



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 256 OF 2018**

**JUMWA TINGA KALU.....PLAINTIFF**

**VERSUS**

**MORIN LEAH AKECH AUMA & 4 OTHERS.....DEFENDANTS**

**RULING**

*(Application for revival of suit and substitution of deceased plaintiff and reinstatement of order of injunction; sufficient cause shown as to why the application was not filed within one year of death; on injunction it will be in the interest of justice to allow it to remain in place until conclusion of the suit or otherwise ordered by court; application allowed)*

1. The application before me is that dated 28 April 2021 filed by one Fancisca Thinga Kalu. From what I can see, there are three principal orders sought in her application. The first is that this suit, which has abated, be revived. The second is that the applicant be allowed to continue this suit as legal representative of the deceased plaintiff. The third seeks orders that the order of injunction issued on 18 December 2018 be reinstated so that there is an order of injunction stopping the defendants from dealing with the suit property which is LR No. 5136 (Original No. 4372/3) Section III Mainland North (the suit land) pending hearing and determination of this suit. The application is opposed.

2. To put matters into context, this suit was commenced through a plaint filed on 29 October 2018. The plaintiff averred that he was the registered proprietor of the plot Subdivision No. 2767 (Original No. 408/4) Section III, Mainland North (the original plot) measuring 5.820 Ha. He pleaded that in the year 2007, he subdivided the original plot into several parcels which he transferred to third parties. There remained 3.5 acres known as Subdivision No. 4372/3 Section III Mainland North. Out of this, she sold one acre to another person and handed over the original title deed to her advocate. In the year 2013, the 2<sup>nd</sup> defendant (Michael Arina Knight) approached the plaintiff with an offer to purchase 2 acres of the remainder. The plaintiff agreed and the 2<sup>nd</sup> defendant's counsel prepared a sale agreement dated 28 June 2013. The plaintiff did not however sign the agreement since the deed plan showed that what was being sold was 2.43 acres and not 2 acres. She thus rescinded the agreement, but unknown to her, the 2<sup>nd</sup> defendant proceeded to process a subdivision and obtained a certificate of title in her name for 2.43 acres which is the suit land. She avers that in the year 2016, she was informed that the property has been sold to the 1<sup>st</sup> defendant (Morin Leah Akech Auma). She reported the matter to the police and the 1<sup>st</sup> defendant was charged with a criminal offence relating to the sale. In the plaint, the plaintiff sought orders inter alia for a declaration that the suit land belongs to her as she never transferred it to either 1<sup>st</sup> or 2<sup>nd</sup> defendant. The 3<sup>rd</sup> defendant is the advocate who oversaw the transfer whereas the 4<sup>th</sup> defendant is the Land Registrar, Mombasa. The 5<sup>th</sup> defendant is the Attorney General.

3. Together with the plaint, the plaintiff filed an application for injunction seeking orders to restrain the defendants from dealing with the suit property or constructing on it pending hearing of the suit. Interim orders were granted on 30 October 2018 pending inter partes hearing. The application for injunction was allowed by consent on 18 December 2018, albeit with a small modification.

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendants filed separate defences through separate counsel where they basically pleaded to have properly purchased the suit land.

5. On 14 February 2019, the plaintiff filed an application seeking to strike out the defences of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. I heard that application and dismissed it in my ruling of 27 February 2020. I directed the case to be fixed for pretrial. On 13 April 2021, at the pretrial, Mr. Muniyithya, learned counsel for the plaintiff informed court that his client died on 6 March 2020. I observed that more than one year had lapsed since her death and I thus proceeded to mark the suit as abated. This application was subsequently filed.

6. In her supporting affidavit, the applicant has deposed that due to logistical challenges caused by Covid-19, it took a while before she could get the Certificate of Death. She has mentioned the restriction of movement that was in place between Kilifi and Mombasa between April and May 2020. She managed to get the Certificate of Death in November 2020. She filed an application for grant in January 2021 in the Magistrate's Court but the file got misplaced. She eventually got her grant on 16 February 2021. She then filed this application.

7. The 2<sup>nd</sup> defendant filed Grounds of Opposition to oppose the motion. It is inter alia stated that the applicant has not shown any sufficient cause for the revival of the suit and that the order for injunction, having been made on 18 December 2018, lapsed after one year and that this court has no jurisdiction to reinstate the same.

8. I asked counsel to file written submissions in respect of the application and I have taken note of the submissions filed. I observe that in his submissions, Mr. Wafula, learned counsel for the 2<sup>nd</sup> defendant, submitted that the applicant does not deserve the order for reinstatement. On the injunction, counsel submitted that the order of injunction was allowed to enable the plaintiff prosecute the main suit but instead of doing so, the plaintiff filed a frivolous application to strike out defence which took time to be heard and was eventually dismissed. He submitted that the plaintiff was well aware that she needed to prosecute her claim within 12 months or else the injunction would lapse. Nevertheless, counsel submitted on the merits of the prayer for injunction and referred me to the principles laid down in the case of *Giella vs Cassman Brown*, which he submitted the applicant has not met. He asked that the application be dismissed. On the other hand, Mr. Munyithya, learned counsel for the applicant, made submissions urging me to allow the application and he referred me to various decided authorities.

9. I have considered all the foregoing. The first limb of this application seeks a revival of the suit and for the applicant to continue the same on behalf of the estate of the deceased plaintiff. Pursuant to the provisions of Order 24 Rule 3, an application for substitution of a deceased plaintiff needs to be made within one year of death or else the suit will abate. That is what happened in this case. No application for substitution was made within one year and therefore the suit abated. However, under Order 24 Rule 7 (2) the legal representative of a deceased plaintiff may apply for an order to revive the abated suit. The order is drawn as follows :-

*(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.*

10. It will be seen from the above, that to revive an abated suit, the applicant needs to show that he was prevented by sufficient cause from continuing the suit. In our instance, the applicant has cited Covid-19 restrictions and the delays caused by the misplaced file where she had applied for a grant ad litem. I am persuaded by the explanation given by the applicant. I also note that this application was filed on 30 April 2021 just about a month or so after the abatement of the suit. I do not think that the applicant has been guilty of inordinate delay. I will therefore revive the suit and permit the applicant to be substituted for the deceased plaintiff. The plaint may accordingly be amended within 14 days of this order and be served upon all parties.

11. The second limb of the application relates to the order of injunction. Indeed, there was issued an order of injunction by consent of the parties as I have demonstrated above. The plaintiff seeks the said orders to be reinstated but this is resisted by the 2<sup>nd</sup> defendant who argues that the order has lapsed. Whereas Order 40 Rule 6 does provide that an injunction shall lapse if the suit is not determined within 12 months from the date of the order, I think the reality is that in many court stations there is serious congestion of cases, so that it is not unusual to have a matter determined even years after the order of injunction, not because of any fault of the parties, but because of the huge backlog of cases. I think in those instances the court has discretion to allow, in the interests of justice, the extension of the order of injunction unless otherwise persuaded. The order herein was granted by consent. I think it is still necessary to have that order in place so that the subject matter of the suit is not lost. I am persuaded that it is in the interests of justice that the orders of injunction of 18 December 2018 do remain in place until the conclusion of this case or unless otherwise ordered by the court.

12. The only issue left is costs.

13. I will make no orders as to costs.

14. Orders accordingly.

**DATED AND DELIVERED THIS 3<sup>RD</sup> DAY OF FEBRUARY 2022.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA.**