

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 832 OF 2012

TUNGO CHESEREM BWALEI.....PLAINTIFF

VERSUS

SCOLA JEPKORIR.....1ST DEFENDANT

JOSEPH KIBET MAIYO.....2ND DEFENDANT

JACKSON KIMELI MAIYO.....3RD DEFENDANT

RULING

The application before court is dated 16.8.2016 and seeks an order that the amended plaint dated 25.11.2014 and filed on 17.4.2015 be struck out and costs of the application be provided for. The application be based on grounds that the amended plaint dated 25.11.2014 and filed on 17.4.2017 was filed out of time and was filed and served without the leave of the court. That same is a blatant abuse of the court process. The application is supported by the affidavit of Ledisha J. Kipseii who states that the application dated 22.4.2014 for amendment of plaint was allowed on 2.10.2014. The court gave direction that the plaintiff files and serves amended plaint within 10 days. The plaintiff filed the amended plaint on 17.4.2015 out of time and served the same on 30.4.2015 without seeking leave of the court in disregard of the court's direction issued on 2.10.2014.

In response, Mr. Richard Kamau states that the plaintiff instituted the suit herein in court on 20.3.2012. Before the suit was heard, direction was given that all land matters were to await the Constitution of the Environment and Land Court and the matter was stood over generally. The plaintiff passed away on 1.10.2013 and therefore, substitution was necessary. On the 22.4.2014, Barnabas Bargoria made an application for substitution upon being granted letters of administration and litem which was allowed on 2nd October, 2014. The plaintiff states that after leave of amendment, it was necessary for the plaintiff to sign verifying affidavits and it took some time to get in touch with the plaintiff.

The plaintiff on his part has applied for leave to file and serve the amended plaint out of time and that the amended plaint be deemed to be properly filed. According to the plaintiff, the amended plaint raises serious and substantive issues to be addressed. The delay is not inordinate and was occasioned by miscommunication between the advocate and his client. In response to this application. Ledisha Kipseii states that the amended plaint was filed out of time and that the suit had abated and therefore, there was nothing to amend. That the applicant has lost interest in the suit.

I have considered bot applications and the rival submissions of counsel and do find that it is not in dispute that the suit herein was filed on 20.3.2012. The plaintiff died on 1.10.2013. Mr. Barnabas Bargoria made an application for substitution upon obtaining grant of letters of administration ad litem which was allowed on 2.10.2014. After leave was granted on 2.10.2014, it took the plaintiff until the 17.4.2015 more than five months after leave was granted to comply. The explanation given for the delay is that it took the counsel some time for the plaintiff's counsel to get in touch with Barnabas Bargoria who was the substitute to plaintiff. There is no evidence that Mr. Richard Kamau, counsel for the plaintiff made any effort to reach Barnabas Bargoria. I do find that the delay which is inordinate is not properly explained.

In conclusion, I do find that the suit abated on the 1.10.2014 and no application for reinstatement was made hence all directions made for substitution were nullities. Secondly, that the amended plaint was

filed out of time and that the delay is inordinate and that the explanation given is not sufficient to enable the court exercise its discretion. Ultimately, the amended plaint dated 25.11.2014 and filed on 17.4.2015 is struck out with costs. The application dated 31.1.2017 is dismissed with costs being an afterthought. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 25th DAY OF JANUARY, 2018.

A. OMBWAYO

JUDGE