



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC SUIT NO. 208 OF 2014**

**DANIEL NDERITU KAGOKO.....PLAINTIFF**

**VERSUS**

**ZUBERI MOHAMMED KOMBANIA.....1<sup>ST</sup> DEFENDANT**

**JAMES NYAMBANE MASESE.....2<sup>ND</sup> DEFENDANT**

**BRENDA BONARERE METOBO.....3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF LAND, KWALE.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**AND**

**LAWRENCE KAGOKO NDERITU.....1<sup>ST</sup> APPLICANT**

**FLORENCE NDERITU.....2<sup>ND</sup> APPLICANT**

**RULING**

1. The subject of this ruling is an application dated 1<sup>st</sup> July 2019, and filed in court on 16 August 2019. The applicants seek for the revival of the suit, as well as to be substituted as the plaintiffs in this case following the death of the plaintiff.
2. The application is supported by the grounds on the face of it, and the supporting affidavit of William C. Kenga, the applicants' advocate.
3. Mr. Kenga deposed that the plaintiff died intestate on 6<sup>th</sup> March 2017 and the applicants are the legal representatives of the plaintiff's estate. He has further deposed that the revival of the suit and substitution of the plaintiff be made pursuant to a grant of letters of administration ad litem issued on 8<sup>th</sup> August 2018 from the Chief Magistrate Succession Cause No. 248 of 2018.
4. The 5<sup>th</sup> defendant has opposed the application vide Grounds of opposition. They stated that the application is fatally defective as it does not meet the requirements of Order 24 Rule 7 (2) of the Civil Procedure Rules in that, the suit abated on 7<sup>th</sup> March 2018, which is over 16 months prior to the filing of the revival and substitution of the parties' application. The 5<sup>th</sup> defendant further stated no sufficient reason has been advanced to explain why the suit should be revived, and further that there has been inordinate delay in applying for revival of the suit and the substitution of parties.
5. To put matters into context, this suit was commenced by way of a plaint filed in court on 13 August 2014. It was the case of the plaintiff that he is the registered owner of the land known as Plot No. Kikomani/Bumbani A/264 (hereinafter, 'the suit property') and that on 15<sup>th</sup> July 2014 the 1<sup>st</sup>-3<sup>rd</sup> defendants trespassed into the suit property, subdivided it, and further developed the same. The plaintiff pleaded that he never sold or transferred the suit property, however, the result of an official search shows that the suit property was transferred to, and registered in the name of the 1<sup>st</sup> defendant who subsequently transferred it to the 3<sup>rd</sup> defendant. For these reasons, the plaintiff prayed for a declaration that the registration of the 1<sup>st</sup> defendant as owners of the property was obtained through fraud, and an order of cancellation of the titles issued to the 1<sup>st</sup>-3<sup>rd</sup> defendants and title deed issued to the plaintiff. The record shows that on 19<sup>th</sup> October 2017, the suit was dismissed by the court for want of prosecution after there was no cause shown where there had been no action in the matter since 5<sup>th</sup> October 2015.

6. In this case, the plaintiff is said to have died on 6<sup>th</sup> March 2017, therefore, the suit abated after one year from the death of the plaintiff that is 7<sup>th</sup> March 2018. The law and procedure in circumstances of the death of the plaintiff is laid down in Order 24 Rule 3 Sub rule 2 of the Civil Procedure Rules. It is drawn as follows:-

*“3. (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 subrule (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.”*

7. Further to this Order 24 Rule 7 gives the court discretion to revive the suit only if the applicants have adduced sufficient cause. It provides as follows:-

*“7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.*

*(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.”*

8. The applicants were issued with the limited grant of letters of administration ad litem on 8<sup>th</sup> August 2018, they then filed their application for revival of suit on 16<sup>th</sup> August 2019, almost one year later. This is undue delay of more than one year. The applicants have not adduced any good and sufficient reasons for this inordinate delay. This matter was instituted on 13<sup>th</sup> August 2014, there was inactivity in the suit for more than two years before it was dismissed for want of prosecution. Then the applicants have taken another one year before applying for the suit to be revived. Really and truly, this is the definition of abuse of the court process and wasting of the courts time.

9. There is also one pertinent issue I have to address. The supporting affidavit herein is sworn by Mr. Kenga, the applicants advocate. Although the law does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matters of fact in any matter in which he acts or appears, Order 19 Rule 3 of the Civil Procedure Rules provides that affidavits should be confined to such facts as deponent is able of his own knowledge to prove. Rule 9 of the Advocates (Practice) Rules also prohibits an advocate from appearing in any matter in which he has reasons to believe that he may be required as a witness to give evidence, whether verbally or by declaration on affidavit unless on formal or non-contentious matters of fact. In this case, counsel deposed on matters regarding death of the plaintiff, and that the applicants obtained grant to represent the estate of the deceased plaintiff. In my view, these are issues of fact that could have been left to the applicants to give evidence one has to be alive to the major function of a supporting affidavits. Order 51 Rule 4 of the Civil Procedure Rules states that the supporting affidavit gives evidence on the grounds in the application. As far as I am concerned, there is no evidence adduced that can satisfy the court that the applicants want to revive the suit and be substituted as plaintiffs. These are all averments by counsel, who in fact is a stranger to the suit. There is nothing connecting the applicants to the application.

10. The Court of Appeal in the case of Gerphas Alphonse Odhiambo v Felix Adiego [2006] eKLR held as follows:-

*“Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the Evidence Act, as it is in interlocutory proceedings under the Civil Procedure Rules, Order 18 rule 3(1), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded.”*

11. I see no reason, as none is stated, why the applicants could not swear the supporting affidavit. That being said, the supporting affidavit sworn by the Mr. Kenga, embarrassing as it is, it is also bad in law and fatally defective, and the same is struck off. The applicant ought to have sworn the affidavit and prove the facts of their own knowledge.

12. For the foregoing reasons, I find that the notice of motion dated 1<sup>st</sup> July 2019 as lacking in merit and hereby dismiss it with costs to the 5<sup>th</sup> respondent.

Orders accordingly.

**DATED, SIGNED and DELIVERED virtually at MOMBASA this 21<sup>st</sup> Day of July 2021**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

**Yumna Court Assistant**

**Chengo holding brief for Kenga for the plaintiff**

**N/A for the defendant**

**N/A for the Applicants**

**C.K. YANO**