



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND CASE No. 7 OF 2019

JOSEPH KAHONGE MUTHONDU.....PLAINTIFF

VERSUS

JOHN THUO MACHARIA.....DEEFENDANT

ELIZABETH MUTHONI KAHONGE.....APPLICANT

RULING

1. This ruling is in respect of applicant's Notice of Motion dated 23rd November 2017, an application seeking the following orders:

1. That the instant suit having abated, be revived for hearing on merit.

2. That the honourable court be pleased to extend time and order substitution of the deceased plaintiff with his legal representative namely ELIZABETH MUTHONI KAHONGE out of time.

3. That costs of the application be provided for.

2. The application is supported by an affidavit sworn by Elizabeth Muthoni Kahonge, the applicant. She deposed that the plaintiff herein passed away on 4th February 2015 and that she obtained letters of administration *ad litem* in respect of his estate on 22nd August 2016 in **HC Probate and Administration Cause No. 181 of 2016 (Nakuru)**. She added that as at the time of the plaintiff's death, this matter was pending delivery of ruling in respect of the defendant's application dated 12th November 2007 and that the said ruling was delivered on 26th May 2016. That she later filed an application dated 9th November 2016 which she withdrew and filed the present application. That failure to apply for substitution on time was occasioned by the pendency of the ruling. She annexed a copy of the death certificate, the letters of administration and the ruling.

3. The defendant opposed the application through his replying affidavit sworn on 11th January 2018. He deposed that the applicant has not explained why it took her over one year after the plaintiff's death to apply for letters of administration *ad litem*, that despite obtaining the letters of administration *ad litem* on 22nd August 2016, the applicant took 15 months to file the present application, that pursuant to the orders made in the ruling dated 26th May 2016 this suit stood dismissed on 27th July 2016 and that the plaintiff has not had a good history of fixing the suit for hearing.

4. The application was canvassed through written submissions. The applicant argued in her submissions that the ruling delivered on 26th May 2016 was of no legal consequence since the suit had abated as it was pending delivery. Citing the cases of **Titus Kiragu v Jackson Mugo Mathai & another [2013] eKLR**, **Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR**, **Leonard Mutua Mutevu v Benson Katela Ole Kantai & another [2014] eKLR** and **Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others [2013] eKLR**, the applicant urged the court to allow the application so that the suit can be heard and determined on the merits.

5. On his part, the defendant argued that although the plaintiff passed away way back on 4th February 2015 his advocates on record did not disclose that fact, that the matter has lasted 15 years in court with only one hearing being fixed on 16th January 2009 during those 15 years and that the applicant had a duty to explain the inordinate delay in bringing the present application. Citing the cases of **Said Sweilem Gheithan Saanum v Commissioner of Lands (supra)**, **Mbugua Wangige & another v Muthanji Wangige [2015] eKLR** and **Macharia Gachangaga v Peter Kamau Macharia HCCC NO. 110 of 1983 (Nakuru)**, the defendant urged the court to dismiss the application.

6. I have carefully considered the application, the affidavits filed as well as the submissions. The applicant seeks revival of this suit and that she be substituted with the plaintiff. There is no dispute that the plaintiff passed away on 4th February 2015 and that the applicant obtained letters of administration *ad litem* in respect of his estate on 22nd August 2016 in **HC Probate and Administration Cause No. 181 of 2016**

(Nakuru).

7. The application is brought inter alia under **Order 24 Rules 3 (2)** and **7(2)** of the **Civil Procedure Rules**. **Order 24 Rule 3** provides:

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:

Provided the court may, for good reason on application, extend the time. [Emphasis supplied]

8. There is equally no dispute that this suit abated on 4th February 2016.

9. **Order 24 Rule 7(2)** of the **Civil Procedure Rules** provides:

7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2) 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. [Emphasis supplied]

10. The plaintiff commenced this suit through a plaint filed in the High Court at Nakuru on 15th July 2003 as HCCC No. 112 of 2003. The matter was later transferred to this court and became ELC Case No. 7 of 2019. The plaintiff averred that he was the owner of the parcel of land known as plot No. 28 Silanga, Nyahururu which was allocated to him in the year 1963 by the land settlement department. That he left for Tanzania in 1971 and left his wife and daughter on the plot. That the defendant fraudulently obtained registration of the suit property which became known as Nyandarua/Silanga/28 in his name and forcefully evicted his wife and daughter. He therefore sought judgment against the defendant for:

(a) *Judgement against the defendant to vacate the suit premises title No. Nyandarua/Silanga/28 and to give vacant possession of the same to the plaintiff.*

(b) *Judgement directed to the Land Registrar Nyandarua District Land registry to call and cancel the title register regarding the suit premises in favour of the defendant and to register the suit premises in favour of the plaintiff absolutely; Title No. Nyandarua/Silanga/28.*

(c) *A permanent injunction against the defendant, his agents and or servants restraining him from interfering with the plaintiff's title to the suit premises in any way whatsoever.*

(d) *Special damages for the value of the properties pleaded in paragraph 8 above.*

(i) 6 dairy cows worth	- Kshs.4,000.00
(ii) House	- Kshs.2,000.00
(iii) 1 Bull worth	- Kshs. 200.00
(iv) 1 Heifer worth	- Kshs. 600.00
(v) 6 Sheep worth	- Kshs. 350.00
(vi) Fence worth	- Kshs.3,000.00
(vii) Pyrethrum crop then worth	- Kshs. 300.00
(viii) Value of household goods	- Kshs.2,000.00

(e) *Interest on (d) above with effect from 1971 at commercial rates.*

(f) *General damages for fraudulent transfer and alienation of the suit premises.*

(g) *Mesne profits at the rate of Kshs. 10,000.00 per annum with effect from 1971.*

(h) Costs of this suit.

(i) Any other relief that this Honourable Court may deem fit to grant.

11. The foregoing makes it clear that the cause of action survived the plaintiff and if an application for substitution was made prior to abatement, the legal representative would have been made a party to enable her proceed with the suit. As already noted, this suit abated on 4th February 2016. Consequently, the provisions of **Order 24 Rule 7(2)** of the **Civil Procedure Rules** come into operation. Having made the present application, the applicant must prove that she was prevented by any sufficient cause from continuing the suit.

12. The principles applicable while considering an application such as the present one were stated by the Court of Appeal in **Said Sweilem Gheithan Saanum v Commissioner Of Lands** (supra) as follows:

There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'boroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in MacFoy v United Africa Co. Limited (1961) 3 All ER 1169, that

"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so...."

It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.

13. There is also the issue of the ruling delivered in this matter on 26th May 2016 wherein the court ordered the plaintiff to take steps to have the case fixed for hearing within a period of 60 days from the date of the ruling and in default the suit would stand dismissed with costs without further reference to the court. The defendant argued that the order not having been complied with, this suit stood dismissed on 27th July 2016. Needless to reiterate, the suit had abated by the time the ruling was delivered. As stated by the Court of Appeal in **Said Sweilem Gheithan Saanum v Commissioner of Lands** (supra), the effect of an abated suit is that it ceases to exist in the eye of the law. It seems therefore that the orders made on 26th May 2016 were really of no effect having been made by the court unaware the case in which the orders were being made was no longer legally in existence.

14. That takes us back to the question of whether the applicant has demonstrated that she was prevented by any sufficient cause from continuing the suit. The applicant obtained letters of administration *ad litem* in respect of the plaintiff's estate on 22nd August 2016. Prior to that date, she could not legally apply to substitute the deceased plaintiff. By the time the suit abated on 4th February 2016, she was still legally incapacitated. The defendant has argued that the plaintiff ought to demonstrate why she did not obtain letters of administration earlier. While that would be a useful detail in the spirit of a full disclosure, I find that it is sufficient for purposes of **Order 24 Rule 7(2)** of the **Civil Procedure Rules** for the applicant to demonstrate as she has done, that by the time this suit abated on 4th February 2016 she was still legally incapacitated for want of letters of administration.

15. The defendant has further argued that despite obtaining the letters of administration *ad litem* on 22nd August 2016, the applicant took 15 months to file the present application. The record shows that on 10th November 2016, the applicant filed Notice of Motion dated 9th November 2016 seeking among others an order that time for substitution of the deceased be extended. The application came up for hearing on 3rd November 2017 when directions were given that it be canvassed through written submissions. The applicant later realised that the application could not address the issue of abatement. Upon her request, the application was marked withdrawn pursuant to this court's order of 19th December 2017. It was replaced by Notice of Motion dated 23rd November 2017. The delay from 22nd August 2016 to 10th November 2016 when the applicant took the first steps to obtain substitution is about two and a half months. That in my view is not inordinate delay. I am therefore satisfied that the applicant has demonstrated that she was prevented by sufficient cause from continuing the suit. I further consider that in view of the nature of relief sought in the suit, it is in the interest of justice that the suit be determined on the merits. That however is not an excuse for the parties not to be proactive. The applicant is warned to actively prosecute the suit. Needless to state, should occasion arise in the future to consider whether or not the suit should be dismissed for want of prosecution, the court will consider that based on the law as well as the facts and circumstances of the occasion.

16. I therefore make the following orders:

- a) This suit is hereby revived.
- b) The deceased plaintiff is hereby substituted with Elizabeth Muthoni Kahonge.
- c) The plaintiff to file and serve an amended plaint to reflect the substitution within 14 days of delivery of this ruling.
- d) Costs in the cause.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 4th day of December 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Ngugi holding brief for Mr Gakuhi Chege for the applicant

Mr Karanja Mbugua for the defendant/ respondent

Court Assistants: Beatrice & Lotkomoi