



**REPUBLIC OF KENYA**

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

**ELCC No. 115 OF 2019**

**(FORMERLY HCC. NO 122 OF 2002)**

**GIRISH VAGHJI SHAH.....1<sup>ST</sup> PLAINTIFF**

**VIPUL PATEL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**BEN NGUNYANGI IRAGU.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, NAKURU.....2<sup>ND</sup> DEFENDANT**

**CONSOLIDATED WITH**

**NAKURU HCC No. 317 OF 2011**

**LUCY NJERI NGUNYANGI.....1<sup>ST</sup> PLAINTIFF**

**MAXWELL MUNENE .....2<sup>ND</sup> PLAINTIFF**

**ESTHER WANGUI.....3<sup>RD</sup> PLAINTIFF**

**JENIPHER WANGARI.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**THE CHIEF LAND REGISTRAR.....DEFENDANT**

**RULING**

1. This ruling is in respect of Notice of Motion dated 16<sup>th</sup> December 2019 filed by the plaintiffs in ELCC No. 115 of 2019. The following orders are sought in the application:

1. *[Spent]*

2. *That this honorable court be pleased to order that the plaintiff's suit against the 1<sup>st</sup> defendant be revived.*

3. *That upon revival, this Honorable court be pleased to order that Ben Ngunyangi Iragu be substituted with his legal representatives of his estate namely Lucy Njeri Ngunyangi and Maxwell Munene.*

4. *That the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Joseph Chege Muthama who deposed that he holds a power of attorney in respect of the interest held by Vipul Thakarshi Patel in land parcel No. Nakuru Municipality Block 18/48 and that he has the authority to swear the affidavit on behalf of Albert Gatimu Nderitu who holds a power of attorney in respect of the interest of Girish Vaghji Shah in the same property. That the plaintiffs instituted this suit against Ben Ngunyangi Iragu and the Land Registrar Nakuru seeking to be registered as owners of land parcel No. Nakuru Municipality Block 18/48.

3. He deposed that the plaintiffs later learnt that Ben Ngunyanji, the 1<sup>st</sup> defendant herein had died and that his beneficiaries had filed Nakuru HCC 317 of 2011 contesting the ownership of the suit property instead of applying to be substituted in the present matter. He added that Lucy Njeri Ngunyangi and Maxwell Munene are the personal representatives of the estate of the deceased 1<sup>st</sup> defendant having been issued with a certificate of confirmation of grant on 10<sup>th</sup> November 2008 and that they therefore ought to be substituted.

4. Lucy Njeri Ngunyangi opposed the application through grounds of opposition and a replying affidavit. She deposed that on 8<sup>th</sup> March 2006, this matter did not proceed for hearing as the 1<sup>st</sup> defendant was hospitalized and that when the matter came up again on 8<sup>th</sup> October 2006, the case did not proceed and was stood over generally to await the substitution of the 1<sup>st</sup> defendant as he had died. She disputed the contents of the supporting affidavit and stated that the suit against the 1<sup>st</sup> defendant having abated, there is no party that they can substitute. She further deposed to many other matters which address the merits of the main suit as opposed to the application at hand.

5. Francis Gichiri who is the plaintiff in Nakuru CMCC No. 1074 of 2013, a related suit which was stayed by my brother Munyao J on 10<sup>th</sup> February 2015 pending hearing and determination of these two consolidated suits, opposed the application through grounds of opposition in which he took the position that no reason had been given for the inordinate delay in bringing the application to revive the suit. The defendants in the said case also filed grounds of opposition in which they contended that the application is defective, without merit and an abuse of the court's process.

6. The application was canvassed through written submissions. The plaintiffs/applicants relied on **Order 24 Rules 4 and 7** and submitted that it is not in dispute that the 1<sup>st</sup> defendant passed away and no substitution was made as a result of which the suit abated. That the court has unfettered discretion to revive an abated suit provided sufficient cause is shown. They also relied on the cases of **Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 others** [2015] eKLR and **Kishor Kumar Dhanji Varsani v Amolak Singh & 4 others** [2016] eKLR. They submitted further that through her replying affidavit, Lucy Njeri Ngunyangi admitted that when this matter came up for hearing on 8<sup>th</sup> October 2007 it was stood over generally to await substitution. That instead of applying for substitution, the administrators of the 1<sup>st</sup> defendant's estate opted to file Nakuru HCC 317 of 2011 against the 2<sup>nd</sup> defendant but failed to sue the plaintiffs/applicants. They also submitted that the only issue for determination in the suits is who between the plaintiffs and the 1<sup>st</sup> defendant has a good title to the suit property which issue once resolved will completely determine the matter. They urged the court to allow the application as prayed.

7. The plaintiff in Nakuru CMCC No. 1074 of 2013 filed submissions in which he argued that the suit abated by operation of the law on 10<sup>th</sup> October 2008 and that the applicants brought the application after inordinate delay of more than twelve years after the defendant had died. He relied on **Leonard Mutua Mutevu v Benson Katela Ole Kantai & another** [2014] eKLR and submitted further that no reason had been given for the delay and urged the court to dismiss the application with costs.

8. The 2<sup>nd</sup> defendant in ELCC No. 115 of 2019 and the defendant in HCC No. 317 of 2011 neither responded to the application nor participated in its hearing. On their part, the plaintiffs in HCC No. 317 of 2011 relied on entirely on their replying affidavit and their grounds of opposition while the defendants in CMCC No. 1074 of 2013 associated themselves with the position taken by the plaintiffs in HCC No. 317 of 2011.

9. I have carefully considered the application, the affidavits, the grounds of opposition and the submissions. The only issue for determination is whether the applicants have shown sufficient cause for the revival of the suit against the 1<sup>st</sup> defendant and substitution.

10. **Order 24 Rule 4** of the **Civil Procedure Rules** provides as follows:

**4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

11. Although the applicants have not specified the date of death, it is not disputed that Ben Ngunyangi Iragu who was the 1<sup>st</sup> defendant in ELCC No. 115 of 2019 passed away over 10 years ago and that Lucy Njeri Ngunyangi and Maxwell Munene obtained written grant of representation in respect of his estate, which grant was confirmed on 10<sup>th</sup> November 2008. The said Lucy Njeri Ngunyangi and Maxwell Munene are plaintiffs in HCC No. 317 of 2011. A perusal of their plaint dated 31<sup>st</sup> October 2011 reveals at paragraph 6 thereof that Ben Ngunyangi Iragu passed away on 7<sup>th</sup> December 2006. Since no application for substitution was made within one year of the death, it follows therefore that the suit against Ben Ngunyangi Iragu abated on 7<sup>th</sup> December 2007. There has thus been a delay of 12 years in filing the present application.

12. I further note that Lucy Njeri Ngunyangi and Maxwell Munene included in their bundle of documents in HCC No. 317 of 2011 a copy of the same certificate of confirmation of grant which the applicants annexed to the present application. While it is not clear when they obtained the initial grant, the grant was confirmed on 10<sup>th</sup> November 2008. Thus, there can be no argument about their status as legal representatives of the estate of Ben Ngunyangi Iragu.

13. Whereas pursuant to **Order 24 Rule 7 (2)** an application for revival should ordinarily be made by the plaintiff, it is not unusual to find

diligent legal representatives of a deceased defendant seek revival and substitution. Sometimes however, one comes across a deceased defendant whose estate is least bothered or is even actively interested in the claim abating and remaining abated. In such cases, the plaintiff may be left to his own devices. His situation may be even more complicated if the estate is not keen on obtaining grant of representation or if grant is obtained without his knowledge and that fact kept from him. As I will explain below, the delay herein notwithstanding, the circumstances of this case call for a pragmatic approach so as to get to the bottom of the dispute in the suits between the parties.

14. Did Lucy Njeri Ngunyangi and Maxwell Munene as legal representatives of the estate of Ben Ngunyangi Iragu know about the existence of ELCC No. 115 of 2019 (Formerly HCC. No. 122 of 2002)? The answer is a firm yes. One only needs to look once again at their plaint in HCC No. 317 of 2011, a suit which they filed on 1<sup>st</sup> November 2011. At paragraph 10, they categorically mention the case and state that Ben Ngunyangi Iragu was a defendant. As legal representatives who were aware of the suit, they ought to have sought revival and substitution or at least notify the plaintiffs that they had been appointed legal representatives and work with the plaintiffs towards revival and substitution, more so considering that in their suit they were claiming ownership of Nakuru Municipality Block 18/48, the very property that is claimed in ELCC No. 115 of 2019. Instead, they went ahead and filed a new suit, HCC No. 317 of 2011.

15. I do not think that in those circumstances, Lucy Njeri Ngunyangi and Maxwell Munene can accuse the applicants of any inordinate delay. If anything, it is Lucy Njeri Ngunyangi and Maxwell Munene who should explain their failure to work with the plaintiffs towards revival and substitution. My own guess is that they wanted the plaintiffs' claim to die a natural death. One wonders how they expected to sweep the case under the carpet yet the very same issues are being raised in their HCC No. 317 of 2011. The nature of the dispute between the parties calls for a hearing and determination of the suits on the merits.

16. The court now has a wider latitude to ensure that substantive justice prevails and that judicial time is better utilized. **Article 159 (2) (b) and (d)** of the **Constitution** and **Section 3** of the **Environment and Land Court Act** emphasise that mission. In that regard, the Court of Appeal stated in **Coast Development Authority v Adam Kazungu Mzamba & 49 others [2016] eKLR** as follows:

*... Article 159 (2) (d) demands that justice shall be administered without undue regard to technicalities. In Salat v. IEBC & 7 Others, Petition No. 23 of 2014, the Supreme Court reiterated that the above constitutional provision accords precedence to substance, over form and in Lamanken Aramat v. Harun Maitamei Lempaka, Petition No 5 of 2014 the same Court observed that a court dealing with a question of procedure, where jurisdiction is not expressly limited in scope, may exercise discretion to ensure that any procedural failing that lends itself to cure under Article 159, is indeed cured. The Court concluded thus:*

*“The Court’s authority under Article 159 of the Constitution remains unfettered, especially where procedural technicalities pose an impediment to the administration of justice.”*

*As regards the overriding objective, the ELC Act provides that its principle objective is to enable the court to facilitate the just, expeditious, proportionate and accessible resolution of disputes and enjoins the court to discharge its functions so as to give effect to the overriding objective. ...*

17. The parties herein have no less than three suites between each other, litigating over the same issues. The approach that commends itself to me is one that facilitates each party to advance his case and hence ensure substantive justice and better utilization of judicial time. That can only be attained by allowing revival and substitution as is sought. No doubt, the constitutional edict that emphasizes substantive justice and better utilization of judicial time is superior to the Civil Procedure Rules. I also note that the first of the cases herein was filed in court almost 20 years ago. The cases need to be heard and determined without any further delay.

18. In view of the foregoing discourse, I am persuaded that the application should be allowed. I therefore make the following orders:

- a) **The suit by the plaintiffs in ELCC No. 115 of 2019 against the 1<sup>st</sup> defendant therein be and is hereby revived.**
- b) **Ben Ngunyangi Iragu, the 1<sup>st</sup> defendant in ELCC No. 115 of 2019, be and is hereby substituted with Lucy Njeri Ngunyangi and Maxwell Munene.**
- c) **The plaintiffs in ELCC No. 115 of 2019 to file and serve an amended plaint to reflect the substitution within 14 (fourteen) days from the date of delivery of this ruling.**
- d) **Costs of Notice of Motion dated 16<sup>th</sup> December 2019 shall be in the cause.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 23<sup>RD</sup> DAY OF SEPTEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

Mr Konosi for the plaintiffs in ELCC No. 115 of 2019

No appearance for the 1<sup>st</sup> defendant in ELCC No. 115 of 2019

No appearance for the 2<sup>nd</sup> defendant in ELCC No. 115 of 2019

Mr Mindo for the plaintiffs in HCC No. 317 of 2011

No appearance for the defendant in HCC No. 317 of 2011

Court Assistant: E. Juma