



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CIVIL CASE NO. 1361 OF 2007**

**KINYANJUI WAITHIARI.....1<sup>ST</sup> PLAINTIFF**

**DAVID KOMU.....2<sup>ND</sup> PLAINTIFF**

**MUTURI MUIRU.....3<sup>RD</sup> PLAINTIFF**

**KANG'ETHE GATHIGE.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**GICHANA GATHUKU.....DEFENDANT**

**AND**

**PETER KOINANGE KINYANJUI.....APPLICANT**

**RULING**

1. This is the Notice of Motion dated 23<sup>rd</sup> March 2017 brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 50 rule 6 and 8 , Order 24, Rule 1, 7, 8, 2, Order 51 Rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of law.

2. It seeks orders:-

*(1) Spent.*

*(2) That the court revives the suit and sets aside its orders made on 17<sup>th</sup> March 2017 and enlarge the time for filing the application for substitution of Kinyanjui Waithiari the deceased (1<sup>st</sup> plaintiff)*

*(3) That the Applicant Peter Koinange Kinyanjui to substitute the deceased (1<sup>st</sup> plaintiff) as the 1<sup>st</sup> plaintiff in this suit.*

*(4) That the costs of this application be in the cause.*

3. The grounds are on the face of the application and are listed as in paragraph 1 to 4.

4. The application is supported by the affidavit of Peter Koinange Kinyanjui, the applicant herein sworn on the 23<sup>rd</sup> March 2017.

5. The application is opposed. There is a replying affidavit sworn by Gichana Gathuku, the defendant/respondent, sworn on the 10<sup>th</sup> April 2017.

6. On the 15<sup>th</sup> May 2017 the court directed that the notice of motion be canvassed by way of written submissions.

**The applicant's submissions**

7. The court is urged to uphold its cardinal purpose of rendering substantive justice as set out in Article 159 of the Constitution. Order 24, rule 7 of the Civil Procedure Rules gives the court unfettered discretion to revive an abated suit.

8. The Court of Appeal and the Supreme Court have held and found that the court's inherent jurisdiction is wide and far reaching and able to revive cases which have been dismissed and gave them life for purposes of ensuring substantive hearing and determination of the issues in controversy.

9. He has put forward the cases of **Kishor Kumar Dhanji Varsani vs Amolak Singh & 4 Others [2016] eKLR; Kamau Kuria vs Patrick Rerimoi & 2 Others [2017] Eklr; Rosemary Bunny vs Gichuhi Kamotho [2005] eKLR; Bilha Gahuya Akatsa vs Attorney General & 2 Others [2015] eKLR; Kamau Kuria vs Patrick Rerimoi & 2 Otehrs [2017] eKLR**. He prays that the application be allowed.

10. On the 18<sup>th</sup> October 2018, Mr. Kiragu for the defendant/respondent was present. He sought and was granted leave to put in their submissions before close of business that day. I have perused the court file and found their submissions are not on record. Nevertheless I will rely on the replying affidavit filed by the defendant/respondent.

11. I have considered the Notice of Motion, the affidavit in support and the annexures. I have also considered the replying affidavit and the annexures. I have also considered the written submissions of counsel and the authorities cited. The issue for determination is whether the applicant has established sufficient cause to enable this court revive the suit which had abated.

12. I have gone through the court record, on 27<sup>th</sup> May 2014, Mr. Odawa for the plaintiff informed the court that the sole plaintiff had passed away on 14<sup>th</sup> February 2014. He told the court that he had one year within which to substitute the plaintiff. The matter was then stood over generally. The defendant later filed a notice of motion dated 14<sup>th</sup> July 2015 seeking to have the suit declared as abated. Following this application a ruling was rendered. Hon. Lady Justice Gitumbi on 17<sup>th</sup> March 2017, found the suit to have abated. It is against this ruling that the applicant seeks to set aside.

13. As stated in the ruling of 17<sup>th</sup> March 2017, the said deceased plaintiff, Kinyanjui Wathiari ought to have been substituted within one year from 14<sup>th</sup> February 2014. There was no application for substitution filed by February 2018.

14. Order 24 rule 7 (2) of the Civil Procedure Rules 2010 provides that:

***“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.”***

From the above provision it is clear that the applicant must demonstrate that he was prevented by sufficient cause to make the application in time.

15. Has the applicant herein sufficiently explained the reasons for his failing to pursue the suit before it abated? I find that the answer is no. The applicant herein has not explained why he did not file the application for substitution by February 2015.

16. It was held by **Munyao Sila J** in the case of **Kamau Kuria vs Patrick Rerimoi and 2 others [2017] Eklr** that:

***“...The grant of an order to revive an abated suit is therefore not automatic. The court must be satisfied that there is good reason why the application to continue suit was not made within one year.”***

17. I have gone through paragraphs 4 and 5 of the applicant's supporting affidavit sworn on the 23<sup>rd</sup> March 2017. I find that he raises serious allegations of shortage of judges and registry staff in all courts country wide. These averments are unsupported by any evidence. They are an attempt to give excuses for his laxity. I agree with the defendant/respondent that this application does not meet the threshold for setting aside the orders of 17<sup>th</sup> March 2017.

18. I find that the applicant herein has failed to satisfy the court that he deserves the orders sought. Litigation must come to an end.

19. The applicant has failed to point out any sufficient reason which prevented him from making the application in time. I find no merit in this application and the same is dismissed. I make no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 27<sup>TH</sup> day of MARCH 2019.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court Assistant