



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 184 OF 2013**

**1. VUE TAURE VUE**

**2. TSORI CHIWAI SUDI.....PLAINTIFFS**

**VERSUS**

**1. FELIX TSORI CHIVATSI**

**2. DANCAN JAMES WAITA.....DEFENDANTS**

**RULING**

1. By this Notice of Motion application dated 11<sup>th</sup> June 2019, the Plaintiffs pray for orders:-

- 1. That this Court be pleased to reinstate the abated suit against the deceased 2<sup>nd</sup> Plaintiff the late Tsori Chiwai Sudi;**
- 2. That this Honourable Court further be pleased to grant leave to the Applicant to substitute the 2<sup>nd</sup> Plaintiff now deceased with Anthony Kiringi Tsori who is now the legal representative of the deceased the late Tsori Chiwai Sudi;**
- 3. That the costs of the application be provided for.**

2. The application which is supported by an affidavit sworn by the said Anthony Kiringi Tsori is based on the grounds:-

- i. That the 2<sup>nd</sup> Plaintiff passed away on 17<sup>th</sup> November 2016 and the Applicant obtained Letters of Administration on 27<sup>th</sup> March 2017;**
- ii. That the Applicant then instructed the deceased's previous Advocates to substitute the 2<sup>nd</sup> Plaintiff with his name but the said Advocates only filed an application on 8<sup>th</sup> December 2017 before filing another one on 5<sup>th</sup> February 2018;**
- iii. That it was never explained to the Applicant that the suit had already abated as was correctly held in the Ruling delivered by this Court on 28<sup>th</sup> June 2018;**
- iv. That despite that Ruling, the said Advocates on record failed to file the requisite application for revival of the abated suit. The said Ruling did not bar the Applicant from reinstating the abated suit;**
- v. That the estate of the deceased stands to suffer loss as the Defendants are desirous of disposing off the subject property and it is in the interest of justice that the suit proceeds to trial.**

3. The application is opposed. By his Grounds of Opposition dated 16<sup>th</sup> July 2019, Felix Tsori Chivatsi (the 1<sup>st</sup> Defendant) opposes the Motion on the grounds:-

- 1. That the Applicant has been indolent and has failed to act vigilantly; as clearly demonstrated by the following facts:-**
  - i. That Tsori Chiwai Sudi died on 17<sup>th</sup> November 2016 and a limited grant was issued to the applicant on 27<sup>th</sup> March 2017 but the applications for substitutions were filed after the suit had abated.**

ii. It was determined on 28<sup>th</sup> June 2018 that the suit had abated yet the application herein was filed almost one year later on 11<sup>th</sup> June 2019.

2. That the applicant expressly admits that he personally instructed his former Advocates on 27<sup>th</sup> March 2017 and it is apparent he did not follow up the issue even after the dismissal on 28<sup>th</sup> June 2018.

3. That it is impossible in law to speak of substituting a party in a suit that has abated (a dead suit) and since substitution cannot be ordered, the Applicant has no locus standi to file the application herein.

4. That it is in the public interest that every litigation should come to an end in the fullness of time. The litigation herein came to an end upon the suit abating as confirmed by the Court in its Ruling dated 28<sup>th</sup> June 2018; and

5. That the Applicant seems to blame his former Advocates for the misfortune he finds himself in and if that be the case, he ought to pursue his remedy elsewhere but not through the resuscitation of a dead horse.

4. Similarly, Dancan James Watta (the 2<sup>nd</sup> Defendant) is opposed to the application. By his Grounds of Opposition dated 17<sup>th</sup> July 2019, he is opposed to the application on the grounds that:

1. The Applicant is guilty of delay and laches.

2. The application does not lie in law.

3. The application is otherwise an abuse of Court process.

4. The application is incurably defective.

5. On the principle "Interest Reipublicae ut sit finis litium."

5. I have perused and considered the application and the Grounds of Opposition thereto. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. Order 24 Rule 7(2) gives the Court discretionary power to revive a suit that has abated in the following terms:-

**"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."**

7. In the matter before me, the Applicant deposes that the 2<sup>nd</sup> Plaintiff passed away on 17<sup>th</sup> November 2016. On that ground and by an application dated 5<sup>th</sup> December 2017, the Plaintiffs had sought an order for the reinstatement of interim orders and the substitution of the Applicant herein.

8. Having heard the said application, this Court in a Ruling delivered on 28<sup>th</sup> June 2018 dismissed the said application on the basis that the suit had abated and there was no way in which interim orders could be extended and substitution done in a suit which was essentially dead.

9. On the basis of that application, the Defendants herein assert that the application is res judicata and that this Court has no jurisdiction to hear the same. While the Applicant is certainly guilty of serious delay, I did not think that the application before me raises the same issues as those that were before me in the application dated 5<sup>th</sup> December 2017.

10. From the Applicant's Supporting Affidavit, it was obvious to me that the Applicant had some issues with their previous Advocates as the limited grant to continue with this suit was obtained within six months after the death of the 2<sup>nd</sup> Plaintiff. In those circumstances, I think the delay in bringing this application is excusable.

11. As the Applicant submits, a refusal to grant this application is tantamount to the dismissal of the Plaintiff's case without hearing it on the merits. That is a draconian act as it would be driving away the Plaintiffs from the Judgment seat without being given a hearing. In the circumstances before me, I will not punish the Applicant and other beneficiaries of the estate for the failure to revive the suit earlier.

12. Instead, I invite the intrinsic power of this Court to administer justice devoid of technicalities as well as the overriding objective for the suit to be heard and disposed off on merit and hereby allow the application as prayed in terms of prayers 1 and 2 thereof.

13. Accordingly and given the age of this matter, the Plaintiffs are hereby granted 90 days to effect any amendments to the Plaint and to fix this matter for hearing.

14. As the Plaintiffs have inconvenienced the Defendants however, the Defendants shall have the costs of this application.

Dated, signed and delivered at Malindi this 25<sup>th</sup> day of June, 2020.

J.O. OLOLA

JUDGE