REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

JUDICIAL REVIEW NO.5 OF 2018

REPUBLIC..... APPLICANT

VERSUS

THE CHAIRMAN LAND DISPUTE APPEALS

TRIBUNAL AT EMBU.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

AND

MATHUVA MUKEMBA.....INTERESTED PARTY

KYUNGUTI MUUKI.....EX-PARTE APPLICANT

MBAIKA KAVITI KYUNGUTI alias **MBAIKA**

KAVITI NYANGE.....APPLICANT

R U L I N G

1. What is before this court for ruling is the Applicant's notice of motion application expressed to be brought under Order 24 Rule 3(1)(2), Rule 7(2), Order 51 Rules 1, 3, 4, 10, Sections 1A, 1B and 3A of the Civil Procedure Rule Act, Article 159(2) (d) of the Constitution and all enabling provisions of the law for orders:-

1. THAT the suit herein be revived.

2. THAT the applicant be joined in these proceedings as the legal representative of KYUNGUTI MUUKI - deceased.

3. THAT the judicial review application do now proceed for hearing and determination on merit.

4. THAT the costs of this application be in cause.

2. The application is dated 21st October, 2018 and was filed in court on 01st November, 2018. It is predicated on the grounds on its face and is supported by the supporting affidavit of Mbaika Kaviti Kyunguti, the Applicant herein, sworn at Machakos on the 29th October, 2018.

3. Mathuva Mukemba, the Interested Party herein, has opposed the application vide his replying affidavit sworn at Machakos on the 28th November, 2018 and filed in court on even date.

4. On the 28th November, 2018 parties agreed to dispose off the application by way of written submissions. Both parties have since then filed and served their respective submissions.

5. Both parties are agreed that the law on revival of suit is Order 24. **Order 24 Rule 3(1)** provides as follows:-

"(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time.

Rule 7(2) of the same Order provides that: -

(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."

6. In his submission, the Counsel for the Applicant cited the last part **of Order 24 Rule 3(1)** which reads as follows: -

"**……**.provided the court may, for good reason on application extend the time."

The Counsel gave the Applicant's reasons for the delay as follows: -

"That the Applicant died on 06/12/13. He had three wives as evidenced by the letter from chief – **(annexture MK1)**. When he died, the other families became uncooperative as it is in reality in many instances and her being the last wife; she was pushed to the periphery. After much persistence, she decided to follow the issue alone and started collecting the necessary documents to file succession cause. She was then unable to get the death certificate and letter from chief showing the list of beneficiaries. When she pressed, she learned later that the 2nd wife had petitioned and obtained a confirmed grant excluding the other families. – **(annexture MK 3a and 3b)** being the summons for confirmation of grant and the confirmed grant. She then immediately filed summons for revocation of grant **– (annexture MK4a)** and the court after hearing all the parties in a lengthy hearing, issued orders revoking the grant on 22/3/2018. – **(annexture MK 4b)**. That after the grant was revoked; the Applicant went to the chief requesting for the proper letter to enable her file and obtain grant for purposes of prosecuting the suit but he declined. When the Applicant reported to her advocate that the chief had declined to do the letter, the advocate wrote a demand letter to the chief dated 4/6/2018 and only threats of court sanctions caused the chief to do the letter on 2/7/2018. That the Applicant filed application for limited grant immediately and the same was issued on the 5/9/2018 – see annexture MK5. The Applicant reorganized herself and then filed this application before court.

That the Applicant was prevented by the fact that a succession cause had been filed secretly and by the time she moved the court successfully for revocation, the suit had abated. It is therefore a genuine mistake which the Applicant ought not to be punished.

It is not easy for such an applicant who was fighting rejection and fraudulent filing of the succession cause to emerge as strong as she is."

The Counsel was of the view that the above explanation constitutes,

"a good reason for the court to extend the time."

He emphasized that it was not possible for the Applicant to file two succession causes at the same time. That she had to have the first grant revoked to enable her obtain the grant that she now has.

7. The Counsel relies on the Court of Appeal case of **Kishor Kumar Dhanji Varsani vs. Amolak Singh & 4 Others [2016] eKLR** where the court stated thus: -

"[23] The issue in this appeal is simple. That is, whether the 1st respondent established sufficient cause for failing to continue with the suit after the death of the deceased, to justify the learned Judge of the High Court exercising his discretion in allowing the revival of the suit following its abatement. In his judgment, the learned Judge took into account the object of limitation enactments as stated in ***Mehta vs Shah*** ***[1965] EA 321***:

> **"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand and on the other hand to protect a defendant after he has lost the evidence of his defence from being disturbed after a long lapse of time.**

[24] The learned Judge also took into account the explanation given by ***Punny***. This is how the learned Judge rendered himself:

"…The applicant has been candid that she did not know that she was required to do anything in relation to the case …… is

this candid admission the same thing as sufficient cause? It may be that ignorant of law is no defence. In my humble view that may apply more to criminal matters than civil litigation. There are many Kenyans even the educated who may not unlike lawyers be aware of the existence of Order 23 Rule 8. It is clear that immediately the applicant became aware, she applied and obtained the grant and without further delay brought the instant application. Her claim cannot be described as stale nor can it be said the 2nd respondent has lost his defence. After all there are still three plaintiffs in the matter. They we joined by an order of this court (Kamau, J) which order has not been set aside.

In view of the contest in this matter, it would be unconscionable to lock out a party who has expressed serious keenness in proceeding with the case. The questions regarding her capacity, whether the other plaintiffs are properly on record or whether the suit property has ceased to exist can only be canvased after the suit is revived and the applicant joined. For those reasons, I allow the application dated 4th December, 2008 and order that the 1st plaintiff's suit be and is hereby revived….."

[25] In our view the above extract demonstrates that the learned Judge took into account all relevant factors in arriving at his decision to exercise his discretion in favour of **Punny**. The learned Judge rightly directed his mind to the reasons for the limitation period and the need for **Punny** to establish "the sufficient cause that prevented her" from continuing with the suit. The applicant sufficiently explained the reasons for her failing to pursue the suit before it abated and the learned Judge accepted the explanation as candid and plausible. Although the appellant attempted to make hay of the failure by the deceased's son to take action in proceeding with the suit before it abated **Punny** could not be penalized for this failure. Being the deceased's wife **Punny** has a greater interest in the deceased's affairs and she has explained why she failed to take action.

[26] We find no reason to fault the Judge. He addressed himself properly on the law and took into account relevant factors."

The Counsel further cited the case of **Kabui Njebere vs Peter Maina Muriuki & 2 Others [2016] eKLR** while the court while allowing a similar application stated:

"8. Pointing out that the subject matter of the suit is family land and arguing that there are substantial and weighty grounds touching on the jurisdiction of the defunct Land Disputes Tribunals established under the Land disputes Tribunal Act, No.18 of 1990 (now repealed), based on the decisions in the cases of **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others** (supra), **Rosemary bunny v. Gichuru Kamotho (2005) eKLR** and **Peterson Gichohi v. Maina Johana Miano alias Joseph Miana Miano Nyeri ELC No.14 of 2015**; and the duty imposed on the court under **Article 159** of the constitution, the applicant urges the court to allow the application in order to do justice to all the parties in this case.

9. In **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others** (supra*), the Court of Appeal, **Koome J.A**, observed:-*

"…The principles to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a long line of authorities. See the case of; Leo Sila Mutiso vs. Rose, CA NAI 255 of 1997 (unreported) ….Besides the principles set out in the case of Leo (supra), I am also guided by the provisions of Section 3A and 3B of the Appellate jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal at the end of the day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in Article 159…..Bearing in mind those overarching objectives, this appeal deserves to be revived for the following reasons: firstly, the appellant was acting in person when he filed the appeal. Secondly, an advocate was instructed but he did not take the necessary steps to revive the appeal; although no reasons have been given for the advocate's failure, his failure or mistakes cannot be attributed to the applicant. Thirdly, the applicant has a limited grant of letters of administration in respect of the deceased's estate. Although the limited grant gives the applicant power to file a suit, that power can also be construed to include prosecuting an appeal. The fourth reason for allowing the revival of the suit is for reasons that the dispute involves ownership of land and a durable solution to that addresses the substantive issues is always better option.

The respondents' complaint that this matter has taken several decades and in particular, this application was made after two (2) years and eight (8) months had passed are valid concerns. It is also obvious the respondents will continue to be inconvenienced by the prolonged litigation, but in my humble view, that is the price one has to pay while defending their rights and the prejudice can be compensated by costs…"

10. In **Rose Mary Bunny v. Gichuru Kamotho (2005) eKLR** it was stated: -

"As was held by the Court of Appeal in Trust Bank Limited v. Amalo Company Ltd C.A Civil Appeal No.215 of 2000 (Kisumu) (unreported) at page 4

"The principles which guide the court in the administration of justice when adjudicating on any dispute is that; where possible disputes should be heard on their own merit. This was succinctly put a while ago by C.J. (Tanzania in the case of Essanji & Anor –vs- Solanki (1968) E.A. at page 224."

The applicant has established sufficient reasons to enable this court exercise its discretion in her favour….in the circumstances of this case, it is only proper that the estate of the deceased is allowed to ventilate its case to its natural conclusion on merit."

11. In **Peterson Gichohi v. Maina Johana Miano** (supra) this court stated: -

> **"Whereas it is true that the period of delay in the cases cited by the applicants is less compared to the delay in the instant case, upon reading and considering the application alongside the principles espoused in the cases cited by the applicants' advocate and in particular the case of Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 Others (*supra), I hold the view that the delay, though inordinate, has been adequately explained in that the applicants who were all along represented by advocates were misadvised on how to approach the dispute between them and the respondent. Bearing in mind the special circumstances of this case, the applicants are in occupation of the suit property and have been in occupation for over four decades, I hold the view that it is in the interest of justice to have the issues raised concerning the suit property, and which issues I find to be arguable, heard and determined on their merits."***

The Counsel submitted that in **Kabui Njebere vs. Peter Maina Muriuki & 2 others (supra)** the court held: -

> "20. With regard to this issue, despite the fact that there has been inordinate delay in bringing the application for revival of the appeal, the same having been brought 10 years from the time the appeal abated, just like in the case of **Peterson Gichohi v. Maina Johana Miano** (supra), I hold the view that the delay, though inordinate, has been adequately explained in that the applicants who were all along represented by advocates were misadvised on how to approach the dispute between them and the respondent.
>
> 21. Bearing in mind the special circumstances of this case, I hold the view that it is in the interest of justice to have the issues raised concerning the judgment appealed from and which issues I find to be arguable, heard and determined on their merits."

8. It was also the Counsel's submissions that the Applicant stands to suffer irreparable loss if the application is not allowed for the following reasons;

- The land in issue has been litigated for a long time before the tribunal and an appeal to the minister which is being challenged in these judicial review proceedings.
- The land in issue is also family land and the Applicant stands to suffer irreparably because he will have no recourse.
- The court should allow the application so that the judicial review proceedings are decided on merit.
- On the other hand the 1st Interested Party will suffer no prejudice and if any, costs would adequately compensate the same.

9. The Counsel urged the court to be guided by **Article 159(2)(d) of the Constitution** which obliges the court to do substantive justice as opposed to technical dismissal.

The aforementioned Article provides as follows: -

> "Justice shall be administered without undue regard to procedural technicalities."

10. The Counsel concluded by submitting that the delay has been sufficiently explained and that the Applicant stands to suffer greatly if the application is not allowed. That she will lose the land in issue without any legal recourse available to her and that the 1st Interested Party will suffer no prejudice and that costs would suffice.

11. On the other hand, the Counsel for the Interested Party submitted that the strict timelines provided under Order 24 are to be adhered to religiously. That it is only with a good cause that the court may extend timelines. That for a party to apply to revive a suit that has abated, it is a prerequisite that they seek extension of the timelines. The Counsel relies on the Court of Appeal case of **Rebecca Mijide Mungole & Another vs. Kenya Power & Lighting Company Ltd & 2 Others [2017] eKLR** where it was held that: -

> "Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. **Order 24** *must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to* **rule 3(2)** to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted."

The Counsel added that the **Court of Appeal in Rebecca's** case went ahead and found that the burden of proof was on the Applicant to show the court why the matter should be revived. The court stated thus: -

> "After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in **rule 7(2)** "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, *deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right*

that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant."

12. It was further submitted by the Counsel that the Court of Appeal while emphasizing the need for strict adherence to the statutory timelines quoted with the approval the case of **Charles Wanjohi Wathuku vs. Githinji Ngure & Another in Civil Application No. 9 of 2016** where the court stressed the importance of strict application of timelines set by the law as follows: -

> "Timelines are not technicalities of the procedure which may be accommodated under Article 159 of the Constitution or section 3A and 3B of the Appellate Jurisdiction Act."

The Counsel added that the above holding was reiterated in the case of **John Mutai Mwangi & 26 Others vs. Mwenja Ngure & 4 Others, in Civil Appl. No.126 of 2014**, where the Court of Appeal ruled that: -

> "That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice is a timely, just, efficient and cost-effective manner."

13. Arising from the above, the Counsel submitted that in the instant judicial review proceedings, the initial applicant died on 06/12/2013 as can be seen from the certificate of death filed in court. That the application was filed on 01/11/2018 which is approximately five (5) years form the death of the initial applicant. That Order 25 requires an application to enjoin a party be made within one year failure of which the matter will abate.

14. The Counsel termed the Applicant's contention in her submissions that the delay in substituting parties caused lengthy proceedings for revocation of grant in Makueni PM Succession Cause No.36 of 2014 as not true since the application for revocation of the grant in question was filed on 05/09/2017 which was approximately four (4) years later. The Counsel termed the delay in filing this application as inordinate and this would prejudice the Interested Party taking into account that for five (5) years the matter remained unprosecuted.

15. The Counsel concluded by terming the application as one that is meant to subvert the cause of justice. That the Applicant without justifiable cause acted in blatant defiance of statutory timelines and court directions. That it would be unfair for the Applicant to seek to benefit from the same law that she has defied. The Counsel urged the court to find the application as unmeritorious, incompetent, misconceived and an abuse of the court process and thus dismiss it with costs.

16. My take on the rival submissions by the Counsel for the parties herein is that there is no prayer in the application for extension of time before the Applicant can seek to be enjoined as a party in these proceedings. However, of importance to note is that the Applicant's Counsel extensively submitted on the reasons why time should be extended so as to enable the Applicant to be enjoined as a party herein. I will assume that was a procedural error or omission on the part of the Applicant and her Counsel to apply for extension of time before seeking to be enjoined as a party. To lock out the Applicant from the fountain of justice would run contrary to Article 159(2) (d) of the Constitution.

17. I have read the reasons proffered by the Applicant as to the many challenges that she went through to have the grant *annexted as MK 3(a) and (b)* in paragraph 4 of her supporting affidavit. I have also seen the summons for revocation of grant *annexed as MK4(a).* Though the Interested Party has submitted that the reason for the delay in filing this application are unmeritorious, in my view, the procedure that the Applicant followed to have the grant issued to her family members revoked and subsequent issuance of another grant to her as the proper one. It seems to me that there were major obstacles that the Applicant had to overcome in order for her to file this application. The reasons that she has proffered are satisfactory and if the Interested Party were to be prejudiced if the application is allowed, he can be compensated by way of costs notwithstanding the fact that his concern that this application is being made five (5) years after the initial Applicant's death being valid.

18. For the foregoing reasons my finding is that the application has merits. In the circumstances, I will extend time to apply for joinder of the Applicant up to the time of filing this application. I, therefore, proceed to grant prayers 1, 2 and 3 with costs in the cause. It is so ordered.

Signed, dated and delivered at Makueni this 08th day of July, 2019.

MBOGO C. G.,

JUDGE.

In the presence of: -

Mr. Hassan holding brief for Mr. Nthiwa for the Applicant

Mr. Masaku for the Interested Party

Ms. C. Nzioka – Court Assistant

MBOGO C. G. (JUDGE),

08/07/2019.