



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 74 OF 2017

RAPHAEL KAKULA NZUKIPLAINTIFF

VERSUS

DIVISIONAL INTEGRATED DEV. PROGRAMME.....DEFENDANT

AND

ANTHONY MWENDWA NZUKI (*Legal representative of the*

***Estate of RAPHAEL KAKULA NZUKI – Deceased*).....APPLICANT**

RULING

1. In the Application dated 25th May, 2015, the Applicant is seeking for the following orders:

a. That this Honourable Court's order dated 22nd March, 2007 dismissing the Plaintiff's suit for non-attendance be set aside.

b. That the Plaintiff, who died on 2nd January, 2007, be substituted with Anthony Mwendwa Nzuki, a legal representative of the deceased Plaintiff and an administrator of his Estate.

c. That costs of this Application be in the cause.

d. Any other order that this Honourable Court may deem fit and just to grant.

2. The Application is supported by the Affidavit of the Applicant who has deponed that the Plaintiff was his father and he died on 2nd January, 2007; that he was issued with letters of administration on 18th December, 2007 and that the Defendant never filed a Defence in this matter.

3. According to the Applicant, when the suit was dismissed by the court on 22nd March, 2007, the Plaintiff had already died and that the suit involves the deceased's prime land being L.R. No. 12715/197 measuring approximately five (5) acres.

4. It is the Applicant's deposition that he was not aware of the suit until when he was served with a Decree and produced in Machakos ELC Case No. 18 of 2008; that the Plaintiffs in ELC No. 18 of 2008 are claiming that they bought the land from the Defendant herein and that the Plaintiff's Estate stands to suffer irreparably unless the orders herein are granted.

5. The Defendant's advocate filed a Notice of Preliminary Objection in which he averred that there is no

suit in existence for revival; that the suit abated in the year 2008 and that there has been inordinate delay in filing the Application.

6. The Applicant's advocate appeared before me on 16th October, 2017 and submitted that by the time the suit was dismissed for non-attendance, the Plaintiff was already dead; that the Applicant was not aware of the existence of the suit and that Section 3A gives the court a free hand to make orders as may be necessary for the ends of justice.

7. The record shows that this suit was dismissed by the court on 22nd March, 2007 when neither the Plaintiff nor his advocate was in court when the matter was called out.

8. Indeed, the suit remained dismissed from 22nd March, 2007 until 25th May, 2015 when the current Application was filed.

9. According to the Plaintiff's Legal Representative, he was not aware of the suit or the fact that the same had been dismissed until when he was served with a Decree in Machakos ELC Case No. 18 of 2008.

10. Considering that the Applicant obtained the Letters of Administration on 18th December, 2007, it was incumbent upon him to find out about the status of the suits that the Plaintiff had filed within a reasonable time.

11. The Applicant cannot wait for over eight (8) years to seek to set aside an order dismissing a suit for non-attendance on the basis that he was not aware of the suit.

12. It cannot be said that the court erred in dismissing a suit for non-attendance just because the Plaintiff was already dead by the time the suit was dismissed. Where a Plaintiff dies and the cause of action survives him, it is the responsibility of the legal representative to move with speed and step in the shoes of the deceased party to forestall the abatement of such a suit or its dismissal.

13. Having not moved with haste to file the current Application, and considering that the Plaintiff's advocate knew or ought to have known that the suit had been dismissed way back in the year 2007, I find that the filing of the Application eight (8) years down the line to set aside the orders of the court is unreasonable and inordinate delay.

14. For those reasons, I decline to grant the orders sought and instead dismiss the Application dated 25th May, 2015 with no orders as to costs.

15. For avoidance of doubt, the suit stands dismissed.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 2ND DAY OF MARCH, 2018.

O.A. ANGOTE

JUDGE