



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 459 OF 2013

MOSES MUTHEKI MUCHONJORU.....PLAINTIFF

VERSUS

DISTRICT LAND REGISTRAR.....1ST DEFENDANT

HON. ATTORNEY GENERAL2ND DEFENDANT

IAN THUKU MUTHEKI.....INTENDED PLAINTIFF

RULING

(Application to revive an abated suit; application being filed 4 years after the death of the plaintiff; no sufficient reason tendered as to why application has been filed this late; suit in any event having been dismissed for want of prosecution owing to inactivity; application dismissed; suit stands dismissed).

1. The application before me is that dated 8 May 2018 filed by one Ian Thuku Mutheki, who wishes to be substituted for the deceased plaintiff. The application is opposed by the respondent.
2. By way of background, this suit was commenced through a plaint which was filed on 11 July 2013 through the law firm of M/s Kanyi Ngure & Company Advocates. In the plaint, the plaintiff averred that he is the registered owner of the land parcel LR No. 10553/4 measuring approximately 92.90 Ha, a property that he held title to since the year 1987. He pleaded that at the time he purchased the land, he surrendered two acres of it to a public school, Kiamaina Primary School. He later offered his land for subdivision and the same became registered as Bahati/Engorusha Block 1 (Muchonjoru) which he subdivided into several portions, one of which, Bahati/Engorusha Block 1/4 (Muchonjoru) became registered in the name of the Government of Kenya for Kiamaina Primary School on 23 March 1989. His grievance in this matter is that this land parcel measures 7.93 acres, instead of 2 acres, and he has contended that this was fraudulent on the part of the Government. In the suit, he sought orders for rectification of this title so that he is given title to a portion of 5.93 acres of it, or in the alternative, he be compensated at the prevailing market price for the 5.93 acres.
3. The defendants filed defence, through the State Law Office, vide which they refuted the claims of the plaintiff and further pleaded that the suit is statute barred.
4. The plaintiff did not take any steps to list the case for hearing and the suit was dismissed for want of prosecution on 22 January 2018. It is then that this application was filed on 9 May 2018 through the law firm of M/s Wachira Maina & Company Advocates.
5. The application is said to be brought pursuant to the provisions of Order 51 Rule 1, Order 24 Rules 1 & 3 of the Civil Procedure Rules, and Sections 1A, 1B, and 3A of the Civil Procedure Act, and all other enabling provisions of the law. In the application, it is averred that the plaintiff died on 12 October 2014 and that the cause of action survives his death. The applicant has stated that he is the legal representative of the deceased plaintiff and that he holds a grant of letters of administration ad litem issued on 9 April 2018. He has deposed that on 12 February 2015, Mr. Kanyi Ngure, then on record for the plaintiff, informed the court that the plaintiff is deceased but that counsel failed to make the requisite application for substitution. He has stated that the family got frustrated and collected their file on 16 January 2018. He has lamented that despite counsel receiving the Notice to Show Cause why the suit should not be dismissed, he never attended court on 22 January 2018 to show cause, and the suit was thus dismissed. He averred that he has now changed counsel to M/s Wachira Maina & Company Advocates. He has contended that the suit was dismissed because his erstwhile counsel never attended court nor informed the family of the impending dismissal of the suit.
6. Mr. Karwanda, in supporting the motion, submitted inter alia that what occasioned the dismissal of this suit was a mistake of counsel. He submitted that counsel failed to file an application for substitution and also failed to advise his client of the date for Notice to Show Cause.

Mr. Ondieki for the respondents submitted that there has been inordinate delay in filing this application and that the last activity in the matter was in February 2015. He submitted that there was adequate time to also change counsel. He submitted further that some of the witnesses they would have called are now no longer board members of the school and it will be a challenge finding them.

7. I have considered the motion. There are two issues here. First, is the issue of substitution of the deceased plaintiff and secondly is the issue of dismissal of the plaintiff's suit. The record does show that on 12 February 2015, counsel for the plaintiff did inform court that the plaintiff died in the year 2014 and the case was stood over generally to await an application for substitution. None was filed and the case was dismissed for want of prosecution on 22 January 2018. Assuming that the order of dismissal had not been made, the case would anyway have stood abated, one year after the death of the plaintiff. I have seen from the Certificate of Death annexed to this application that plaintiff died on 12 October 2014. The applicant herein obtained a grant of letters of administration ad litem on 9 April 2018 which is about 3 ½ years since the plaintiff died. Now, putting aside for a moment that there is already an order for dismissal for want of prosecution, and if I am to determine this application solely on the basis of the provisions of Order 24, which covers the death of a litigant, Rule 2 thereof, provides that an application for substitution needs to be made within one year of death although the court for good reason may extend the time. Under Rule 7, a person may apply to revive an abated suit but he must show that "he was prevented by (some) sufficient cause from continuing the suit".

8. Thus, I need to be persuaded that there is sufficient cause which prevented the applicant from continuing this suit on behalf of the estate of the deceased. The applicant has put all the blame on his erstwhile counsel. He has stated that he did not file an application for substitution within time and did not inform the applicant of the date for Notice to Show Cause why the suit should not be dismissed for want of prosecution. Now, the applicant has not informed this court what he did since April 2014, when his father died, until 16 January 2018 when he went to collect the file from his former advocates. He has not told us why he did not apply for any letters of administration, even if limited for purposes of prosecuting this suit, for all this period of time. He has not told us what prevented him from continuing the suit. He could of course continue the suit through another advocate if he felt that his erstwhile counsel was not bothered much with the case. He did not have to wait for 3 years to get another advocate. I can see that he picked the file from his former advocate's offices on 16 January 2018. Why didn't he get counsel to address court on 22 January 2018 when the case was listed for dismissal for want of prosecution? This is not answered by the applicant.

9. I am afraid that the applicant has failed to demonstrate to this court, sufficient reason for not moving the court earlier than he has done. He cannot try to blame his former advocate for all his maladies for he himself has not shown what steps he took to move the matter. The delay of more than 3 years since the plaintiff died is not sufficiently addressed.

10. I of course have wide discretion but I am not persuaded that I should exercise the same in favour of the applicant. Firstly, I do note that the title which the plaintiff tried to impugn is one that was prepared in the year 1989, which is close to 30 years ago. I have also seen that the plaintiff had filed a suit in the year 1999 over the same land, but which in the plaint, he has averred that he withdrew. No reasons are given in the plaint as to why he chose to withdraw that suit. There has been considerable delay, not just from the applicant, but also from the deceased plaintiff, in litigating his matter. These issues militate against me exercising my discretion in favour of the applicant.

11. I am thus not persuaded to revive this abated suit and neither am I persuaded to set aside the order of dismissal for want of prosecution. This suit remains dismissed.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 25th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Karwanda for the applicant.

No appearance for the State Law Office for the respondent.

Court Assistants: Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU