



**REPUBLIC OF KENYA**

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

**E & L CASE NO. 6 OF 2014**

**JOAN YATICH KILELE.....PLAINTIFF**

**VERSUS**

**DAUDI CHEPTUM SAWE.....DEFENDANT**

**RULING**

By application dated 26.1.2011, the plaintiff **Joan Yatich Kilele** prays that this suit be revived and reinstated as against the defendant and that Philip Kiprop Sawe, Rael Tarlok Sawe and Francis Kipkemboi Sawe being the legal representatives of the Estate of Daudi Sawe (deceased) be substituted as defendants and that the plaintiff be given leave to amend the plaint to reflect such substitution. The application is made on the grounds that after the demise of the defendant herein, she was involved in a succession cause pertaining her deceased husband estate which became complex protracted, time consuming and costly and hence she was not able to instruct her advocates on record in this matter to proceed appropriately and this resulted in the abatement of this suit.

That Philip Kiprop Sawe, Rael Tarlok Sawe and Francis Kipkemboi Sawe are the legal representative of the estate of Daudi Sawe (DCD), the defendant in the suit thus the necessity for substitution. That it is prudent that the plaint reflects the substitution as to enable the court effectively adjudicate on the matters.

The application is supported by the affidavit of Joan Yatich Kilele herself wherein she states that the defendant herein died on 22nd April, 2002 and the letters of administration intestate were issued to Philip Kiprop Sawe, Rael Tarlok Sawe and Francis Kipkemboi Sawe on 10th May, 2002. That meanwhile, her husband, Walter Kiprono Kilele had died and she was involved in a complex and protracted succession cause in Nairobi Succession Cause No. 2699 of 1998 in respect of her said late husband's estate. That the said succession cause was costly, time consuming and emotionally involving as she lost in her objection in the cause. That she was therefore not able to instruct her advocates on record to proceed appropriately in this matter and hence this suit abated. Everything went out of her control as a result of which this matter abated and therefore it is in the interest of justice that the suit be revived and reinstated in court as the abatement is prejudicial to the plaintiff. That upon the suit being revived and reinstated, the legal representative herein ought to be substituted as the defendants to allow the hearing and full determination of the suit as per the annexed further amended plaint. That in the premises, it is just. Fair and expedient that the application herein be allowed.

The intended defendants to be substituted on behalf of Daudi Cheptum Sawe filed grounds of opposition under protest stating that a period of about twelve (12) years has lapsed since the defendant herein died on 2.4.2002 and a grant of letters of administration was issued to the administrators on 10th May, 2002. That consequent to paragraph (a) above, the suit abated upon the lapse of one year after the issuance of the grant to the administrators. That the delay of about eleven (11) years since the abatement of the suit and the filing and service of the application is inexcusable, inordinately excessive, culpable and unreasonable

on the part of the plaintiff/applicant. That the purported action is barred by the limitation of time and the suit is thus legally untenable. That the application is therefore incompetent, fatally defective and bad in law.

The applicant submits that the suit abated because her counsel lost touch. She submits that the applicant was prevented by reasonable and sufficient cause from prosecuting the suit herein. The applicant relies on Sections 1A of the Civil Procedure Act, Section 3A of Civil Procedure Act. The applicant also relies on Article 159 of the Constitution.

The respondents who are intended to be substituted as respondents submit that the defendant died on 22.4.2002 while the grant of letters of administration was issued to Philip Kiprof Sawe, Rael Tarlock and Francis Kipkemboi Sawe on 10.5.2000. The application dated 26.1.2011 was filed on 3.5.2011, 12 years after the death of the defendant and after the grant of the letters of administration to the respondents. The application is made 11 years after the abatement of the suit. The respondent relies on Section 7 of the Limitation of Actions Act Cap. 22 Laws of Kenya and Section 24, Rule 4(1) and 3 of the Civil Procedure Rules Cap. 21.

The respondent further argue that consent in the plaintiff's family, dispute was entered on 12.3.2007 settling the dispute in relation to the succession cause but the plaintiff came to court, 4 years later. Equity aids the vigilant and not indolent.

I have considered the application, grounds of opposition and rival submissions of parties. For the court to grant the orders sought, the applicant must account for every delay in every step taken or not taken.

To begin with, the plaintiff argues that the delay was caused by the protracted and complex succession cause involving her husband, Walter Kiprono Kilele who had died on a date that she does not disclose. I do find this explanation as not sufficient as her deceased husband was not party to the dispute as the property under dispute was not part of her husband's estate. The succession dispute was resolved on 27.3.2007 and yet there is no explanation made on the delay of 4 years between 27.3.2007 to 3 .5 .2011. Moreover, it is evident that the application was dated 26.1.2011 but filed on 3.5.2011 thus, a whole 90 days. The total delay amounts to approximately 9 years.

Order 24 Rule 4(1) and (3) of the Civil Procedure Rules Cap. 21 provides that:

- 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.***

Order 24, Rule 7 provides that:

- (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 any 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.***

I do find that the reasons given by the plaintiff for the revival of the suit are not sufficient to enable this court exercise its discretion judiciously. It is trite that discretion should be exercised judiciously and not capriciously.

Article 159(2) of the Constitution should be applied in very special cases for the ends of justice to be met and it should be known that justice should be applied on both sides. I do find that it would not be proper to exercise discretion based on the provisions of section 1A, 3A of the Civil Procedure Act Cap. 21, Laws of Kenya and Article 159 of the Constitution in view of the inordinate delay in filing the application.

Ultimately, this court finds that the delay by the plaintiff is inordinate, inexcusable and no sufficient reason has been given for the court to exercise it's discretion to reinstate the suit. The application is dismissed with costs.

**DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF FEBRUARY, 2016.**

**ANTONY OMBWAYO**

**JUDGE**