



**Keen v Kenya Forestry Service (Environment & Land Case
521 of 2014) [2023] KEELC 16013 (KLR) (2 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16013 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 521 OF 2014**

**LN MBUGUA, J
MARCH 2, 2023**

BETWEEN

JOHN KEEN PLAINTIFF

AND

KENYA FORESTRY SERVICE DEFENDANT

RULING

1. This suit was commenced by a plaint dated 30th April 2014 where the plaintiff sought to be declared the registered owner of the parcel of land known as LR No. Ngong /Ngong 12673. However, he passed away on 25th December 2016. The suit abated by operation of law a year after his death and it was so marked by the court on 12th February 2020.
2. By a Notice of Motion application dated 19th September 2021, plaintiff's estate seeks an order for extension of time for the purpose of substituting him. The application is based on grounds on its face and on the supporting affidavit of Pamela S Keen, an executrix of his estate, sworn on 19th September 2022. She deposes that the grant of probate to the estate of John Keen was made on 4th April 2017. That upon his death, the Advocate on record; Mr Maina Wachira who was also an executor of his will also passed away resulting in a delay with regard to obtaining the file and documents from Maina Wachira & Company advocates. She also blames covid 19 pandemic for the delay.
3. In opposition, the Defendant filed a replying affidavit sworn on 16th November 2022 by Laura Yego, its Chief Legal Officer. She deposes that a grant of probate with written will in respect of the Plaintiff's estate was issued on 4th April 2017 thus the executors of his estate had well over 8 months to file an application for substitution of the Plaintiff before the suit abated on 25th December 2017. She further deposes that Maina Wachira Advocate (deceased) who was on record for the deceased and was also an executor of his will passed away on 27th March 2021, more than 4 years after the grant of probate to the estate of the Plaintiff was issued.



4. She points out that the executors of the Plaintiff's will were aware of this suit. She cites letters addressed by Maina Wachira Advocate dated 17th January 2019 and 3rd July 2019, addressed to the National Land Commission and copied to the Defendant and executors of the Plaintiff's will over the subject matter herein and citing this suit to buttress the point that the executors had knowledge of this suit.
5. What more, the matter was listed for mention before the Deputy Registrar on 16th September 2019 when one Oduor (its actually Ndiwo) held brief for Kagunda for the Plaintiff who sought 30 days to file an application for substitution and the matter was stood over to 12th February 2020 when it was marked abated as the Plaintiff's estate failed to make any such application for substitution.
6. She contends that covid 19 pandemic emerged in March 2020 thus it is not to blame as clearly executors of the Plaintiff's will knowingly allowed the suit to abate and now bring this application after inordinate delay being 6 years after the Plaintiff died and 5 years after executors were issued with a grant of probate. She adds that order No. 2 sought is not in compliance with Order 24 rule 3(1) of the Civil Procedure Rules to the extent that it seeks to enjoin the estate rather than the legal representative of the deceased Plaintiff.
7. In reply thereof, the Applicant filed a supplementary affidavit sworn by Pamela S Keen on 19th January 2023 averring that the title deed over the suit property is in the name of the deceased Plaintiff and his proprietorship rights are not to be defeated except as provided in the Land Registration Act and since the title has not been challenged by evidence, his estate should benefit from the constitutional protection of its right to property.
8. She points out that the suit land is a big substantial acreage and it is an asset of significant value to the estate of the Plaintiff and its beneficiaries, thus substitution is essential to avert any prejudice to them and any prejudice caused to the Defendant can be remedied by an appropriate order for costs. She also avers that mistakes of previous counsel should not be visited upon them and urges the court to apply substantive justice.
9. I have considered all the arguments raised here in as well as the submissions of the Applicant.
10. The Plaintiff herein passed away on 25th December 2016. Thus under Order 24 Rule 3 (2) of the Civil Procedure Rules, the suit abated by operation of the law one year after the death. A grant of Probate with written will in respect of the Plaintiff's estate was issued on 4th April 2017. Maina Wachira Advocate (now deceased) who was the Plaintiff's Advocate in this matter was one of the executors of his will. There is no plausible explanation why the executors of the Plaintiff's estate obtained a grant of probate within 4 months of his death yet failed to apply for substitution in good time.
11. Under Order 24 Rule 7 (2) of the Civil Procedure Rules, an abated suit may be revived if sufficient cause is established.
12. In *Kishor Kumar Dhanji v AmolakSingh & 4 others* [2016] eKLR, the Court of Appeal stated that it is appropriate to revive suit where an Applicant sufficiently explained the reasons for failing to pursue the suit before it abated. The sufficient reasons ought to be rational, plausible, logical, convincing, reasonable and truthful and should not leave unexplained gaps in the sequence of events.
13. Firstly, the grant of probate was obtained just 4 months after the death of the plaintiff. As rightly noted by the defendant, the applicants had about 8 months to substitute the plaintiff before the abatement of the suit. They never took any action. Secondly, the advocate for the applicants passed away on March 27, 2021, 4 years after the grant had been obtained of which, the said advocate was apparently updating the applicants on matters concerning this suit (see paragraph 5 of the respondent's affidavit). Thus the applicants were well aware of this suit before the death of their advocate.



14. Further, an advocate even appeared in court on September 16, 2019 seeking just one month to make an application for substitution. The court indulged them. Several months later, a counsel by the name Coro appeared in court on February 12, 2020 holding brief for Kagunda for the plaintiff and he informed the court that “succession proceedings were under way”. The court proceeded to mark the case as abated.
15. What emerges from the record is that the passing away of Maina Wachira advocate in year 2021 had nothing to do with the unexplained delay before his death.
16. Thirdly it is pertinent to note that the issue of delay is manifested even in the filing of the current application. The said application is dated September 19, 2021 prepared by the current advocates of the applicants, but was only filed a year later on September 20, 2022!, more than 5 years after a grant of probate was issued in respect of the Plaintiff’s estate. Again that delay has not been explained at all.
17. The Applicant also blames covid 19 for the delay. However, the pandemic only struck in year 2020, three years after the grant was acquired; noting that even with the pandemic, the courts remained operational through the digital platforms.
18. In *Kiprotich Korir & another v Shiyotor Holdings Limited* [2021] eKLR while considering an application of similar nature, the court held that;

“It is time that litigants were alive to the reality of the overriding objectives of Section 1A of the *Civil Procedure Act* which in part, requires the expeditious resolution of cases. Parking a case in court for 5 years without any good reason cannot be said to be in execution of the overriding objective. In the case of *Said Sweilem Gheitham Saanum v Commissioner of Lands & 5 Others* (2015) eKLR the Court of Appeal stated as follows: -“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes.”

19. I find that the reasons given by the Applicant are not sufficient to warrant the revival of this suit. The application dated September 19, 2021 and filed on September 20, 2022 is hereby dismissed with costs to the Respondent/Defendant. The file is marked as closed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Echessa for the Applicant

Kariuki for the Defendant

Court assistant: Vanilla

