Kariuki & another v Gachara & 2 others (Environment & Land Case 156 of 2015) [2024] KEELC 1072 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1072 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT & LAND CASE 156 OF 2015

JO OLOLA, J

FEBRUARY 29, 2024

BETWEEN

STEPHEN MACHARIA KARIUKI ..... 1ST PLAINTIFF

MWIHAKI KARIUKI ..... 2ND PLAINTIFF

AND

MWANGI GACHARA ..... DEFENDANT

AND

MARY WANGARI MWANGI ..... 1ST RESPONDENT

AGNES WAMBUI MWANGI ..... 2ND RESPONDENT

RULING

1. By the Notice of Motion herein dated 26th October 2022, Stephen Macharia Kariuki and Mwihaki Kairuki (the Plaintiffs) urge this Court to be pleased to revive this suit and upon doing so, to substitute Mwangi Gachara (the Defendant) with Mary Wangari Mwangi and Agnes Wambui Mwangi (the Respondents).

2. The application is supported by a short Affidavit sworn by Stephen Macharia Kariuki (the 1st Plaintiff) who deposes at the relevant Paragraphs 3 and 9 thereof as follows:

> "3. That this case wsa partly heard, and (is) only pending the evidence of the Defendant;
>
> 4. That the Defendant passed on on 15th August, 2014;
>
> 5. That it was in September, 2022 when I was served with an application dated 6th May, 2022 in Karatina Principal Magistrate Succession Cause No 2 of 2019

that I learnt that the Respondents had petitioned for the administration of the Defendant's estate (Annexed is a copy of the said application marked "SMK 1");

6. That upon perusal of the Court file I learnt that the Respondents had obtained letters of Administration to the estate of the deceased Defendant (annexed are copies of both the temporary and confirmed grants);

7. That the estate of the deceased in Karatina PM Succ. Cause No 2 of 2019 constitutes only of land parcel No Magutu/Gathethu/98 which is the subject matter of this suit; and

8. That in the circumstances it is only fair and just that the Respondents be substituted in place of the deceased Defendant."

3. Mary Wangari Mwangi (the 1st Respondent) is strongly opposed to the grant of the orders sought by the Plaintiffs. In a Replying Affidavit sworn on 25th April 2023, she avers that she is the daughter of the deceased Defendant who died on 15th August, 2014. While conceding that the 2nd Respondent and herself were issued with a confirmed grant for the estate of the deceased on 2nd February, 2021, she avers as follows at paragraphs 5 to 8 of the Replying Affidavit:

"5. That the said Mwangi Gachara died (on) 15th October, 2014 and in the premises the Applicants were obliged to lodge an application for substitution of the deceased Defendant by 14th August, 2015;

6. That I am advised by Counsel on record, which legal advise I believe to be legally correct, that the suit against Mwangi Gachara abated upon expiry of one year from the date of his demise;

7. That 8 years have lapsed since the demise of the Defendant and the Applicants have not demonstrated any reasonable explanation for the delay which has been inordinate; and

8. That in the circumstance, I urge the Honourable Court to dismiss the Applicant's application dated 26th October, 2022 as the same is lacking in merit."

4. I have carefully perused and considered the application by the Plaintiffs as well as the response thereto by the 1st Respondent. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the Parties herein.

5. By their application before the Court, the Plaintiffs have urged the Court to be pleased to revive this suit and upon doing so, to substitute the two Respondents herein for the Defendant who is said to have passed away on 15th August, 2014. The Respondents on their part are opposed to the application asserting that the same has been brought inordinately late in the day and without any justification therefor.

6. As it were, there was no dispute that the suit herein had abated on 15th August 2015, a year after the Defendant had passed on and that the plaintiffs' application had arrived in Court some seven (7) years thereafter. In a situation such as this, Order 24 of the *Civil Procedure Rules* provides as follows:

"24

(1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

(2) ...

(3)

(1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving 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 sub-rule (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."

"4

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

(2) Any person so made a party may make any defence appropriate to his character as the legal representative of the deceased defendant.

(3) Where within one year no application is made under sub-rule (1) the suit shall abate as against the deceased defendant.

5. ...

6. ...

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 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."

7. Considering the above provisions in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Limited & 2 others* (2017) eKLR, the Court of Appeal (Makhandia, Ouko & M'Inoti, JJA) observed as follows:

> "Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party."

8. The Court of Appeal went on to state further that:

> "Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been enjoined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted ..."

9. Applying the above principles to the matter before me, one could not fail but agree with the submissions made by the Respondents that the application before this Court is incompetent. As it were, the Plaintiffs have not made any prayer for and they are yet to be granted extension of time within which to apply for joinder and revival of the suit some seven (7) years after the time within they could do so had lapse. That omission as the Court of Appeal observed was fatal. In seeking to revive an abated suit, the Applicant must in the first place seek for extension of time within which to do so.

10. Even where one would try to ignore the said omission by the Plaintiffs, it was telling that there was absolutely no attempt on their part to explain and/or justify the seven years that it took them before they made an attempt to revive the suit. As can be seen from the Supporting Affidavit, they were only woken from their slumber when in September, 2022 they were served with an application indicating the Respondents had petitioned the Karatina Magistrates Court to be issued with a grant for the administration of the deceased Defendant's estate.

11. As the Court of Appeal observed in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Limited* (*supra*):

> "After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter of course or right. If the applicant demonstrates and the Court is satisfied that he was prevented by sufficient cause from continuing the suit, the Court will allow the revival of the suit upon such terms as to costs or otherwise as the Court may think fit. The operating phrase in rule 7(2) "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal

> construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the Court will not revive the abated suit ...
>
> The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant."

12. As already stated hereinabove, in the matter before the Court, there was absolutely no explanation offered to justify the delay.

13. It follows that I was not persuaded that there was any merit in the Plaintiffs' Motion dated 26th October, 2022. The same is dismissed with no order as to costs.

RULING DATED SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 29TH DAY OF FEBRUARY, 2024.

In the presence of:

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

.....

J. O. OLOLA

JUDGE