



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 28 OF 2020**

**CLEMENT SHIKAMI MUHANJI.....DECEASED/ PLAINTIFF**

**VERSUS**

**CHARLES FENDO.....DEFENDANT**

**AND**

**JELESENCIA ISERI NAMALE.....APPLICANT**

**VERSUS**

**VINCENT SHIKAMI CLEMENT.....INTERESTED PARTY**

**RULING**

The first application is dated 30<sup>th</sup> July 2020 and is brought under the Constitution of Kenya Articles 162 (2) (b), 167 (6) (2) (b), Section 4 of the Environment and Land Court Act No. 9 of 2011, Section 1A, 1B & 3B of the Civil Procedure Act. Order 12 Rule 7, Order 17 Rule 2 sub-rule 3, order 24 Rule 3 sub-rule 1 & 2, order 40 rule 1 & 5 of the Civil Procedure Rules 2010 seeking for orders that:-

1. That the application herein be certified as extremely urgent and heard ex parte in the first instance.
2. That the matter herein be mentioned before Judge for directions.
3. That the case herein be transferred to Kakamega High Court Land and Environment Division and mention date issued on priority basis.
4. That the interim orders granted by this honourable court on 22<sup>nd</sup> July, 2014 be extended until hearing and final determination of the suit herein.
5. That the status quo of the register herein be maintained until hearing and final determination of the suit herein.
6. That this honourable court grant an inhibition on the register of land parcel No. Isukha/Shitochi/883 until hearing and final determination of the case herein.
7. That this honourable court do substitute the plaintiff/respondent Clement Shikami Muhangi with Vincent Shikami who is the administrator of the estate.
8. That this honourable court does set aside the decree and or judgment given on 22<sup>nd</sup> May, 2013.
9. That the suit herein be dismissed for want of prosecution.
10. That the suit herein be declared to have abated by operation of law.
11. That upon grant of order No. 7 and 8 above, this honourable court do revert the suit land to the original owner Lusimba Ndikuyani- deceased.
12. That this court grants any other order as may be just and expedient to meet the ends of justice in the suit herein.

13. That the cost of this application be provided for.

The application is based on the affidavit of Jelesencia Iseri Namale grounds that the subject of this case is land parcel No. Isukha/Shitochi/883. That the suit herein has never been heard and concluded as per the orders given by the honourable court on 22<sup>nd</sup> July, 2014. That Vincent Shikami has filed succession petition in Kakamega CMC Succession Cause No. 177 of 2019 in respect of the estate of Clement Shikami, distributed the estate and are in the process of transmitting land parcel No. Isukha/Shitochi/883. That the Administrator of the estate of the late Clement Shikami Muhanji is Vincent Shikami. That one year has lapsed since the orders of 22<sup>nd</sup> July, 2014 were made. That the Land Registrar is under instructions to register transmission documents in favour of the beneficiaries of the estate of Clement Shikami. That the applicant Clement Shikami died in 2007 and one year has since lapsed. That the applicant has never moved court since 6<sup>th</sup> November, 2014. That prior the decree of this honourable court the original registered owner of the suit land was Lusimba Ndikuyani.

The second application is dated 12<sup>th</sup> October 2021 and is brought under Sections 1A, 1B, 3A of the Civil Procedure Act and Order 24 rule 2 of the Civil Procedure Rules 2010 seeking the following orders:-

1. That this honourable court be pleased to revive the suit herein and the same to be heard and determined on merit.
2. That upon grant of prayer No. 1 this honourable court do here the application dated 30<sup>th</sup> July, 2020 and 20<sup>th</sup> August, 2020.
3. That costs of this application be in the cause.

It is based on the affidavit of Jelesencia Iseri Namale and grounds that the plaintiff/applicant herein Clement Shikami Muhanji died in the year 2017 while the suit herein was spending hearing and final determination. That it is over one year since the plaintiff/applicant died and the suit is deemed to have abated. That the interested party/applicant was unable to find beneficiaries of the deceased. That it is until lately that the applicant/deceased's family filed letters of administration. That the interested party Jelesencia Namale learned of the succession proceedings when she went to register restrictions on the land mid this year.

The interested party Vincent Shikami opposed the Notice of Motion by the applicant dated the 12<sup>th</sup> day of October, 2020 on the ground that the said motion has not advanced sufficient reasons for failure by the applicant to revive the suit herein following the demise of the deceased plaintiff.

This court has considered the applications and submissions therein. The court would first considered the second application dated 12<sup>th</sup> October 2020 as this could determine whether the second application is granted or not. In this matter it cannot be denied that the suit has abated. The plaintiff died in 2017 and this application has been filed in 2020. An abated suit is non-existent prior to it being revived. This suit abated in 2018. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement. In the case of **Said Sweilem Gheithan Saanum vs. Commissioner of Lands (being sued through the Attorney General) & 5 Others (2015) eKLR**, the Court of Appeal explained the provisions of Order 24 of the Civil Procedure as follows:

***“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.***

***Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.***

***Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”***

In the case of **Titus Kiragu vs. Jackson Mugo Mathai (2015) eKLR** it was held that:

***“It is not the act of the court declaring the suit as having abated that abates the suit but by operation of law.”***

In **Charles Mugunda Gacheru vs. Attorney General & Another (2015) eKLR**, it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of **Rukwaro Waweru vs. Kinyutho Ritho & Another (2015) eKLR**, the court held that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. Be that as it may I see no sufficient reason why this court should extend time for this suit to be revived as the plaintiff died in 2017. Judgement was delivered in this matter way back in 2013. The interested party/applicant came into the scene in 2014 and was aware of this matter all through. What was she doing between 2017 and 2020 when the plaintiff was dead. The reasons given are insufficient and this suit has long abated and will not be revived. Having found that there is no suit before me there will be no need to go into the merits and demerits of the first application dated 30<sup>th</sup> July 2020. I find both applications are not merited and I dismiss them with costs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 27<sup>TH</sup> JULY 2021.**

**N.A. MATHEKA**

**JUDGE**