REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 385 OF 1994

STANLEY NKANATA & OTHERS..PLAINTIFF/APPLICANT

VERSUS

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT........1ST RESPONDENT/DEFENDANT

HENRY KINYUA...2ND RESPONDENT/DEFENDANT

RULING

1. On 24.10.2019, the plaintiffs/applicants filed an application seeking orders to have the dismissal Order issued by this Court on 27/11/2018 set aside, that the suit be revived against the 2nd defendant, that the matter proceeds for hearing and that **Henry Kinyua** (now deceased) be substituted by his legal representatives namely **Karimi Mutuma** and **Peter Harris Kimathi.**

2. The application was supported by the sworn affidavit of **Stanley NKanata** who averred that the suit was dismissed on the ground that service of the hearing notice was not effected upon the parties. That at the time, they were unable to substitute the 2nd Defendant within a period of one year because the legal representative of the estate of the deceased remained unknown.

3. That in an effort to trace the representatives of the estate of the deceased, they located and cited the deceased widow i.e. **Karimi Mutuma Kinyua** in **HC NO. 23 OF 2018.** However, the citee never responded to the citation application. That it is only recently that it came to their knowledge that the deceased widow and son i.e. **Karimi Mutuma Kinyua** and **Peter Haris Kimathi Kinyua** have petitioned for letters of administration in **Nairobi High Court Succession Cause No. 366 of 2017.** The applicants have attached the relevant gazette notice in the supplementary affidavit of Stanley Nkanata dated 22.1.2020.

4. That the cause of action which is a claim for land survives the death of the 2nd Defendant and in the circumstances, it is right and proper that the deceased widow and son be substituted in place of the 2nd Defendant.

5. The application was opposed through a Replying affidavit dated 4th December 2019 sworn by **Christine Murithi,** advocate on record for the 2nd defendant. She averred that the matter abated as against the 2nd respondent and that the applicant has failed to prosecute the matter since 1994, hence litigation must come to an end. That if anything the matter was dismissed on 27/11/2018 and no justifiable reasons have been offered in the delay in the filing of this application.

6. Both parties have since filed their submissions to the application which I have dully considered.

Analysis and Determination

7. The long history of this suit dates back to 25/10/1994 when the plaintiffs instituted the suit against the defendants seeking a declaration that the substitution of the plaintiffs' names with that of the 2nd Defendant in respect of the suit land was fraudulent, illegal null and void. The plaintiffs also desired to be declared as the owners of the suit land Ntima/Igoki/1774.

8. Through the decades, the case stalled primarily due to non-compliance with regard to the issue of filing documents in support of or in opposition to the suit. From the proceedings the delay is in equal measure as both parties sought adjournment severally. At some point, both sides would consent to have the matter adjourned despite stern warnings from the court for the suit to be prosecuted to its logical conclusion. The history of the matter which I will endeavour to capture however reveals a grim picture in the manner the plaintiffs have conducted this case since its institution decades ago.

9. On 27.3.2014, the matter was listed down for a "**Notice to show cause why the case should not be dismissed".** In a ruling delivered on

6.5.2014, the Judge observed the following in respect of the Notice to show cause;

> ***"I note that the last time this matter was in court was 26.4.2012. No step has been taken since then, therefore this suit qualifies for dismissal. However, the plaintiffs have shown enough interest in prosecuting their case. In the interest of justice, I direct as follows;***
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> ***"Plaintiffs to set down the case for hearing at the Registry within 60 days after delivery of this ruling. If the plaintiffs do not set down the case for hearing as the court has stipulated, the suit will stand as dismissed".***

10. This means that the suit stood as dismissed on 6.7.2014 or thereabout (60 days after 6 .5. 2014). After that ruling of 6 .5.2014, the plaintiffs again went into slumber for a period of 1 year 9 months that is until 16.2. 2016 when a mention date was given. Thereafter, the advocates for the parties managed to wriggle out of the orders given on 6.5.20214, hence the said orders fizzled out. No steps were taken to prosecute the suit until this court on its own motion issued a hearing notice to the parties on 4.4.2017. That is when the advocate for the 2nd Defendant informed the court that the 2nd Defendant had passed on two months earlier.

11. On 1/11/17 the court granted the applicants herein 30 days to initiate proceedings of substitution of the 2nd Defendant. That issue of substitution of the 2nd defendant has casually been handled by the applicants. Vide an application dated 5/1/2018 the applicants filed an application for substitution of the 2nd defendant but the same was withdrawn by the applicants on 17.4.2018 as the parties sought to be substituted had not obtained grant of letters of administration. The applicants had averred that they had filed a citation no. 23 of 2018 before the Chief Magistrates court at Meru.

12. This matter was then given a mention date for 12.7.2018 to confirm if an appropriate application for substitution had been filed. Come 12.7.2018 and there was no tangible evidence regarding the developments on the issue of substitution. The counsel for the plaintiffs who had been present in the morning was nowhere to be found when the case was mentioned later in the day. The matter was listed for mention again on 26.9.2018 and on 29.10.2018.

13. It is against this back ground that this court gave the following directions on 29/10/2018 in the presence of the advocates for the plaintiffs;

> ***"Case to proceed for hearing on 27/11/2018. The court notes that this case is very old and it shall not be adjourned. Service to be effected otherwise the matter shall stand as dismissed"***

14. On 27/11/2018 when the matter came up for hearing, the 2nd Defendant's advocate alerted the court that the matter had abated against their client. The court also noted that the 1st Defendant had not been served with the hearing notice. In the circumstances, the court proceeded to mark the case against the 2nd defendant as abated while the case against 1st defendant was dismissed.

15. **Order 24 Rule 4 of the Civil Procedure Rules** provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

> ***"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.***
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> ***(2) ….…………….***
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> ***(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."***

16. In **Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd [2018] eKLR** the court held that;

> ***"An abated suit is non-existent prior to it being revived. For a suit to be revived an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement…."***

17. **Order 24 Rule 7(2) of the Civil Procedure Rules** gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit.

18. In the instant suit, this court has considered the conduct of the plaintiffs from the time they learnt that the 2nd defendant had died and the picture painted is unflattering. This court gave the plaintiffs adequate time and an opportunity to brief the court on the progress they were making in their endeavour to substitute the 2nd defendant but they failed to seize the moment. They now state that a cause has been filed in Nairobi by the legal representatives of the deceased. However, they still have no grant. I am not persuaded that there is sufficient cause to warrant the revival of the suit against the 2nd defendant or rather, the efforts now being made for substitution have come late in the day.

19. As regards the issue of reinstatement of the suit against the 1st defendant, the history of the case as captured here in is self-explanatory and I need not analyse the same all over again save to add that from 14. 7. 2014, the court had put the plaintiffs on notice, that the suit faced

imminent dismissal and the court revisited this issue severally thereafter.

20. One of the cardinal principles in our constitution is "**the expeditious delivery of justice" –see Article 159 (2) (b) of the Constitution of Kenya,** which in effect codifies the 17th century maxim of **"Justice delayed is justice denied**". This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred.

21. The people of Kenya have for decades cried out to the justice system to embrace the aforementioned principle of expeditious delivery of justice, and in response thereof, the Judiciary formulated its 2017 blue print **"Sustaining Judiciary Transformation - (SJT)"** where speedy delivery of justice was one of the key strategic area of concern. Under that key area, Judiciary embarked on an exercise of clearing old cases which had clogged the justice system for years. The matters identified as falling under this category were cases which were five years old and/or older. It is against this back ground that this court on its own motion retrieved the matter and had it listed for hearing on 4.4.2017 and on 1.11.2017 (before Hon. Judge Grace Kemei, a visiting Judge), all in an effort to have the matter prosecuted.

22. In the case of **Mwangi S. Kimenyi v Attorney General & another [2014] eKLR,** the court stated that;

> ***"The decision whether a suit should be re-instated for trial is a matter of justice and it depends on the facts of the case".*** The court had made reference to the case of **IVITA v KYUMBU [1984] KLR 441, where Chesoni, J.** (As he then was) stated that:
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> ***"The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite such delay".***

23. It is now 26 years since the suit was filed in this court. Though the matter was dismissed on 27.11.2018, the current application was not filed until 24.10.2019. The facts of this case do not warrant this court to exercise its discretion in favour of the plaintiffs. In the circumstances, the current application is hereby dismissed with costs. This file is marked as CLOSED.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF SEPTEMBER, 2020

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 6.7.2020. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE