



REPUBLIC OF KENYA



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Gichana v Araka & another; Araka & another (Interested Party) (Environment & Land Case 261 of 2013) [2022] KEELC 2361 (KLR) (6 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2361 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 261 OF 2013**

JM ONYANGO, J

JULY 6, 2022

BETWEEN

VICTOR NYANG'AU GICHANA PLAINTIFF

AND

BENINA BOSIBORI ARAKA 1ST DEFENDANT

SOLOMON OIGO NYAMBANE 2ND DEFENDANT

AND

REBECCA GESARE ARAKA INTERESTED PARTY

JARED OYAGI ARAKA INTERESTED PARTY

RULING

1. By a Notice of Motion dated 17th February, 2021 the Plaintiff filed an application seeking the following orders:
 - a. Spent
 - b. That this Honourable Court be pleased to set aside its ex-parte orders made on 29th January, 2021 dismissing this suit for want of prosecution.
 - c. That this Honourable Court be and is hereby pleased to reinstate this suit for hearing and determination on its merits.
 - d. That the costs of this application be provided for.
2. On 11.1.22 the application was amended to include an order that the deceased 1st Respondent be substituted by the Intended 1st and 2nd Respondents. The application is premised on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Julius Juma, Advocate sworn



on the 17th February, 2021. In the said affidavit, he depones that they were not served with a notice of intended dismissal of the suit for want of prosecution and they were therefore denied an opportunity to show cause why the suit should not be dismissed. At paragraph 11 of his affidavit Mr Juma has set out the steps taken to fix the matter for hearing on various dates between October 2017 and July 2019, when he was informed that the diary for 2019 was closed.

3. He has deponed that in January 2020 his attempts to fix the matter for hearing were hampered by the Corona Virus pandemic which resulted in scaling down of court activities. He has further deponed that in January 2021 he wrote letters to the court registry both by hard copy and by e-mail requesting for a hearing date but he received no response. Copies of the said letters and e-mail have been annexed to his affidavit. He later called the Deputy Registrar of the Court on 17th February, 2021 and he was informed that the matter had been dismissed for want of prosecution on 29th January 2021. He therefore pleads that the court exercises its discretion and reinstates the matter for hearing on its merits.
4. The application is opposed by the Respondents through the Replying Affidavit of Rebecca Gesare Araka, the 1st Interested Party/Respondent sworn on the 22nd February 2022. In the said affidavit she depones that the 1st Defendant who was her mother passed away on 20th January 2020 and the suit was dismissed on 29th January 2021. It is therefore her contention that the court cannot revive a suit that had already abated. She further depones that the Applicant has failed to explain why he did not appear in court on the date when the matter was listed for a Notice to show cause why the suit should not be dismissed for want of prosecution. She has taken issue with the fact that the Applicant has not sworn any affidavit to prove the allegations presented before the court and the reasons for the delay in prosecuting the suit. She further contends that the suit is sub-judice as there is another suit ELC Case No. 187 of 2013 between the same parties over the same subject matter which was filed by the firm of Ochoki & Co Advocates.
5. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

Issues For Determination.

6. The following issues fall for determination:
 - i. Whether the suit against the 1st Defendant which had abated should be revived.
 - ii. Whether the order of dismissal of the suit should be set aside
 - iii. Whether the deceased 1st Defendant should be substituted by the Interested Parties.

Analysis And Determination

7. It is not in dispute that the 1st Defendant died on 23rd January, 2020 and this being a land matter the suit against him survived. In order for the suit against the 1st Defendant to proceed, there was need for the 1st Defendant to be substituted with his legal representative within a year pursuant to the provisions of Order 24 Rule 4(1) of the [Civil Procedure Rules](#) Order 24 Rule 4 provides as follows:

Rule 4(1) “Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendants alone or where a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the Court on application made in that behalf shall cause the legal representative of the deceased to be made a party and shall proceed with the suit



- (2) Any party so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
 - (3) Where within one year no application is made under sub-rule
 - (1) the suit shall abate against the deceased defendant.”
8. Order 24 Rule 7(2) gives the court discretion to set aside an order of dismissal or abatement of a suit in the following terms:
- Rule 7(2) “The Plaintiff or 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 set aside an order of dismissal and if it is proved that he was prevented by any sufficient cause from continuing with 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.”
9. In the instant suit, it has been contended that the Plaintiff was not aware that the 1st Defendant had died on 23rd January, 2020 and he could therefore not have applied for substitution within a year as required by the Civil Procedure Rules. As seen from the correspondence attached to the Supporting Affidavit, the Plaintiff requested for hearing dates up to 26th January 2021 as if all the parties were alive. It is on record that when the matter came up for the hearing of the instant application on 23.3.21, learned counsel for the 1st Defendant informed the court that they had not responded to the application because the 1st Respondent had died on 23.1.20 and the suit against her had abated. Learned counsel for the Applicant then informed the court that he was not aware that the 1st Defendant had died.
10. From the material placed before the court, I am persuaded that the Applicant has sufficiently explained why he did not take any action before the suit abated. The Applicant has also demonstrated that he made efforts to fix the case for hearing but was prevented from explaining the same to the court as he was not served with the notice to show cause why the suit should not be dismissed for want of prosecution. I agree with the observation of Justice Fred Ochieng in *DHL Global Forwarding (Kenya) Limited v Global Fresh Agencies* (2016) eKLR where while dealing with an application for setting aside an order of dismissal of a suit for want of prosecution he opined that:
- “I hold the view that justice is best served when a party whose case may be dismissed for want of prosecution is given a real opportunity to show cause why the it should not be dismissed.
- I cannot expect you to show cause when you do not have notice of my said expectation”
11. This is therefore a proper case in which the court should exercise its discretion to revive the abated suit and set aside the order of dismissal of the suit.
12. With regard to the issue of substitution of the 1st Defendant, the Plaintiff proceeded to file citation proceedings as soon as he learnt that the 1st Defendant had died and none of his beneficiaries had taken out Letters of Administration. The Plaintiff having obtained an order in Kisii High Court Succession Cause No. 4 of 2021 appointing the Interested Parties as the personal representatives of the estate of the deceased for purposes of representing the interests of the 1st Defendant, it is only just that they be allowed to substitute the deceased 1st Defendant.
13. Although counsel for the Interested Parties has raised matters touching on the merits of the suit, particularly whether the suit is res judicata or sub-judice, I am of the considered opinion that it would be premature for the court to delve into them at this stage as the same can only be determined once the suit is reinstated.



14. Having carefully considered the application, the affidavits for and in opposition thereof as well as the rival submissions and the relevant law and authorities, I am of the view that the application is merited and I grant it as prayed. The order of dismissal of the suit is hereby set aside and the suit is reinstated for hearing. The costs of the application shall however be borne by the Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 6TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

