



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**MISC. CIVIL APPLICATION NO. 32 OF 2011 (J.R)**

**NICODEMUS MOMANYI.....APPLICANT**

**VERSUS**

**ONCHIRI KEGENI.....RESPONDENT**

**LAWRENCE MOSE.....OBJECTOR/RESPONDENT**

**RULING**

**INTRODUCTION**

1. This is ruling is in respect of the Notice of Motion dated 3<sup>rd</sup> March 2020 filed by the Applicant seeking the following orders;

- I. That the Applicant be granted extension of time within which he can apply for substitution of the Respondent now deceased with his legal representative.
- II. That the suit which has since abated be revived and reinstated.
- III. That the Respondent's legal representative, Lawrence Mose be substituted as the Respondent.
- IV. Costs of this application be provided for.

2. The Applicant swore an affidavit in support of his application in which he averred that the Objector was the legal representative of the estate of the Respondent and thus intended to substitute him as a Respondent of the Respondent who had died on 18<sup>th</sup> July, 2015. He averred that he sought extension of time since he was not aware that he ought to have sought an extension of time to substitute the Respondent with the Objector as the suit had abated after the expiry of one-year after the death of the Respondent. He averred that his former Advocate misled him to file an application dated 13<sup>th</sup> November, 2019 before seeking leave for extension of time for the same given that the period for filing the said application had expired and he was thus forced to withdraw the said application. He contended that this court has unfettered discretion to extend time for substitution of parties and failure to allow him do so would deny him the right to enjoy the fruits of the orders issued in his favor which he intended to execute against the Respondent before the Respondent died.

3. In response to the application, the Objector/Respondent filed a Replying Affidavit on 5<sup>th</sup> February, 2021. In the said affidavit the Objector/Respondent averred that the application was defective and an abuse of the court process. He further averred that the application was *res judicata* as the same had been dealt with and appropriate orders made. He equally averred that the application was time barred as the Applicant's father died in 2015 and the cause of action did not survive him. It was his further averment that an application of this nature ought to have been filed before the expiry of one year following the death of the Respondent and the delay of 5 years was inexcusable.

4. The court directed that the application be canvassed by way of written submissions. The Respondent filed his submissions on 5<sup>th</sup> May, 2021 while the Applicant did not file any submissions.

**BACKGROUND OF THE CASE**

5. In order to effectively determine the application, it will be essential to give a brief background of the case.

6. The Respondent (now deceased) sometime in 2010 filed a complaint with Keumbu Land Disputes Tribunal claiming that he was the registered owner of the land parcel known as **NYARIBARI CHACHE/BIRONGO/543** measuring 1.4. He alleged that the Applicant had

encroached on the said parcel of land. During the hearing the Applicant failed to appear and the Tribunal made a determination that the land belonged to the Respondent and ordered that the Applicant vacates the land failing which he would be arrested.

7. Vide Misc. Application No. 36 of 2010, The Respondent approached the Keroka Resident Court seeking the adoption of the award by the Keumbu Land Dispute Tribunal and the same was dismissed on the grounds that the award could only be presented before the court by the Chairman of the Tribunal.

8. The Respondent, thereafter approached the Chief Magistrates Court at Kisii vide Misc. Application No. 7 of 2011 dated 24<sup>th</sup> January, 2011. The court adopted the award vide an order dated 14<sup>th</sup> February, 2011.

9. The Applicant subsequently filed this Judicial Review application seeking to have the order of the Chief Magistrate set aside on the grounds that the proceedings of the Land Disputes Tribunal were conducted without his involvement as he was not served and thus he was not given an opportunity to be heard.

10. In its judgment dated 21<sup>st</sup> January, 2012 the Court allowed the Applicant's application with costs by quashing the order issued by the Chief Magistrate's court on the grounds that Applicant was not given an opportunity to be heard. The Respondent was therefore prohibited from implementing the said order.

11. The Applicant later filed a Bill of Cost dated 18<sup>th</sup> February, 2013 which was taxed at 89,880 on 7<sup>th</sup> May, 2013.

12. A Notice to Show Cause why the Respondent, now the Judgment Debtor should not be committed to civil jail for failure to pay the costs was later filed by the Applicant. The matter was adjourned on several occasions at the instance of the Respondent's Advocates on the grounds that the Respondent was sick. Finally, the Respondent appeared in court and the Deputy Registrar who was in conduct of the matter declined to grant an order to commit the Respondent to civil jail after noting that he was sick and thus it would not have been prudent to commit him to civil jail. The Deputy Registrar instead ordered the Applicant to recover the costs through other avenues provided for under the Civil Procedure Act.

13. By an application dated 1<sup>st</sup> February, 2019 the Applicant applied for execution of his costs against the Objector as the Respondent had died before the execution process was complete. He then proceeded to attach the Objector's property.

14. Following the attachment of his property the objector filed an application dated 21<sup>st</sup> August, 2019 under Certificate of Urgency to stop his properties from being attached and sold because he was not a party to the suit. The Objector's application was allowed on the grounds that there had been no substitution before the said attachment.

15. On 13<sup>th</sup> November, 2019 the Applicant filed another application seeking that the Objector, who had obtained an Ad litem Grant in respect of the estate of the deceased Respondent to be made a party to the suit on behalf of his late father. However, on 17<sup>th</sup> February, 2020 the application was withdrawn with costs to the Objector and therefore the Applicant could not carry on with execution against the objector.

16. Undeterred by the aforementioned proceedings, the Applicant filed the instant application.

## **ISSUES FOR DETERMINATION**

17. The main issue for determination is whether the Applicant has provided sufficient reasons to warrant an extension of time to file an application for substitution.

## **ANALYSIS AND DETERMINATION**

18. Order 24 of the Civil Procedure Rules provides as follows: -

*“24. 1. The death of a Plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.*

*2.....*

*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 Plaintiff alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court on 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 sub-rule (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's Plaintiff.*

*Provided the Court may, for good reason on application, extend the time.*

*4....*

5...

6...

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 the 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.”*

19. A perusal of the Supporting Affidavit to the application before me, shows that the Respondent passed away some five (5) years before the application was filed. The Applicant being fully aware of the time within which he ought to have filed this application, sought for an extension of time within which he could apply for substitution of the Respondent (now deceased) with the Objector.

20. It is not lost to me that the Applicant was all along represented by counsel and his allegation that he was not aware that the suit would abate if the substitution was not done within one year cannot be true.

It is a general legal principle that ignorance to the law is not a defence. The Applicant therefore cannot rely on this ground to explain his 5-year delay before seeking extension of time.

21. It is clear from the court record that on 18<sup>th</sup> February, 2014 when this matter came up for a Notice to Show Cause, the Applicant was advised by the Deputy Registrar to use alternative means of recovering his costs provided for under the Civil Procedure Rules other than committing the Respondent to civil jail because he was sick and frail. The Applicant did not take any steps until 2019 when he attempted to recover his costs directly from the Objector on the grounds that he was the personal representative of his father without ascertaining whether he had obtained a Grant of Letters of Administration. The Applicant has therefore not been diligent in following up on his costs. Equity assists the vigilant, not the indolent.

22. In view of the foregoing, I am not persuaded that the Applicant has provided sufficient reasons for this court to exercise its discretion in granting an extension of time to file an application for substitution as provided for under the provision to Order 24 rule 3 (2) highlighted above.

23. Consequently, I find no merit in the application and I dismiss it with costs to the Respondent.

**Dated, signed and delivered at Kisii this 23<sup>rd</sup> day of November, 2021.**

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**J.M ONYANGO**

**JUDGE**