



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. CIVIL APPLICATION NO. 182 OF 2000

REPUBLIC.....APPLICANT

VERSUS

KIPKAREN LAND DISPUTES TRIBUNAL.....RESPONDENT

AND

KIPKAREN KIPOR LITALAM.....INTERESTED PARTY

ELIZABETH CHEPKIRUI BITOK,

VINCENT KIPRONO BITOK.....RESPONDENTS

EX PARTE TERESA BITOK

RULING

1. The *interested party* prays that Elizabeth Chepkirui Bitok and Vincent Kiprono Bitok (hereafter *the respondents*) be substituted as the *ex parte* applicants in place of Teresa Bitok (hereafter *the deceased*).
2. The interested party has presented a notice of motion dated 5th November 2014. It is pleaded that the deceased died on 22nd April 2006; that a grant of letters of administration was issued to her children (the respondents) on 27th August 2009 in Eldoret High Court Succession Cause 53 of 2008; that the two are not keen to be substituted yet they are wasting the estate and in particular a parcel of land known as Nandi/KipkarrenSalient/245 belonging to the interested party; and, that the interested party is hindered from prosecuting his application dated 31st March 2004. Those matters are buttressed by a deposition of the interested party sworn on 5th November 2014.
3. The motion is contested by the Republic and the 2nd respondent. The former has filed grounds of opposition dated 27th April 2015. The latter has also filed his grounds of opposition dated 25th May 2015 and a preliminary objection of even date. The pith of the objections are that the motion is fatally defective; that there has been undue laches; that the legal representative sought to be substituted is also *deceased*; that there is material non-disclosure; and, that the motion offends Order 24 of the Civil Procedure Rules 2010.
4. On 27th May 2015, I heard brief submissions from learned counsel for the three parties. I have considered the application, deposition, grounds of opposition, preliminary objection and the rival submissions.

5. Order 24 of the Civil Procedure Rules provides that a cause of action shall not be defeated merely by the death of the plaintiff or defendant. If the cause of action *survives* the deceased, a substitution must be undertaken within a *year* of the death; in default, the cause of action *abates* by operation of the law. Kenya has a new Constitution. The Court must thus pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution; and, sections 1A, 1B and 3A of the Civil Procedure Act. See also Harit Sheth T/a Harit Sheth Advocate v Shamas Charania, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

6. It is not disputed that this action was filed in court *fifteen* years ago; to be precise on 11th December 2000. It is also common ground that the *ex parte* applicant died on 22nd April 2006. That is nearly *nine* years ago. An application by the interested party dated 31st March 2004 has remained unprosecuted. I have studied that application. It sought leave for new counsel to come onto the record; and to set aside an order of court dated 14th July 2003. The court had granted a writ of *certiorari* to bring into the High Court and to quash the decision of the Kipkarren Land Disputes Tribunal dated 27th October 2000.

7. I find there has been *inordinate* delay at *four* critical points in time. First the present notice of motion was only presented to court on 13th November 2014, *eight* years after the death of the *ex parte* applicant; secondly, there is no explanation tendered why the interested party's motion dated 31st March 2004 was never fixed for hearing during the *life* of the *ex parte* applicant. The deceased died on 22nd April 2006. So the interested party had nearly *two* years to set down the motion for hearing. Thirdly, the original order of court ultimately sought to be set aside dates back to 14th July 2003, nearly *twelve* years ago. Fourthly, the legal representatives of the deceased received a grant way back on 27th August 2009. There is no explanation why the present motion was presented *five* years later.

8. The supporting affidavit is completely mute on those delays. As a general rule, when delay is established, unless it is well explained, it is deemed to be *inexcusable*. See Ivita v Kyumbu [1984] KLR 441. In this case the delay is not explained at all. Granted those circumstances, I am unable to exercise my discretion in favour of the applicant.

9. I also find that the application offends Order 24 of the Civil Procedure Rules 2010. For starters, the application for substitution was not presented within *one* year. It was presented on 13th November 2014, *eight* years after the death of the *ex parte* applicant. The cause of action had accordingly *abated* by operation of the law. Secondly, the interested party never applied for *extension of time* within which to present the present motion. He proceeded directly and after substantial and unexplained *delay* to file the present motion without any *leave*. Thirdly, and very important, the motion is *not* brought by the legal representative of the deceased. There are allegations in the grounds of opposition that the legal representative sought to be enjoined is also *deceased*. I cannot make a finding on that aspect for want of evidence. But it all points to *material non-disclosure*; and, to a scheme or attempt by *all* the parties to leave the court in a blind spot.

10. Granted all those circumstances, the present application is on a legal quicksand. It cannot even be redeemed by the overriding objective in article 159 of the Constitution or sections 1A, 1B and 3A of the Civil Procedure Act. The upshot is that the notice of motion dated 5th November 2014 is dismissed. In the interests of justice; and, considering the plight of the interested party, I order that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 7th day of July 2015

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

Ms. Adhiambo for Mr. Magut for the applicant.

No appearance for the 1st respondent.

Mr. Aseo for the 2nd respondent.

Mr. J. Kemboi, Court clerk.