



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KAPSABET

ENVIRONMENT AND LAND CIVIL APPEAL NO. 6 OF 2021

(FORMERLY ELDORET ELC CIVIL APPEAL NO 1. OF 2014)

EDWIN KIPCHUMBA ASIS.....APPELLANT

VERSUS

ELIZABETH LETING..... RESPONDENT

AND

BEATRICE CHEPCHIRCHIR OCHOGO.....APPLICANT

RULING

1.This Ruling relates to the Notice of Motion Application dated 29.5.2019 by the Applicant Beatrice Chepchirchir Ochogo the widow of the appellants who is also the Administratrix of his Estate. The Applicant seeks orders as follows;

1. Spent
2. That Leave be and is hereby granted to the applicant to be substituted in this Appeal in place of the Appellant who died domiciled in Kenya on 5.11.2015
3. THAT the order of this Honourable court issued on 29.01.2019 marking the Appeal as abated be and is hereby set aside and in its place, there be an order reinstating and reviving the appeal.
4. Costs be provided for.
5. Any other and further reliefs that this Honourable court shall deem just and expedient to grant.

2.The application is grounded on grounds, inter alia, that the Appellant purchased **NANDI/ARWOS/ 938** from Joseph Letting who is a beneficiary of the Estate of Francis Letting together with his brother Simeon Kimeli Some but were left out when the Respondent applied for Grant of letters of Administration with strangers, and that they have filed summons for Revocation of Grant which was pending in court, being ELDORET HC Succession cause no 6 of 2013; the appellants died and was buried on the suit property and the application is supported by the affidavit of Applicant.

3. The Respondent opposes the application and has filed a replying affidavit deponed on 7th April 2020 sworn by herself.

4.Hitherto the Respondent had vide the Notice of Motion Application dated 15th June 2017 sought orders inter alia that the Appeal be marked as abated. The said application was allowed on 29.01.2019 by A. Ombwayo J.

APPLICANTS SUBMISSION

6.It is the Applicant's position that she is the widow and Administratrix of the Estate of the late Edwin Kipchumba Asis who had preferred an appeal against the decision of KAPSABET SRMCC NO 347 OF 2004 where the Respondent had obtained eviction orders in respect of **NANDI/ ARWOS/938**.

7.The Applicant further states that the suit property initially belonged to the late Francis Letting and that the respondent applied to letters of administration but left out two of the deceased sons Joseph Letting and Simeon Kimeli Some and that the Appellant had bought 0.3 acres from Joseph Letting.

8. That there is pending before the High Court in Eldoret Summons for Revocation of the Grant held by the respondent. the Applicant further contends that the Appellant had died and was buried on the suit property, where she continues living.

9. The Applicant submits further that the court has power under the proviso in Order 24 Rule 3 (2) to reinstate the appeal. She has also advanced reasons as to why the appeal abated indicating, inter alia, that upon the demise of her husband she had to choose between the welfare of her children and the case, and now that she has stabilized she has opted to pursue the appeal that her late husband had lodged.

10. She submits that at the time of burying her late husband, the Respondent did not oppose and that she continues to live on the suit property which has been hived off for her by the Respondent. She prays that the court thus allows the Application.

RESPONDENT'S SUBMISSION.

11. The respondent opposes the application and has filed a replying affidavit deponed on 7th April 2020, where she depones giving a history of the dispute and the resultant appeal. She depones that the Applicant slept on her rights for 5 years from the death of her husband and that whereas his sons' Joseph Letting and Simeon Kimutai had filed objection proceedings to the Grant issued to the administratrix they have since withdrawn the same, she further that the burial of the Appellant in the suit property did not afford any proprietary rights to the Applicant.

12. The Respondent further depones that since the appeal was to await the outcome of the objection proceedings in the Succession cause and since the objections have in any event been withdrawn there is nothing to save the appeal. The Respondent in her submission has framed two issues for determination, to wit,

a) whether the appeal has abated?

b) whether the Applicant has shown sufficient cause for granting the orders sought

13. With regard to the first issue the Respondent submits that the Appeal actually abated on 15.6.2017 by dint of operation of law and the formal pronouncement vide the court order on 29.1.2019.

13. The respondent further submits on the second issue that Order 24 rules 3(2) of the Civil Procedure Rules and the proviso thereto allows the court to extend time once sufficient reasons have been given.

14. The Respondent submits the principles under which the Court can exercise its discretion to revive an abated suit / appeal as follows:

- i) length of delay
- ii) reason for delay
- iii) the chances of the appeal succeeding if the application is granted
- iv) the degree of prejudice to the Respondent if the Application is granted.

15. The Respondent submits that the present application was brought in after an inordinate delay of Four and a half years (4 1/2) and further that they are not sufficient reasons for the court to exercise discretion.

16. On whether the appeal has a chance of success, the Respondent submits that there was no chance of the abated appeal succeeding in view of the fact that the vendor of the parcel of land, one Mr. **Joseph Letting**, had withdrawn the objections he raised to the Grant issued in favour of the Administratrix the Respondent herein. And that as the appeal was dependant on the said Objections it had no chances of success.

17. On prejudice the Respondent submits that the matter is an old one and she requires to enjoy the Fruits of the Judgment. And that by allowing the application the respondent shall be subjected to, emotional and financial constraints. For the above reasons, the Respondent prays for the dismissal of the application and costs.

ANALYSIS AND DETERMINATION

18. Both counsels for the Applicant and the Respondent agree that under the proviso to Order 24 Rules 3(2) the court has discretion to revive an abated suit/appeal. The Respondent has cited the principles for the exercise of the judicial discretion in extension of time but neither party has cited the relevant case law upon which the said principles are anchored.

19. The court is aware that the said principles for the exercise of judicial discretion in extension of time were developed by the Court of Appeal in **Leo Silla Mutiso vs Rose Hellen Wangari Mwangi Nai. Civ Application No. 255 of 1997**. Other than the said principles in **Leo Silla** the court has discretion under **Order 50 Rule 6** of the **Civil Procedure Rules** which provides as follows:

“ Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

20. Similarly under **Section 95** of the Civil Procedure Act also grants the Court discretion to extend time fixed for doing **any act** under of the Civil Procedure Act as follows:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

21. In so far as the said principles in the **Leo Silla case** and the above cited provisions of the law are principles for exercise of judicial discretion in extension of time, this court readily accepts that the said principles and provisions of the law apply to this application where the court has been called to exercise its discretion in an application to revive an abated appeal.

21. Applying the principles in the **Leo Silla case** to the present application seriatim, the instant appeal abated by operation of the law on 15.6.2017 one year after the death of the appellant. A formal pronouncement vide a court order was equally made on 29.01.2019 and this instant application was filed on 28.05.2019.

22. The applicant submits that there was a delay of 4 and ½ years in bringing and argues that the said delay was inordinate and thus submits for the dismissal of the application, whereas I would have readily accepted that 4 and ½ years period as an inordinate delay, I am aware of the Court of Appeal decision in **JOSEPH KIRUI V SAID K. KEITANY [2021] eKLR** invoked the provisions of Article 159 of the Constitution and allowed an application to revive an abated appeal filed after 6 ½ years, in the said case, it was observed that;

“We have considered the applicants motion and the respondent’s reply. It is evident to us that although the applicant’s motion has been filed about 6½ years after the death of the deceased, the applicant has demonstrated that he made serious efforts in seeking to identify the persons concerned with the deceased’s estate but his efforts were not successful.

In the circumstances, we think that this is an appropriate situation in which the Court should apply Article 159 of the Constitution, revive the appeal and allow the application for substitution in order to give the applicant an opportunity in having his day in Court. This would allow for substantive justice and fairness.”

23. In view of the above decision I find therefore that the 4 and ½ years delay in the circumstances as reasonable and not inordinate. As regards the reasons for the delay the Applicant submits that after the death of the appellant, she had to make a choice between fending for her children and taking up the case hence she lost time in between.

24. Equally the reasons for the delay as advanced by the Applicant are reasonable as indeed a widow needs time to return to normality and keep her affairs in order after the demise of the bread winner, the Applicant submits that she had to choose between the welfare of her children and pursuit of the case.

25. With regard to the issue as to whether the appeal has a chance of success or not. The respondent submits that the appeal largely depends on the objections proceedings which have now been withdrawn hence by dint of the withdrawal the Appeal has no chance of success. This may be true, however nothing stops the Applicant as the Administratrix of the Estate of the Appellant who was a purchaser to file her own objection proceedings independent of the withdrawn one. Hence the withdrawal of the objection proceedings does not affect the chances of the Appeal.

26. The last limb of the test in the **Leo Silla case** relates to whether prejudice will be caused on the Respondent. The Respondent submits that the respondent will be subjected to psychological, emotional and financial constraints among suffering at her old age. The Applicant has not however not submitted on this limb, but as order 50 rule 6 provides costs in such an application are ordinarily awarded to the respondent. The court finds that any prejudice that may be suffered by the Respondent shall be compensated by an award of costs in any event.

27. For the reasons given above, I do find the application as merited and allow the same in terms of prayer 2 and 3; thereby allowing the Applicant to be substituted in this appeal in place of the appellant and secondly setting aside the orders of this honourable court made on 29.01.2019 marking the Appeal as abated and in place an order is hereby issued reinstating and reviving the appeal.

28. The Respondent shall have the costs of this application.

DATED SIGNED AND DELIVERED AT KAPSABET THIS 2ND DAY OF NOVEMBER, 2021.

JUSTICE M. N. MWANYALE

JUDGE OF THE ENVIRONMENT AND LAND COURT.