



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 116 OF 2019

MANUEL J. OMINDE OTIANGALA.....PLAINTIFF

VERSUS

ROSE KUTA.....1ST DEFENDANT

HAGAI SHIMANYULE alias

MAKONJIO SHIMANYULE.....2ND DEFENDANT

TITO KUTA.....3RD DEFENDANT

JOSEPH KUTA.....4th DEFENDANT

ROBERT KUTA.....5TH DEFENDANT

KABARA KUTA.....6TH DEFENDANT

KENNEDY KUTA alias KILO.....7TH DEFENDANT

ALICE ANINDO AYUKU(Applying as legal representative

of Manuel J. Ominde Otiangala - deceased).....APPLICANT

RULING

The application is dated 29th March 2019 and is brought under Section 3 and 3A CPA, Order 24 Rule 1 CPR 2010, Order 24 Rule 3(1) and (2) CPR 2010, Order 24 Rule 7(1) and (2) CPR 2010 seeking for orders:-

1. That this suit be reinstated and/or revived.
2. That the applicant be made a party as plaintiff in place of the plaintiff herein Manuel J. Ominde Otiangala who has since died.
3. That costs of this application be provided for.

It is based on the annexed affidavit of Alice Anindo Ayuku and the following grounds that, the plaintiff herein Manuel J. Ominde Otiangala passed away on 19th December 2012. That the suit was dismissed on 20th April 2015 for want of prosecution but by then it had already abated. That the cause of action survives. That the applicant obtained grant of letters of administration intestate over the estate of the deceased plaintiff herein Manuel J. Ominde Otiangala hence is a legal representative thereto. That the applicant was not aware of the existence of this suit till recently hence the delay in making this application. That no prejudice will be occasioned to the defendants as a result of this application.

The respondents submitted that the 1st and 5th defendants herein died in or about 2015 and there has been no substitution since then. Annexed hereto and marked "T.K 1 & 2" are copies of the burial permits relating to the two. That the plaintiff now deceased and the 1st and 5th defendant's case(deceased) abated upon the expiry of 12 months after the death of the said parties. That the suit having abated more than 6 years ago the applicant is guilty of laches and therefore not entitled to the prayers sought. That to revive a suit that abated more than 6 years ago would be prejudicial to the defendants who have all along considered the matter to be a closed chapter. That the abatement of the suit

upon the death of the plaintiff and that of the 1st and 5th defendants this honourable court dismissed the said suit on 20th April 2015. That no good or sufficient reasons have been advanced to reinstate a suit that was dismissed more than 4 years ago since such delay is inordinate. That the plaintiff has never set foot on the suit land. That the 1st and 5th defendants had filed suit in this honourable court being H.C Civil Suit No. 133 of 2009(OS) against the plaintiff herein jointly with one Jackton Ashihuya seeking to reclaim title for the suit land by adverse possession.

This court has considered the application and the submissions therein. I have perused the court file and find that this suit was dismissed on 20th April 2015 for want of prosecution. It was on the 15th April 2019 that the present application was filed. I find that there is inordinate delay in filing this application. Reasons advanced for the delay are unacceptable.

In the case of Utalii Transport Company Ltd & 3 Others vs NIC Bank & Another (2014) eKLR, the court held that it is the primary duty of the plaintiffs to take steps to progress their case since they are the ones who dragged the defendant to court. The decision on whether the suit should be reinstated for trial is a matter of justice and it depends on the facts of the case. In Ivita v Kyumbu (1984) KLR 441, Chesoni J as he then was, stated that the test is whether the delay is prolonged and inexcusable and if justice will be done despite the delay. Justice is justice for both the plaintiff and the defendant. I find this application has no merit and I dismiss it. Costs of this application to the respondents.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 18TH DECEMBER 2019.

N.A. MATHEKA

JUDGE