Muri Mwaniki & Wamati Advocates v Murathe (Environment and Land Miscellaneous Application 73 of 2014) [2023] KEELC 16130 (KLR) (15 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16130 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 73 OF 2014

AA OMOLLO, J

MARCH 15, 2023

BETWEEN

MURI MWANIKI & WAMATI ADVOCATES ..... APPLICANT

AND

WILLIAM GATUHI MURATHE ..... RESPONDENT

RULING

1. The application coming up for determination is the motion dated June 23, 2021 brought under the provisions of order 24 of the *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act*. The Applicant sought for the following orders;

    1. Spent

    2. That the Honourable Court be pleased to admit into these proceedings and substitute the name of the Respondent William Gatuhi Murathe (deceased) with the names of Mercy Wambui Gatuhi, David Wakairu Murathe, George Kuria Murathe and Naomi Nyambura Gatuhi who are the administrators of the deceased's estate.

    3. That the Honourable court be pleased to revive the suit herein that abated on April 7, 2018.

    4. The costs of this application be provided for.

2. The application was supported by the grounds listed on its face inter alia;

    a. On March 18, 2019, counsel for the Respondent informed the court that the Respondent herein had passed on, and matter was stood over to November 27, 2019 for confirmation of the same. On the said November 27, 2019, the

court noted that the suit herein had abated on April 7, 2018 after the lapse of one year since the death of the Respondent.

b. At the time of the death of the Respondent herein, the advocate/client bill of costs filed against the Respondent was yet to be heard and determined.

c. The process of applying for letters of administration for the estate of the Respondent was not within the control of the Applicant and any delay to seek substitution with the legal representative is not deliberate and is excusable.

d. It is in the interest of justice that this application be allowed and the bill of costs be heard to its logical conclusion.

3. The application was opposed through the replying affidavit sworn by Jane Nyabiage Odiya advocate. She deposed that she was instructed by two of the intended Respondents named Mercy Wambui Gatuhi and Naomi Nyambura Gatuhi. Ms. Odiya cited the provisions of order 24 rule 4(3) and stated that subrule 4 does not allow for extension of time without good reasons and in particular where it is the defendant who is deceased. She deposed that this application brought 5 years after the death of defendant is guilty of inordinate delay. Ms. Odiya deposed further that the Applicant being a firm of advocates was expected to exercise high level of due diligence in having access to the Kenya gazette notice which appointed legal representatives of the deceased defendant.

4. Counsel deposed further that the Applicant slept on their rights/indolent thus no aid should go their direction. She invited the court to push the clock backwards and glance at the bill of costs on record with the same pending before the court for over 5 years and no reason has been tendered why the same was never acted upon. She asked the court to dismiss the application.

5. The parties agreed to prosecute the application by way of written submissions. The Applicant filed theirs dated December 6, 2022 and submitted inter alia that they learnt of the death of the defendant when the matter came up in court on March 18, 2019 through word from defence Counsel. That it took time from November 2019 for the Applicant to know who the legal representative were for purposes of substitution.

6. The Applicant submitted that order 24 rule 7(2) of the *Civil Procedure Rules* gives the court discretion to revive an abated suit when there is sufficient proof that the Applicant was prevented by any sufficient cause from continuing the suit. The Applicant argues that abated suit against a deceased defendant is capable of being revived. In support of their argument, the Applicant relied on the Court of Appeal decision on the *Hon. Attorney General v the LSK & another* App No 133 of 2011 where the said court defined sufficient cause to mean;

> " the burden placed on a litigant."

7. The Applicant stated that they should not be blamed for the delay of 5 years in bringing this application since counsel for the defendant took two years to inform them of the death. Secondly, that the process of applying for the letters of administration of the estate of the deceased defendant was not within their control. The Applicants averred that it took them time to establish who the legal representative were for purposes making the application for of substitution. The applicant urged the court that they have explained the delay and the court should exercise discretion under the provisions of section 1A, 1B and 3A to allow the application.

8. The Respondents vide its submissions dated December 5, 2022 opened with a previous of the dispute before the court and submitted that the current application was not served upon them. It is the

defendant's contention that time cannot be extended to revive a suit where the party dead is the defendant. They referred the court to the case of *Lucy Wanjiru Kamau v K. H. Osmond Advocate* (2018) eKLR where it was held thus;

> "……..On the other hand the law did not appear to have any such provisions where the deceased was a defendant. if the drafters of the law had intended that both a deceased plaintiff and deceased defendant were to be treated equally as regards extension of time to file an application to be substituted as a legal representative, or to have an abated suit revived, nothing would have been easier than for the drafters of the piece of legislation to have said so……"

9. In submitting that the Applicant has not shown sufficient cause to warrant the extension, the Respondent stated that the gazette notice (a public document) was out by July 27, 2018 yet counsel did not take any steps to ensure that the suit does not abate. That even after being informed of the death, Counsel waited until 2021 to bring this application.

10. The Respondent further submitted that the Applicant was indolent and equity does not aid the indolent. They argue that the Applicant have not demonstrated why it took them time to prosecute the bill of costs from 2014 – 2017 before the demise of defendant. To buttress this argument, the Respondent cited case of *Amina Karamu vs Njagi Gachangua & 3 others* (2020) eKLR at paragraph 20 thus;

> "……. There is another reason why the plaintiff is disentitled to the equitable relief of injunction, that material on the record indicates that as far as 2006 & 2008 the plaintiff was being the name of the 1st defendant as the rate payer or plot owner, there is no plausible explanation as to why the Plaintiff took more than 14 years to seek legal redress……"

11. The Respondent referred to excepts in the Applicant Supplementary affidavit dated September 19, 2020 accusing them of failing to explain why the matter was not prosecuted on dates it came up in court. Further that the Applicants are in the know that they can cite persons who are reluctant to take out letters of administration if their interest is at stake.

    They asserted that where a file goes missing, a party can always apply for reconstruction. They urge the court not to aid the Applicant who they have demonstrated was indolent.

12. There is no dispute that the Respondent died on April 7, 2017 with the claim against him abating on April 6, 2018 as there was no application for substitution that had been taken out. There is no dispute that the present application for substitution was brought 5 years since the death of the Respondent. From the arguments put forth by both parties, I frame the following two questions for determination:

    i. Whether the application was brought after inordinate delay thus disentitling the Applicant of this court's discretion.

    ii. Whether time can be extended to revive a suit against a defendant.

    iii. If answer to (ii) is yes, whether the Applicant has presented sufficient cause to warrant the extension.

13. It is a common principle of equity that the measure of what is inordinate delay is to be determined on a case by case basis. Gikonyo J. in the case of *Utalii Transport Company Limited & 3 Others v Nic Bank Limited & Another* [2014] eKLR held thus;

> " Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable. On applying Court's mind on the delay, caution is advised for Courts not to take the word 'inordinate' in its dictionary meaning, but in the sense of excessive as compared to normality."

14. The Respondent died on April 7, 2017 so the claim against him expired on April 7, 2018. In explaining that there was no delay, the Applicant stated that they were not aware of the death until January 21, 2019 when Mr. Thuku learned counsel appearing for the Respondent stated so. On that day, Mr. Mwaniki for the Applicant sought time to seek instructions. During the next appearance in court on November 27, 2019, the Applicant's Counsel still intimated to court they were unaware of the death of the Respondent. However, on this date, the judge marked the suit as having abated and left it open for the Applicant to move the court appropriately.

15. The Applicant did not move the court until June 23, 2021 (the instant application). He explained the delay in not being able to know who had been appointed the legal representative of the estate of the deceased. The intended Respondents argued that the applicant took over 5 years to bring this Application hence the delay is inordinate. They added that taking into account that the Applicant is an advocate, he ought to have spotted the gazette notice publishing the legal representatives or to have commenced the process of citation.

16. In answering the question whether the delay was inordinate, this court computed time from when the Applicants were informed that the Respondent was deceased in January, 2019. They did not take any steps between January 2019 – June 2021 a period of two (2) years. This court is sensitive to the fact that between 16th March – June, 2020, the operations of the court were frozen but which is a period of only 4 months within the two years.

17. I do not find plausible the explanation by the Applicant that he did not know who had been appointed the legal representatives since the law allowed them to take out citation proceedings in appointment of an administration of a deceased estate as soon as they became aware of his death. They did not show any attempt of writing or inquiring from their colleagues regarding the administration of the estate of the Respondent. Are the intended Respondents prejudiced with the delay? The intended Respondent submitted that the estate has been distributed so the revival of the suit will be prejudicial. Therefore, I conclude that the delay in bringing the application for substituting the Respondent was inordinate thus prejudicial to the estate of the deceased Respondent.

18. The intended Respondents argued that time cannot be extended to substitute a deceased defendant after the suit abates. The answer is provided in order 24 rule 7 of the *Civil Procedure Rules* which states thus;

> (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.

19. Has the Applicant made sufficient cause for the time to be extended? The applicant explained themselves that the process of applying for letters of administration was not within their control. That the delay to substitute the Respondent was not deliberate. In the supplementary affidavit at paragraph 10, the Applicant narrated the steps he took from the time the bill was filed. The court record does indicate that the case came up in August, September and October 2016. Nothing took place from them until January, 2019 when the court was informed that the Respondent had died.

20. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, Mativo J while discussing what constitutes sufficient cause took the decision given by the Supreme Court of India in the case of *Parimal vs Veena* observed that:-

> " sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

21. Further, in the case of *BML v WM* [2020] eKLR, the Court of Appeal cited with approval the he Supreme Court of India in Civil Appeal 1467 of 2011 *Parimal vs Veena Bharti* (2011), where sufficient cause was defined as follows:

> " Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been 'not acting diligently ..."

22. In the application before me, the record does show that the Applicant was indolent as submitted by the intended Respondents in prosecuting the bill of costs. There is only one letter dated March, 2016 which mentioned the issue of file missing. However, by October 2016, the file was available as the parties appeared before the learned judge. There is no evidence that the Applicant took any steps from October, 2016 until January 2019 when the information of the demise of the Respondent was brought to the court's attention. The Applicant's indolence continued post January 2019 as he did not move the court until June 2021. The Applicant has not shown he acted diligently to warrant allowing for the extension of time for substitution.

23. In conclusion, I find no merit in this application and proceed to dismiss it with order that each party to meet their costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH, 2023.

A. OMOLLO

JUDGE