



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 967 OF 2012**

**DAVID BISEM (*Suing as the administrator of the Estate of the late JOSIAH KIBISEM SANG (DECEASED)*).....PLAINTIFF**

**VERSUS**

**JEROTICH TABARNO SANG.....1<sup>ST</sup> DEFENDANT**

**JOSEPH ARAP LETING.....2<sup>ND</sup> DEFENDANT**

**RULING**

**David Bisem (*Suing as the administrator of the Estate of the late Josiah Kibisem Sang*)**, (deceased) filed a suit against **Jerotich Tabarno Sang** and **Joseph Arap Leting**. The plaintiff prayed for judgment against the defendants for a declaration that the title deeds to land reference Nandi/Lessos/554, 555 and 564 and or processes undertaken using the incompetent letters of administration are null and void ab initio and the title deed to land reference Nandi/Lessos/555 and 564 obtained by the 2<sup>nd</sup> defendant and the 1<sup>st</sup> defendant prior thereto ought to be cancelled and the estate revert to the deceased and that the court ought to declare that since the process used to acquire the subdivision to land reference Nandi/Lessos/317 and transfer of the resultant parcels land reference numbers Nandi/Lessos/554, 555 and 564 was invalid then the 2<sup>nd</sup> defendant did not acquire a good title to the parcels Nandi/Lessos/555 and 564 transferred to him by the 1<sup>st</sup> defendant. An eviction order directing the 2<sup>nd</sup> defendant to vacate land reference Nandi/Lessos/555 and Nandi/Lessos/564. Costs of the suit.

The 2<sup>nd</sup> defendant filed defence stating that the Title Deeds obtained by him were obtained through competent letters of administration and therefore, all legal procedures were followed contrary to what is alleged by the plaintiff. The 2<sup>nd</sup> defendants averred that the process used to acquire the subdivision and transfer of the parcels of land to him were valid and that all legal procedures were followed.

The plaintiff has now filed an application dated 25.11.2016 seeking orders that the deceased, 2<sup>nd</sup> defendant Joseph Tendenei Arap Leting be substituted with Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiproop Leting the administrators of his estate and that the case against the 2<sup>nd</sup> defendant be revived. That costs be in the cause.

The grounds of the application are that the 2<sup>nd</sup> defendant Joseph Tendenei Arap Leting died on 23<sup>rd</sup> day of November, 2015 intestate. The court has subsequent to the death of Joseph Tendenei Arap Leting granted letters of administration to Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiproop Leting. The suit against the 2<sup>nd</sup> defendant has abated on 23.11.2016 and it needs to be revived and that it is in Interest of justice and fairness demands that substitution be effected to facilitate the disposal of

the matter on merits.

In the supporting affidavit, the plaintiff states that the 2<sup>nd</sup> defendant Joseph Tendenei Arap Leting died at Nairobi Hospital on 23.11.2015 intestate. That Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiprop Leting were granted letters of administration by the court to the estate of the deceased Joseph Tendenei Arap Leting on the 13<sup>th</sup> day of July, 2016. She depones that the suit against the 2<sup>nd</sup> defendant abated on 23.11.2016 and it needs to be revived. That he now prays to have the deceased 2<sup>nd</sup> defendant Joseph Tendenei Arap Leting substituted by the administrators of his estate as the case cannot proceed to conclusion on merits without substitution of the deceased Joseph Tendenei Arap Leting. That the application is in the interest of justice.

The respondent being the 2<sup>nd</sup> defendant argues that the said application is an abuse of the process of the court. That the suit herein has abated, the 2<sup>nd</sup> defendant having died on 23<sup>rd</sup> November, 2015 and this application was lodged in this court on 25<sup>th</sup> November, 2016. He further argues that this suit has abated under the mandatory provisions of Order 24, Rule 4(3) of the Civil Procedure Rules and no sufficient reasons have been given as to why the same should be revived or at all. That there has been inordinate and inexcusable delay on the part of the plaintiff bringing this application. That the suit herein should be dismissed as against the 2<sup>nd</sup> defendant pursuant to the provisions of Order 24, Rule 7 of the Civil Procedure Rules. That any other grounds and reasons to be adduced at the hearing hereof. The application was canvassed by way of oral submissions.

**Mr. Momanyi learned counsel for the Plaintiff** submitted that they had to seek for letters of administration and therefore the application was filed two days after the suit had abated. The second defendant died on 23/11/2015 whilst the application was filed on 25<sup>th</sup> /11/2016 and that the letters of administration were obtained on 13<sup>th</sup> July 2016.

**Mr. Otieno learned counsel for the 1<sup>st</sup> defendant** argues that the application is incompetent having been brought under the wrong provisions of law. Moreover, that there is no provision for extension of time in the case of the death of the defendant. Lastly that no substitution can be made under order 24 rule 7.

**Mr. Mukabane**, learned counsel for the 2<sup>nd</sup> defendant now deceased on his part submits that the persons to be brought to the suit have not been served and that a suit against a deceased person which has abated cannot be revived. Lastly that there are no sufficient reasons and that there is inordinate delay.

I have considered the pleadings and submissions made by the parties herein. The issues are whether the suit against the 2<sup>nd</sup> Defendant should be revived, and if so, whether the 2<sup>nd</sup> Defendant should be substituted. Order 24 Rule 4 of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

**“4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or 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 legal representative of the deceased defendant.**

**(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”**

It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was

prevented by any sufficient cause from continuing the suit.

The Court of Appeal in the case of **The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011** observed as follows as to the meaning of sufficient cause:

**“Sufficient cause or good cause in law means: -**

**‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See Black’s Law Dictionary, 9<sup>th</sup> Edition, page 251.**

**Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”**

The defendants’ counsel raised technical objections that that the application is incompetent having been brought under the wrong provisions of law. Moreover, that there is no provision for extension of time in the case of the death of the defendant. Lastly that no substitution can be made under order 24 rule 7. That the persons to be brought to the suit have not been served and that a suit against a deceased person which has abated cannot be revived. Lastly that there are no sufficient reasons for the orders sought and that there is inordinate delay. On this points, I do find that failure to cite the right provision of law relied upon does not make an application incompetent. Moreover, such technicalities are contemplated by Article 159 of the constitution that guides the court to look at the substantive justice and not to put undue regard to procedural technicalities.

Has the plaintiff given sufficient cause to warrant the orders sought? This court finds that the cause of the delay according to the applicant was the fact that there were no legal representatives for the estate of the 2<sup>nd</sup> defendant until 13<sup>th</sup> day of July, 2016. The plaintiff states that That Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiprop Leting were granted letters of administration by the court to the estate of the deceased Joseph Tendenei Arap Leting on the 13<sup>th</sup> day of July, 2016. I do find that the fact that there were no legal representatives until the 13<sup>th</sup> July 2016 is sufficient cause to prevent the applicant from continuing with the suit.

It is a fact that the letters of administration were obtained within the one year limitation period. No explanation is made why substitution was not done between 13<sup>th</sup> July 2016 and 23<sup>rd</sup> November,2016. The plaintiff had a whole four months to substitute the second defendant with the legal representatives. The plaintiff does not explain how and when he came to learn that Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiprop Leting became the administrators of his estate of the second defendant.

I do find that there are unexplained gaps in the sequence of events. However, having considered the pleading by all parties on record, I do find that this is a matter that should go for full trial and that the applicant should not be denied access to the seat of justice. Ultimately, I do order that the deceased, 2<sup>nd</sup> defendant Joseph Tendenei Arap Leting be substituted with Cecilia Chepkoech Leting, Maureen Cheptoo Leting and Antonio Kiprop Leting the administrators of his estate and that the case against the 2<sup>nd</sup> defendant be revived. That costs be in the cause.

**DATED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF JULY, 2017.**

**A. OMBWAYO**

**JUDGE**