REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 135 OF 2013

KIPROTICH KORIR ……..……..1ST PLAINTIFF

ATHUMAN MWAKAMOLE BUNDO…….....……..2ND PLAINTIFF

VERSUS

SHIYOTOR HOLDINGS LIMITED……..…….....DEFENDANT

AND

SIASA ATHUMAN BUNDO & KADIRI ATHUMAN MWABUNDO

(Legal Representatives of Athuman M. Bundo (Deceased)……..…APPLICANTS

RULING

(Application seeking review of an order that dismissed suit for want of prosecution and also marked suit against deceased 2nd defendant as abated; applicants claiming that decision was per incuriam; applicants seeking to revive the abated suit and be made parties; application coming 5 years after death of the 2nd plaintiff; what may constitute "sufficient cause" to revive an abated suit; no reasonable explanation for the delay; no error disclosed in the ruling; application dismissed).

1. The application before me is the one dated 21 October 2020 filed by the legal representatives of the now deceased original 2nd plaintiff. The applicants seek the following orders:

> *a) Spent*
>
> *b) The Honourable court be pleased review/vary rescind and/or set aside its own orders made on 10th November 2017 dismissing the suit for want of prosecution and substitute with an order reinstating the suit.*
>
> *c) The Honourable court be pleased to allow the applicants Siasa Athuman Bundo and Kadiri Athuman Mwabundo 'the Administrators' of the Estate of the late Athuman Mwakole Bundo (deceased) to be substituted in the matter out of time as the 2nd and 3rd plaintiffs.*
>
> *d) The Honorable court may be pleased to order that the case do proceed to hearing and determination on merit.*
>
> *e) Any other order that this Honourable court would deem fit to grant "suo motto" as to expeditious disposal of the application to meet the interest of justice.*
>
> *f) Costs of the application be in the cause.*

2. To put matters into context, this case was instituted by way of a plaint filed on 27 June 2013 by two plaintiffs, Kiprotich Korir and Athuman Mwakamole Bundo. It was the case of the plaintiffs that they are the registered owners of the parcel of land known as L.R No. 13450, as joint tenants in common holding a lease for a term of 99 years with effect from 1 January 1985 (hereinafter referred to as "the suit property"). The plaintiffs pleaded that prior to obtaining this lease, the suit property was the ancestral land of the family of the 2nd plaintiff. They pleaded that the defendant through it agents trespassed into the suit property and erected a perimeter wall thus infringing on their proprietary and possessory rights. It was for these reasons that the plaintiffs prayed for judgment against the defendant for *inter alia* a

declaration that they were the legal owners of the suit land; an order of permanent injunction against the defendant; an order of eviction; and a mandatory injunction compelling the defendant to pull down or remove the structures it had erected on the suit property. Alongside the plaint, the plaintiffs filed an application for temporary injunction. A ruling was made on 14 February 2014, with the court ordering that status quo be maintained until the suit is determined.

3. It is instructive to state that the two plaintiffs were initially being represented by the law firm of M/s Musyoki Mogaka & Company Advocates. On 22 August 2013, the 2nd plaintiff appointed the law firm of M/s Gikandi & Company Advocates to act for him. This was, after the file had remained inactive for more than one year, the defendant filed an application on 13 August 2015, where she sought orders to dismiss the suit for want of prosecution. By a ruling delivered on 12 February 2016 by my predecessor Omollo J, it was observed that though one year of inactivity had lapsed, it was fair and just that the plaintiff be given an opportunity to have the matter proceed for hearing. She therefore dismissed the application but issued orders for the suit to be set down for directions on how to proceed within 60 days of the ruling.

4. These orders were not complied with, and after another year of inactivity, the defendant filed an application dated 10 July 2017, again seeking orders of dismissal of the suit for want of prosecution. Within that application, the defendant did point out to court that the 2nd plaintiff died on 3 November 2015, and no steps taken to substitute. The defendant did annex the Certificate of Death and burial permit issued to Kadir A. Mwabundo. In opposing the said application, a replying affidavit was sworn by a person describing himself as Athuman Mwakamole Bundo (same name as the deceased plaintiff) in which he inter alia deposed as follows :-

> *"I am the son of the 2nd plaintiff. My father passed away on 3rd November 2015. As a result of some family dispute, it was not possible to agree on who was to be appointed the administrator of the estate. However, that the issue has been resolved and I have been mandated by the said family to apply for the letters of administration in respect of the 2nd plaintiff."*

5. This time, after hearing the second application, Omollo J, through a ruling delivered on 10 November 2017, dismissed the suit for want of prosecution. She also found that the suit by the 2nd defendant had already abated, for two years since his death had lapsed without there being an application for substitution.

6. On 7 September 2020, the 1st plaintiff filed an application to review and set aside the ruling of 10 November 2017, so that his suit is reinstated for hearing. While that application was still pending, this application was filed shortly thereafter on 22 October 2020. I first heard the application dated 7 September 2020 and did not find merit in it. I dismissed it through my ruling of 2 February 2021, the result being that the ruling of 10 November 2017 stood.

7. I have already set out the orders sought in this aplication. It will be seen that the first substantive prayer is again for review of the orders made on 10 November 2017 dismissing the suit for want of prosecution. The second substantive prayer is for substitution of the deceased 2nd plaintiff. The application is based on the following grounds

> *(i) The 2nd plaintiff, Athuman Mwakamole Bundo, demised on 3rd November 2015;*
>
> *(ii) The deceased was represented by the firm of Gikandi & Company Advocates;*
>
> *(iii) The instructions to the firm of Gikandi & Company Advocates were terminated by the demise of the 2nd plaintiff on the 3rd November 2015 and were not renewed as no one had taken out letters of administration to give competent instructions;*
>
> *(iv) The court was informed of the death of the 2nd plaintiff vide the Defendant's affidavit in support of the motion dated 10th July 2017 whereby no directions were given to the Estate to rectify the position in court;*
>
> *(v) The directions that the court issued in a ruling to the defendant's application dated 13th August 2015 on 12th February 2016 could not be complied with by the 2nd plaintiff because he was already deceased on 3rd November 2015;*
>
> *(vi) The applicants in the circumstances of the events between 12th February 2016 and 10th November 2017 are excusable because of oversight to obtain letters of administration and failure to inform court of passing of the 2nd plaintiff and seek directions on the matter;*
>
> *(vii) The proceedings by or against the 2nd plaintiff between 3rd November 2015 until they were terminated on 10th July 2017 are "per incuriam" and amount to a mistrial.*
>
> *(viii) The oversight on the part of the previous advocate to advise the applicants to take out letters of administration and inform court are excusable and his failure to inform court that his instructions were terminated by the death of his client when he attended court to take ruling on 10th November 2020 (sic) should not be visited on the estate.*
>
> *(ix) The delay to take out letters of administration between the period after the ruling dismissing suit was because of family internal disputes as a large family of 20 siblings who are all adults was real.*
>
> *(x) Immediately the agreement was reached and a limited grant to prosecute suit given on 13th February 2020, Covid-19 worsened and the country was shut down.*
>
> *(xi) Both the plaintiffs and the defendant hold certificate of title issued to them on the same date hence the need to hear the matter on*

merit.

(xii) The applicants have come to court in time to apply to rescue the case as they have a genuine claim to the suit property as observed by this court in granting the injunction and sustaining the case in ruling against dismissal delivered on 12th February 2016 and public interest regarding Article 6 of the Constitution 2010.

(xiii) The ends of justice lean in favour of granting the orders sought.

8. The application is supported by the affidavit of Siasa Athuman Bundo. He has deposed that he is one of the administrators and beneficiary of the estate of the late 2nd plaintiff. He has mentioned that the suit is over two certificates of title. He has alluded to the application dated 13 August 2015 (the first application for dismissal of suit for want of prosecution) and the ruling of 12 February 2016 which rejected the application. He has deposed that when the ruling was made the 2nd plaintiff was dead (having died on 3 November 2015) and he believes that had the court been informed of this fact, it would have given different directions. He has stated that the law firm of M/s Gikandi & Company Advocates continued to act for the deceased even after his death and "this led us into believing that there was no need to take our letters of administration and give fresh instructions to the Advocate to continue acting." He has deposed that the said firm informed them that it had complied with the orders of court and he annexed some pretrial documents filed by the law firm of Gikandi & Company Advocates on 12 April 2014 comprising of a pre-trial questionnaire and a list of the 2nd plaintiff's documents. He has deposed that the said firm invited him and his brother to their offices in the month of September 2017 and informed them that there was another application filed to dismiss suit and they needed to reply to it. He has deposed that his brother Kadiri Athuman Mwabundo signed the affidavit. He was surprised that the suit was dismissed on 10 November 2017. He has stated that failure to comply with the law is excusable because of partly being misinformed and lack of understanding of the procedure. He averred to wrangles within the family that made it impossible to agree on who should be the administrator and that it took a lot of time to settle matters. He has stated that he and his brother Kadiri Athuman Mwabundo applied for letters of administration and were granted the same on 13 February 2020. He owned up to the mistake of non-action and apologized to court.

9. The defendant opposed the application vide a replying affidavit sworn by John Ngata Kariuki the director of the defendant. Mr. Kariuki deposed that the decree of 10 November 2017 has not been set aside. He deposed that the suit was dismissed following two applications by the defendant under Order 17 Rule 2, as well as failure to comply with directions of the court made in the ruling of 12 February 2016. Mr. Kariuki deposed that it was clear that the plaintiffs had lost interest in the case. He deposed that this was noted in the ruling of 10 November 2017. He further deposed that the only response to the defendant's application of 10 July 2017 was the perjured evidence of the person who signed the affidavit in the application under reply. He deposed that this was an abuse of the court process. He further deposed that the plaintiffs and their advocates also committed contempt of court by not obeying court orders to fix their case for hearing, and further swearing and uttering false affidavits and statements. Mr. Kariuki deposed that the Civil Procedure Rules require substitution of a personal representative in place of a deceased plaintiff or defendant to be within one year of death. He deposed that it has been five years since the death of the 2nd plaintiff, and it has been more than three years since the application dated 10 July 2017 that informed the court about the 2nd plaintiff's death. Mr. Kariuki deposed that the applicants' action should have been sooner. He deposed that there is no application to extend time under the rules, and therefore, the application for substitution is without proper foundation in law. On the order for review, he deposed that an application for review should be made inter alia without unreasonable delay, and stated that three years is unreasonable delay, and there is no mistake that Omollo J, made in her ruling of 10 November 2017. He deposed that although the applicants state that they are 20 siblings, they have not provided any evidence of this. He deposed that the applicants were in touch with their advocates and made the inexcusable mistake of lying to court that one of them was the 2nd plaintiff leading to swearing a false affidavit. He has pointed out that the applicants have not said anything about what he considers to be a "false witness statement" which is a statement purportedly signed on 12 April 2016 by Athuman Mwakamole Bundo, the 2nd plaintiff. He did not believe that there was any ruling made *per incuriam* as the ruling under Order 17 Rule 2 (dismissing suit for want of prosecution) was based on the law and the facts. He went on to claim that Kadiri Athumani Mwabundo, who now wants to be pardoned for his perjury, had purported to offer the suit property for sale to them in March 2017, while passing off as the owner of the property. He has further averred that the late Athumani had filed suit in 2006 against the respondent with a different claim over the suit property. He deposed that the suit was properly brought to an end on 10 November 2017, and if the plaintiffs believed that they had a good case, they should have pursued it diligently. He further deposed that the advocates representing the applicants cannot say that they are replacing the firm of Gikandi & Co. Advocates. He argued that the latter firm represented the 2nd plaintiff whose suit abated and was dismissed and there is no suit in which a change of advocates can occur. He wished that the application be dismissed.

10. I have taken note of the above depositions alongside the submissions made by counsel.

11. There are two substantive prayers sought in this application. The first prayer is that the orders made on 10 November 2017 dismissing this suit for want of prosecution be set aside and be substituted with an order reinstating the suit. The second substantive prayer is seeking orders of substitution of the deceased 2nd plaintiff with Siasa Athuman Bundo and Kadiri Athuman Mwabundo. I will start with the prayer for review.

12. Applications for review are addressed in Order 45 of the Civil Procedure Rules. Order 45 Rule 1 provides as follows :-

1. Application for review of decree or order [Order 45, rule 1.]

(1) Any person considering himself aggrieved—

a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of

judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

13. It will be seen from the above, that an application for review is based on the following grounds :-

(a) Discovery of new and important matter or evidence which was not within the knowledge of the applicant and could not be produced by him when the decree or order was made;

(b) A mistake or error apparent on the face of the record;

(c) Other sufficient reason.

14. Lest we forget, the order sought to be reviewed is the order of 10 November 2017 which dismissed the plaintiffs' suit for want of prosecution. It is also within this ruling that the Judge made the order that the suit by the 2nd plaintiff has abated since more than one year had lapsed following his death. I have gone through the application and the request for review is certainly not based on any discovery of new or important matter or evidence. There is however an allegation that the proceedings by or against the deceased 2nd plaintiff between 3rd November 2015 (when he passed on) and 10th July 2017 (when the application to dismiss suit was filed) are *"per incuriam and amount to a mistrial."* I am not too sure what the applicants mean by this. My understanding of what *"per incuriam"* is, is that it is a decision of a court that fails to apply a relevant provision in statute or ignores a binding precedent.

15. In as much as the applicants are loud in their claim of *per incuriam*, they have not pointed me to any statutory provision or precedent that was ignored by the court in the ruling of 10 November 2017. That ruling found, as a matter of fact, that there had been inactivity in the suit for more than one year and following that inactivity, the provisions of Order 17, touching on dismissal of suit for want of prosecution came into play. The ruling also found that there was an abatement of the suit by the 2nd plaintiff following the provisions of Order 24 Rule 3 of the Civil Procedure Rules which provide 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 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.

16. From the above, a suit will abate, following the provisions of Order 24 Rule 3 (2) if no application for substitution is made within one year of death. Abatement is by operation of law. What the court did in the ruling of 10 November 2017 was to affirm that indeed the suit by the 2nd plaintiff had abated, and it actually had, by operation of law. I do not see what it is that the applicants are now claiming to be *per incuriam*. If their use of the word *per incuriam* was intended to demonstrate that there was a mistake or error apparent on the face of the record, they have not succeeded in persuading me of any error within the ruling of 10 November 2017. The fact of the matter is that the 2nd plaintiff died on 3 November 2015 and by the time the application for dismissal was being made on 10 July 2017, more than one year had lapsed without there being substitution of the deceased 2nd defendant. Clearly the suit by the 2nd plaintiff had abated. There is really nothing more for me to say. I do not see any merit in the prayer for review and it is hereby dismissed.

17. Let me now turn to the prayer for substitution. I have already laid down the provisions of Order 24 Rule 3 regarding abatement of suit. The suit has already abated. One may however apply for revival of an abated suit under Order 24 Rule 7 (2) of the Civil Procedure Rules which is drawn as follows :-

7 (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.

18. Order 24 Rule 7 (2) above has not specifically been cited within this application, and there is no prayer for revival of the abated suit. Strictly speaking, Mr. Mwenesi in his submissions, was therefore correct in pointing out that there is no suit where the legal representatives can apply to be parties because there is no prayer for revival of the suit. But I can consider this a mere omission and/or technicality and still take it that the applicants wish to revive this abated suit and be made parties to continue it. The requirements under Order 24 Rule 7 (2) is that a party needs to demonstrate that he was *"prevented by any sufficient cause"* from continuing the suit. There is no definition of sufficient cause and the court therefore has wide discretion to look into the explanation provided and make a determination whether that explanation meets the threshold of "sufficient cause." Sufficient cause in my view must be equated to good and genuine reason that explains the delay and/or inaction. It must be a reason that is well explained and excusable. It must be reason which must bring no doubt to any reasonable man that there is no way that the applicants could have moved the court, even with exercise of due care and diligence, and that the delay was not a result of mere indolence. That sufficient reason, must in addition, also be balanced with the need not to overly prejudice the defendant. For example, a defendant may have moved on after the abatement of the suit and changed his circumstances so much, such that it will cause him great prejudice and injustice to call him back to the arena of battle. All surrounding circumstances of the case thus need to be

looked at.

19. I have considered the explanation given by the applicants. They mainly blame the advocate of the 2nd plaintiff for filing documents when the 2nd plaintiff had died and claim that this led them to believe that there was no need to take out letters of administration. I am unable to tell the circumstances under which the law firm of Gikandi & Company Advocates continued to file documents despite the demise of the 2nd plaintiff. There could be good reason, for example, instructions to file documents may have already been given before the demise of the 2nd plaintiff and all the advocate was doing was executing the instructions in ignorance of the fact that he had died. I will not speculate, and the law firm of Gikandi & Company is not on trial here, so there is no need to say more on that. But I do not see how, the mere filing of documents by the law firm after the death of the 2nd plaintiff, could have led any reasonable person to conclude that it was not necessary to file for administration of the estate of the deceased. That to me, is a completely irrational correlation. In fact, the applicants themselves admit that an affidavit sworn by one of them was filed to oppose the application seeking to dismiss suit for want of prosecution, and among the depositions made in order to sway the court not to dismiss the suit, was that they are soon going to be filing for a grant of letters of administration in order to continue with the suit. I know that there is a lot of heat raised by the defendant regarding this affidavit, for it bore the name of the deceased 2nd plaintiff as the deponent, yet in reality, the deponent was somebody else, now admitted to be one of the applicants and a son to the deceased. Putting aside the inaccuracy in the description of the deponent in that affidavit, the applicants acknowledge, within that affidavit of the need to file for administration of the estate of the 2nd plaintiff. This was in the year 2017 but this application has been filed three or so years later. The explanation for that delay is that they are a large family and it took a lot of time to settle on the names of the administrators. I would have thought that this is where the applicants need to give proof of that large family, and maybe provide some evidence of a tussle within the family regarding who would be administrator. Absolutely no evidence has been tabled. Since this was a reason given by the applicants, it was upon them to present evidence to demonstrate that this indeed was the factual position. Without evidence, I am unable to conclude that this is indeed a genuine reason for the inactivity.

20. This application was filed close to five years since the death of the 2nd plaintiff. That delay is way too long and the explanation for it is extremely wanting. Moreover, even the delay for not filing the application after the applicants had already received the letters of administration on 13 February 2020 as they allege, is also quite wanting. The applicants cite Covid- 19, but how many applications and court documents have been filed in court despite the pandemic? Court business has indeed been going on. Even assuming that there could have been some sort of destabilization due to the pandemic, did it really have to take 8 months from February to October 2020? That delay of 8 months is also not adequately explained.

21. Yet again this court is being asked to revive suit because there are two titles. As I stated in my ruling of 24 February 2021, the parties cannot continuously keep using the fact of two titles to get away with every infraction, to the prejudice of the defendant.

22. Whichever way you look at it, five years is too long a time, to now call a party back to the ring for another round of fight when that delay is so poorly explained. It is time that litigants were alive to the reality of the overriding objectives of Section 1A of the Civil Procedure Act which in part, requires the expeditious resolution of cases. Parking a case in court for 5 years without any good reason cannot be said to be in execution of the overriding objective. In the case of *Said Sweilem Gheitham Saanum vs Commissioner of Lands & 5 Others (2015) eKLR* the Court of Appeal stated as follows:-

> *"Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes."*

23. Further it was stated by my brother Gikonyo J in the case of *Anthony Kaburi Kario & 2 Others v Ragati Tea Factory Company Limited & 10 Others [2014] eKLR* as follows:-

> *"… justice entails justice to all the parties, the plaintiff and the defendant. Needless to say, unreasonable delay in concluding a case breeds injustice whether the delay has been occasioned by the plaintiff or by the defendant. Equally, I am alive to the demands of the overriding objective of the law that parties should assist the court to attain an expeditious, proportionate, just and affordable resolution of disputes."*

I am in full agreement with the above dictum.

24. I am in essence not persuaded that the applicants have demonstrated "sufficient reason" to revive the abated suit of the 2nd plaintiff.

25. It follows that this application must fail and it is hereby dismissed with costs.

26. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF SEPTEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.