



**Mbondo v Mbinda (Environment and Land Appeal 12 of 2015)  
[2023] KEELC 17773 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17773 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL 12 OF 2015**

**CA OCHIENG, J**

**JUNE 8, 2023**

**BETWEEN**

**WAMBUA MBONDO ..... APPELLANT**

**AND**

**WANZA MBINDA ..... RESPONDENT**

**RULING**

1. What is before Court for determination is the Appellant's Notice of Motion Application dated the 13<sup>th</sup> October, 2022 brought pursuant to order 24 rule 7(2) of the Civil Procedure Rules including Section 3A of the Civil Procedure Act. The Appellant seeks the following orders:-
  1. That this Honourable Court be pleased to reinstate and revive the Appeal.
  2. That this Court be pleased to enlarge time within which to substitute the deceased Respondent.
  3. That the Respondent be substituted with George Musau Mbinda upon taking out Letters of Administration Ad litem for the estate of Wanza Mbinda.
  4. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Wambua Mbondo. He explains that the Respondent herein died on 23<sup>rd</sup> April, 2016. Further, that the proposed Respondent is the Administrator of the Estate of Wanza Mbondo and therefore the legal representative of the deceased as per the Succession Cause filed at Machakos Chief Magistrate's Court No. 414 of 2021. He avers that he filed a Citation Cause No. 342 of 2021 which prompted one George Musau Mbinda to apply for Letters of Administration Intestate in respect to the Estate of the Respondent. He contends that the Respondent's Counsel had on 15<sup>th</sup> March, 2022 informed court that gazettelement of the Estate of his deceased client was yet to issue but on perusal of the Succession Cause file, the process



is yet to begin. He deposes that since the statutory period of one year has lapsed, there is hence the need to seek enlargement of time for purposes of substitution through the filing of a Limited Grant of Administration Ad litem. He states that the cause of action is still continuing and the Appeal has high chances of success. He reiterates that it is in the interest of justice that the instant Application be allowed and no prejudice will be occasioned to the Respondent.

3. The Respondent's Counsel opposed the Application by filing Grounds of Opposition where it stated thus:-
  1. That the Application is defective, an abuse of the court process, an afterthought and orders sought are not available.
  2. There is no administrator appointed for the Estate of Wanza Mbinda and therefore the orders sought cannot issue.
  3. The Respondent died on 23<sup>rd</sup> April, 2016 and the Application is made with inordinate delay and too late in the day, which is over six (6) years.
  4. The Appellant already knew the death of the Respondent on 23<sup>rd</sup> April, 2016 since they are neighbours and failure to file this Application in good time was deliberate.
  5. That the delay of over six (6) years has not been explained and there is even no attempt to explain the same.
  6. That the Application is defective and should be dismissed with costs.
4. The Application was canvassed by way of written submissions.

#### **Analysis and Determination**

5. Upon consideration of the instant Notice of Motion Application including the Supporting Affidavit, annexures, Grounds of Opposition and rivaling submissions, the only issue for determination is whether this Court should enlarge time for substituting the deceased Respondent and revive the abated Appeal.
6. The Applicant in his submissions has provided a background of the Appeal and states that the court should exercise its discretion and extend time for revival of the abated Appeal since the statutory period of one year has lapsed. He argues that the Appeal revolves around dispute in respect to land and it has high chances of success. He insists that the Court should remain alive to the position of the Respondent's counsel on 15<sup>th</sup> March, 2022 that they were in the process of gazetting the Respondent's Estate. To buttress his averments, he relied on the following decisions: *Issa Masudi Mwabumba V Alice Kavenya Mutunga & 4 Others* (2012) eKLR and *Francis Mugo & 22 Others V James Bress Muthee & 3 Others* (2005) eKLR.
7. The Respondent's Counsel in his submissions contends that the Respondent died on 23<sup>rd</sup> April, 2016 prior to the commencement of the Appeal. They insist that there has been inordinate, unexplained and inexcusable delay on the part of the Appellant in substituting the deceased Respondent and prosecuting the Appeal. They argue that the Appellant has never been keen and desirous of prosecuting the Appeal. They insist that the onus of substituting the Respondent was upon the Appellant. They seek for costs. To support their averments, they relied on the following decisions: *Ivita Vs Kyumbu* (1984) KLR 441; *Ibrahim Mungara Kamau v Francis Ndegwa Mwangi* (2014) eKLR and *Titus Kiragu v Jackson Mugo Mathai* (2015) eKLR.



8. In this instance, the Appellant seeks for enlargement of time to substitute the Respondent as well as revive the abated Appeal. I note the Respondent died on 23<sup>rd</sup> April, 2016. The Appellant has not denied that he knew of the death of the Respondent as they are neighbours. From the averments in the Supporting Affidavit, the Appellant except for blaming the Counsel for the Respondent that he informed Court on 15<sup>th</sup> March, 2022 that they are undertaking succession proceedings in respect to Respondent's Estates, has not provided any plausible reasons for the delay in substituting the Respondent. To my mind, it was the responsibility of the Appellant to substitute the Respondent so as to proceed with the Appeal but he failed to do so and only sought substitution six (6) years later, after prompting by the Court.

9. In *Ivita v Kyumbu* [1975] eKLR, the Court while dealing with reinstatement of a suit held that:-

So the test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay. Justice is justice to both the plaintiff and defendant; so both parties to the suit must be considered and the position of the judge too, because it is no easy task for the documents, and, or witnesses may be missing and evidence is weak due to the disappearance of human memory resulting from lapse of time. The defendant must however satisfy the court that he will be prejudiced by the delay or even that the plaintiff will be prejudiced. He must show that justice will not be done in the case due to the prolonged delay on the part of the plaintiff before the court will exercise its discretion in his favour and dismiss the action for want of prosecution. Thus, even if delay is prolonged if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties notwithstanding the delay the action will not be dismissed, but it will be ordered that it be set down for hearing at the earliest available time."

10. While in the case of *Raphael Musila Mutiso & 3 others v Joseph Ndava Nthuka & another* [2019] eKLR, it was observed that:-

In an application for extension of time the most critical consideration is the explanation for the delay. A delay of a day will result in the application being dismissed if there is no explanation. There are, on the other hand many decisions where delays of many months and even years have been excused because the applicant in those applications provided plausible explanation See: *Kamau Mugwima V Nganga Njoroge & 3 Others*, Civil Application No. Nai 60 of 2006 where the delay was 392 days. In the present case, while the delay before July 2018 has been explained on the failure by the court to notify the parties of the date of delivery of judgement, there has been no attempt to explain the delay thereafter. So, although the delay was not inordinate, the reason for the delay has not been furnished. I believe that granting the extension of time will be prejudicial to the respondents considering that the judgment was rendered nearly two years ago. Without expressing any definitive position, I also do not think the appeal has any reasonable chances of succeeding as I think trust was not proved."

See also the case of *Issa Masudi Mwabumba V Alice Kavenya Mutunga & 4 Others* (2012) eKLR.

11. Based on the facts as presented while associating myself with the decisions I have cited, I opine that the Appellant has not made out a case for enlargement of time to substitute the Respondent and revive the abated Appeal. It is my considered view that the Appellant who was a neighbour to the Respondent should have applied much earlier to substitute the Respondent but failed to do so. Further, he only sought to substitute the Respondent after being prompted by the Court twice on 19<sup>th</sup> February, 2021



and 11<sup>th</sup> November, 2021, while dealing with a notice to dismiss the Appeal for want of prosecution. I find that the delay in substituting the Respondent is inordinate and unexplained. Further, the Respondent's estate stands prejudiced in the event this Appeal is revived.

12. In the circumstance, I will decline to enlarge time to substitute the Respondent and reinstate the abated Appeal.
13. In the foregoing, I find the Notice of Motion Application dated the 13<sup>th</sup> October, 2022 unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 8<sup>TH</sup> DAY OF JUNE, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

