



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO. 224 OF 2017(OS)

JAMES MWANIKI KINUTHIA.....APPLICANT/PLAINTIFF

VERSUS

IDD RAJAB.....DEFENDANT (DECEASED)

HEMED IDDI MUKUL.....INTENDED SUBSTITUTE/RESPONDENT

KANGETHE ABDULLAHI IDDI.....INTENDED SUBSTITUTE/RESPONDENT

RULING

1. The instant application has been preferred by the Applicant seeking orders to substitute the Defendant (now deceased) with his legal representative as well as an order for revival of the suit.
2. The facts of the application are supported by the grounds that the suit was filed on 11/2/14, the Defendant passed on later in the year 2015 before the suit was determined. The Applicant also avers that he did not have such knowledge and information in respect to the death of the Defendant until another case Murang'a ELC No. 517/17 was served on him 21/12/17.
3. The Applicant further avers in his supporting affidavit that he was served with the suit papers of the ELC case No. 517/2017 by the legal representatives of the estate of the Defendant. The administrators sought for an eviction against him. That is when he was able to sight the grant from the annexures in the suit papers. In the circumstance, he could not have filed any application for substitution especially when he was not aware of the death of the deceased and appointment of his administrator. That it is only fair and just that the representatives be substituted in place of the deceased.
4. The application is opposed vide the replying affidavit of the Respondents who are the legal representatives of the estate of the late Defendant sworn on behalf of his administrators. The Respondents reiterate that the application is brought after 3½ years after the death of the deceased. That the reinstatement of the suit was pursuant to its dismissal for want of prosecution and not for abatement. That there is no reasonable explanation for failure to revive the suit within one year. That nothing stopped the Plaintiff from moving with speed under the probate and administration rules to get an administrator or substitute for the deceased Defendant instead of waiting for the ELC No 517 of 2017 to be filed and then move the Court to substitute the Defendant. That it had also been over 2 months since 8/11/18 when the suit was reinstated and that the delay is inordinate and has not been explained. The Respondents also aver that the orders sought are prejudicial to them as intended substitutes.
5. The parties filed Written Submissions to canvass this application. The Applicant indicated that the Respondents have not demonstrated any prejudice they will suffer if the application is allowed. That the Applicants moved the Court promptly after the suit was reinstated on 8/11/18, thus there is no delay as he moved with speed. It is submitted that the issue of delay should be addressed in the light of circumstances and merits of each case. The Plaintiff relied on the case of **Mwangi Kanyari -Vs- Beatrice Kanjeri Mwangi Nairobi Civil Appeal Application No. 155 of 2008** where the Court of appeal allowed an application for substitution and revival of the abated suit after 3 years & 5 months. Also, in the case of **Gachichi Wang'ombe -Vs- James Muriuki Maina & Anor Nyeri C.A 155/2005 (unreported)** a suit was revived after 6 years by the Court.
6. The Respondents submit that an Applicant must apply for substitution within 1 year under Order 24 Rule 4(3). That an application to revive a suit will not be given as a matter of course. That there must be sufficient reason and evidence to support the revival. The case of **Henry Kiptalam Barg'etuny -Vs- Stanley A. Ngetich (2012 eKLR)** was cited.
7. The Respondents contend that the Plaintiff filed suit against the Defendant and as such it is unbelievable that he was not aware that he had died. That the Plaintiff failed to serve the originating summons in time or at all. That the Defendant passed on before he became aware of the suit. The unexplained indolence in serving the suit papers should be considered during this application on whether or not to revive the suit. That the Plaintiff is feigning ignorance of the Defendant's demise. The Plaintiff's father and the Defendant had been engaged in litigation for over a decade prior to filing this case. That proceedings confirm that he was aware that the Defendant was dead, the matter was mentioned

severally in Court until on 18/1/18 when it was dismissed. That if the suit had been prosecuted promptly and timeously, it could not have been caught up by the death of the Defendant. If the Plaintiff could have been diligent, one year could not have expired before substitution. Rule 14 of Schedule 5 of the Probate and Administration rules allowed a party to nominate a representative for the estate of a deceased litigant for purpose of substitution. The orders dated 8/11/18 did not revive the abated suit. That the application ought to be dismissed with costs in the absence of sound explanation for failure to cause substitution within one year.

8. The Applicant relied on the case of *Mwangi Kanyari* which refers to revival of an appeal under the Court of Appeal rules. The appellant in that case passed on, the reason for not substituting in time was that the Applicants was unwell, the parties were also relatives. The Court of appeal allowed the revival of the appeal.

9. I have reviewed the proceedings in this file and it is worth mentioning that the suit was filed on the 11/3/14 in Nyeri. It was transferred to this Court in February 2017. On the 25/4/17 the Advocate for the Applicant informed the Court that the Defendant had not been served and undertook to effect service. It must be noted that by then summons had expired.

10. The provisions of Order 24 provide that where a suit has abated but the subject matter still survives, the Court may upon application by the Plaintiff or administrator revive a suit where there is sufficient cause that prevented the party from filing the relevant application for substitution within 1 year.

11. In this case, it is on record that the Defendant died on 21/7/15 therefore substitution ought to have been done by 21/7/16 after which the suit abated. The application for revival of this suit is therefore being brought over 2.5 years after abatement. The rules permit the Court to revive the suit on application and on good reasons being tendered by the Applicant as to why the Court should extend time for substitution.

12. The consequences of abatement or dismissal of suit under this order are dire. Order 24 rule 7 (1) states that where a suit abates or is dismissed under this order no fresh suit shall be brought on the same cause of action.

13. The cause of action in this suit is a claim in land and therefore survived the death of the Defendant. It is a claim for Adverse Possession. The claim of the Applicant as can be gleaned from the suit is that his father purchased land in 1968 from one Wamiti Ndogoto and took possession. It is his case that he has established a claim of title under Adverse Possession against the estate of the deceased Defendant for having been in occupation for over 50 years. According to the green card on record the Defendant became registered as owner of the suit land in 2001. It is on record that following his death his legal representatives have filed a suit by way of plaint in ELC No 517/17 against the Plaintiff and others claiming the same subject matter of this suit. They have sought orders to evict the Plaintiff interlia. ELC 517/17 was filed on the 21/12/17.

14. On the 23/5/17 a notice of appointment of Advocates was filed in this case. It is expressed to be by the dependents of the Defendant. On the 10/7/17 the Defendant's advocate informed the Court that the Defendant was deceased. On the 13/12/17 the Plaintiffs advocate sought to mention the matter to appraise the Court on substitution and to furnish the Court with evidence of death of the Defendant. The suit was thereafter dismissed for want of prosecution and non attendance. On the 8/11/18 the suit was reinstated.

15. The Applicant has explained that he did not know about the death of the Defendant until he was served with the pleadings in ELC 517 of 2017 in December 2017. The record shows that the death of the Defendant was disclosed to the Plaintiff and the process server on the 23/5/17 and 7/7/17 when they went to serve him with the hearing notices as well as on the 10/7/18 in Court. The Plaintiff is not being entirely truthful in his explanation.

16. The Respondents have deponed that the delay is inordinate and highly prejudicial to them. They must demonstrate such prejudice that they stand to suffer in the event the suit is revived and if they are substituted as prayed. They did not. There is also no evidence that such harm may not be compensated by way of costs.

17. I have seen a number of decisions of Courts in this country where suits have been revived outside the one year period depending on the circumstances of the case. In all these cases the decisions were informed by the Court's cardinal duty to meet the ends of justice. In the case of *Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR*, Koome, JA invoked those principles when dealing with an application for revival of an appeal "made two years and eight months" after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

"..... I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in particular Article 159."

18. Section 1A read together with section 3A of that Civil Procedure Act is to facilitate just, expeditious, proportionate and affordable resolution of disputes. Guided by these principles read together with those set out in Art 159 of the Constitution, this Court is inclined to grant the application for the purposes of meeting the ends of justice to the parties in this case. The right to be heard is a Constitutional tenet under Art 48 and 50 and in paying fidelity to these principles this Court is inclined to allow the application to revive the suit and order for substitution of the Respondents in the suit so that the dispute may be heard and determined on its merits.

19. Doing the best, I can in the circumstances and to meet the ends of justice, I allow the application on the following terms;

- a. The Applicant to pay throw away costs in the sum of Kshs 5000/- to the Respondents.
- b. The cost of this application shall abide the main suit.

c. The Applicant to serve the Respondents with all the pleadings within 14 days from the date of the ruling.

d. Parties to list the matter for pretrial at the earliest opportunity.

**Orders accordingly**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30<sup>th</sup> DAY OF APRIL, 2019**

**J G KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

Kirubi for the Plaintiff

Kalume HB for Mbuthia for the 1<sup>st</sup> & 2<sup>nd</sup> Intended Substitutes

Kuiyaki and Njeri, Court Assistants