



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT SIAYA

ELC APPEAL CASE NO. 8 OF 2021

NICHOLAS ONYUNA AURA.....PLAINTFF

VERSUS

DAVID OTIENO ODUOR.....DEFENDANT

RULING

***(An application by administrator ad litem of a respondent in an appeal seeking to revive
an abated appeal and substitute a deceased respondent: application disallowed)***

RULING

Introduction

1. This appeal emanated from the judgement of **Siaya RMCC no. 28 of 1990**. By an undated plaint filed in court on 7/05/1990, the respondent filed a suit against the appellant seeking cancellation of the appellant as the registered proprietor of land parcel title NO. EAST ALEGO/BAR AGULU/963 (**the suit property**) and for him to be registered as the proprietor. In response, the appellant filed a defence dated 23/05/1990. After hearing the evidence of both parties, the court delivered its judgement on 17/1/1991. Being dissatisfied with the judgement, the appellant by a petition and grounds of appeal dated 00/01/1992, filed an appeal to the high court.
2. Subsequent to filing the appeal, the appellant lost interest in the appeal and this provoked the court to write several letters to him requesting him to provide a copy of the decree for purposes of directions but to no avail. From the court records, a record of appeal has never been filed. To buttress the fact that he had lost interest in the appeal, the appellant wrote a letter to court on 19/1/2017 requesting for release of the title deed of the suit property to him. The court complied with this request on 16/3/2017.
3. From the court records, the respondent's administrator vide a letter dated 13/07/2020 wrote a letter to the court requesting for certified copies of the proceedings. A few months later, he filed a motion dated 22/03/2021 seeking for revival of the appeal and substitution of the respondent with the administrator. This motion is the subject of this ruling.

Respondent's case

4. The motion dated 22/03/2021 seeks to revive the appeal and upon revival, to substitute the respondent with the administrator on the grounds;(i) the applicant is the administrator of the deceased having obtained letters of administration ad litem on 2/3/2021, (ii) the deceased's family became aware of the existence of the suit on 00/01/2021, (iii) the appeal is still pending hearing and determination, (iv) it is in the interests of justice for the appeal to be revived and for the respondent to respond to the appeal. The motion was supported by the supporting affidavit of the administrator dated 22/03/2021. In essence, the administrator contended; (i) the appeal had abated but the cause of action survived the respondent, (ii) it is in the interests of justice that the appeal be revived and the respondent be substituted by the administrator, (iii) the appellant will not suffer any prejudice, and (iv) there is no inordinate delay in bringing the motion.

Appellant's case

5. Though the appellant has not filed any response to the application and the motion is unopposed, this court has to determine the motion on its own merits.

Analysis and determination

6. Having considered the motion, supporting affidavit and annexures, these are the issues for determination; (i) whether the respondent's administrator can revive an abated suit against the respondent, and (ii) if the answer to issue (i) is in the affirmative, whether the administrator shall substitute the respondent.

I will proceed to analyze the legal and jurisprudential framework on these issues.

7. The jurisdiction that grants this court discretion to revive an abated suit lies with **Order 24 rule 7(2)** of the **Civil Procedure Rules** which provides: -

“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”. Emphasis added.

8. Can an administrator of a defendant or respondent in an appeal revive an abated suit? My answer to this is in the negative. My understanding of the **Order 24 rule 7(2)** of the **Civil Procedure Rules** is that only four classes of persons have the capacity move the court to revive an abated suit namely; a plaintiff, a deceased plaintiff's legal representative, a trustee or official receiver of a bankrupt plaintiff. Had the drafters of the law envisaged that a defendant or a respondent in an appeal would seek to revive a suit, then nothing could have been easier than for such a provision to be expressly provided for under the law. In my view, it is doubtful that the rules committee envisaged that a defendant or a respondent in an appeal as defined by **Order 24 Rule 9** of the **Civil Procedure Rules** would be keen to revive a suit against him because this would be prejudicial to his or her interests. In the case of **Lucy Wanjiru Kamau v K.H. Osmond Advocate [2018] eKLR**, the court was of a similar view and held;

“It was therefore the finding and holding of this suit that the suit as against the deceased Defendant herein could not be revived under the provisions of Order 24 Rule 4 (1), Rule 4 (3) and Rule 5 of the Civil Procedure Rules as had been sought by the Plaintiff for the simple reason that there was no provision for revival of an abated suit as against a deceased defendant under Order 24 of Civil Procedure Rules”.

9. What is the position if the suit had not abated against a defendant or respondent in an appeal? The answer to this lies with **Order 24 Rule 4(1)** of the **Civil Procedure Rules** which provides;

“(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. (emphasis added).

10. It is the considered view of this court that the wording of **Order 24 Rule 4(1)** of the **Civil Procedure Rules** is not restrictive on the party who can move the court to have the legal representative of a defendant or a respondent in an appeal to be made a party to the suit and it can either be by a plaintiff or a legal representative of a defendant or a respondent in an appeal. However, such an application has to be made within one year from when a defendant or respondent in an appeal dies as envisaged in **Order 24 Rule 4(3)** of the **Civil Procedure Rules**.

11. Did the administrator bring the motion within one year upon the demise of the respondent? My answer to this is in the negative. The administrator has contended that the respondent died on 15/06/2006 which is over 15 years ago. The appeal was filed over 29 years ago which is an inordinate long period of time.

12. Even if the administrator would have had capacity to bring the motion, which this court finds he does not, he would have had the arduous task of proving sufficient cause why the suit should be revived. In the case of **Attorney General v Law Society of Kenya & another [2013] eKLR**, the court of appeal held sufficient cause to be:-

“the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused”. See BLACK’S LAW DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events”.

13. From the court records, a record of appeal was never remitted to the court by the appellant and the appeal was never admitted in accordance with section **79B** of the **Civil Procedure Act** and **Order 42 Rule 13** of the **Civil Procedure Rules**. This holds credence that the appellant lost interest in the appeal. The administrator asserts that the only reason he filed the motion 14 years late was because he came across the appellate documents on 00/01/2021. Contrary to this assertion, the court's record bears a letter dated 13/07/2020 written by the administrator seeking for certified copies of the proceedings.

14. It is the finding of this court that the suit has abated and the administrator of a deceased respondent in an appeal cannot revive an abated suit.

15. Ultimately, I make the following disposal orders: -

a) ***The appeal is marked as abated.***

- b) The Notice of Motion dated 5/5/2020 is dismissed for lack of merit.*
- c) There shall be no orders as to costs on the application and the appeal.*
- d) File is closed*

Ruling delivered by virtual court.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 19TH DAY OF OCTOBER 2021

A. Y. KOROSS

JUDGE

IN THE PRESENCE OF:

MR. CALVIN SIGOMAC FOR THE APPLICANT

N/A FOR THE RESPONDENT

COURT ASSISTANT: SARAH OORO