants were still unable to satisfactorily account for the delay of over 2 years between October, 2019 and November, 2021. In the premises, the trial court was justified in holding that the Appellants had failed to demonstrate sufficient cause within the meaning of Order 24 rule 7 of the *Civil Procedure Rules*. The court does not find any material on record leading to the conclusion that the trial court misdirected itself in law or that it misapprehended the facts. There is no indication to suggest that the court took into account irrelevant considerations or that it failed to take into account relevant considerations. There is also no demonstration that its decision was mainly wrong.

b. Whether the Appellants are entitled to the reliefs sought in the appeal

20. The court has found that the trial court did not err in law in dismissing the Appellants' notice of motion dated 02.11.2021. The court has not found any misdirection in law on the part of the trial court or any other vitiating factor which would justify any interference with the judicial discretion of the trial court. It would, therefore, follow that the Appellant is not entitled to the reliefs sought in the appeal.

(c) Who shall bear costs of the appeal

21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd* [1967] EA 287. The material on record shows that the Appellants and the Respondents are close relatives. The court is thus of the opinion that each party should bear his own costs of the appeal.

H. Conclusion and Disposal Order

22. The upshot of the foregoing is that the court finds no merit in the Appellants' appeal. As a consequence, the court makes the following orders for disposal thereof:
- a. The Appellants' appeal be and is hereby dismissed.
 - b. The decision of the trial court dated 01.12.2022 in Nyahururu CM ELC 278 of 2018 is hereby affirmed.
 - c. Each party shall bear his own costs of the appeal.

It is so decided.

JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 8TH DAY OF FEBRUARY, 2024.

Y. M. ANGIMA

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JUDGE

I certify that this is a true copy of the original



Signed

DEPUTY REGISTRAR

In the presence of:

Ms. Njoki Mureithi for the Appellants

Mr. Mutua for the Respondents

C/A - Carol

