REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CIVIL APPEAL NO. 14 OF 2015

PETERSON GICHOHI …….....…… APPELLANT

-VERSUS-

MAINA JOHANA MIANO Alias JOSEPH MIANA MIANO ……. RESPONDENT

AND

LEAH WANYARA GICHOHI

LEAH WAMBUI GICHOHI ……..….....… APPLICANTS

RULING

1. This ruling is in respect of the notices of motion dated 26th March, 2015 and 27th March, 2015.

2. Through the notice of motion dated **26th March, 2015,** the firm of P.K. Njuguna & Company Advocates (hereinafter referred to as the incoming advocate) seeks leave to come on record in place of M/S Munene Muriuki & Company Advocates (hereinafter referred as the outgoing advocate) on behalf of Leah Wanyara Gichohi and Leah Wambui Gichohi (hereinafter called the applicants).

3. The application is premised on, among other grounds, that the applicants are desirous of acting through the incoming advocate.

4. The application is supported by the affidavit of the applicants sworn on 26th March, 2015 in which the applicants have reiterated their desire to proceed with Nyeri Civil Appeal No.8 of 1973 (abated) through the incoming advocate.

5. The application is accompanied by a consent executed between the outgoing Advocate and the incoming Advocate.

6. Because the outgoing advocate has executed a consent in favour of the incoming advocate, the application is unopposed.

Analysis and determination:

7. This being an application for change of advocate after judgment, it is governed by the provisions of **Order 9 Rule 9** of the Civil Procedure Rules which provides as follows:-

"When there is change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall be effected by order of the court-

a) upon an application with notice to all the parties; or

b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be."

8. As pointed out above, in the circumstances of this case, in compliance with the provisions of **Order 9 Rule 9 sub-rule (b)**, the incoming advocate and the outgoing advocate executed a consent allowing the incoming advocate to come on record in place of the outgoing advocate.

9. Under **Order 9 Rule 9** *supra*, an application for leave to come on record after judgment is only required where the consent contemplated under **sub-rule (b)** has not been obtained and filed.

10. In the circumstances of this case, where the incoming advocate had obtained leave to come on record in place of the outgoing Advocate, the application contemplated in **Order 9 Rule 9(a)** was not necessary. Be that as it may, there being no prejudice occasioned on the parties by the application, I allow it as prayed.

11. Vide the application dated **27th March, 2015** the applicants seek to:-

a) substitute the appellant, Peterson Gichohi (deceased);

b) set aside and/or vacate an order issued on 21st July, 2009 marking the appeal herein as abated;

c) revive the appeal herein;

d) stay the execution of the orders, judgment and/or decree of the lower court, issued in Kerugoya Civil Appeal No. 2 of 1972.

12. The application is premised on the grounds that the applicants are the administrators of the estate of Peterson Gichohi (hereinafter referred to as the deceased person); that before he passed on, the deceased person had preferred an appeal against the decision issued in Kerugoya District Court civil Appeal No. 2 of 1972; that the deceased person passed on before the appeal was heard and determined and that the appeal touches on a parcel of land bought by the deceased person and on which the applicants have been in possession and occupation since 1959.

13. It is pointed out that the appeal abated on 1999 following the passing on of the deceased person and was marked as having abated on 21st July, 2009.

14. Explaining that owing to a mistake on the part of their previous advocates, the deceased person was not substituted, the applicants' contend that unless the orders sought are granted, the respondent may execute the decree appealed from and occasion them irreparable damage and prejudice.

15. The application is supported by the affidavit of the applicants, sworn on **27th March, 2015** in which the grounds on the face of the application are reiterated.

16. In opposing the application, the respondent, Maina Johana Miano alias Joseph Maina Miano, filed the affidavit he swore on **4th June, 2015**. In that affidavit, the respondent contends that the Civil Procedure Rules do not provide for revival of abated appeals; that no sufficient reason has been given

why the deceased person did not prosecute the appeal during his lifetime and that there has been inordinate delay in bringing the application for revival of the abated appeal and substitution of the deceased person.

17. Terming the application fatally defective and aimed at delaying the conclusion of the matter, the respondent urges the court to dismiss it with costs to him.

18. The application was disposed of by way of written submissions.

Applicants' submissions

19. In the submissions filed on behalf of the applicants, a brief background of the circumstances leading to filing of the application is given and submitted the following factors identified as the factors which should guide the court in considering the application:-

a) The substance of the litigation;

b) The constitutional dispensation;

c) Delay in bringing the application and

d) The cause of the delay.

20. Based on the decision in the case of **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others (2012) e KLR** where **Koome J.A**, *inter alia*, stated:-

"…The principles to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a long line of authorities. See the case of; Leo Sila Mutiso vs. Rose, CA NAI 255 of 1997 (unreported) ….Besides the principles set out in the case of Leo (supra), I am also guided by the provisions of Section 3A and 3B of the Appellate jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal at the end of the day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in Article 159…..Bearing in mind those overarching objectives, this appeal deserves to be revived for the following reasons: firstly, the appellant was acting in person when he filed the appeal. Secondly, an advocate was instructed but he did not take the necessary steps to revive the appeal; athough no reasons have been given for the advocate's failure, his failure or mistakes cannot be attributed to the applicant. Thirdly, the applicant has a limited grant of letters of administration in respect of the deceased's estate. Although the limited grant gives the applicant power to file a suit, that power can also be construed to include prosecuting an appeal. The fourth reason for allowing the revival of the suit is for reasons that the dispute involves ownership of land and a durable solution to that addresses the substantive issues is always better option.

The respondents' complaint that this matter has taken several decades and in particular, this application was made after two (2) years and eight (8) months had passed are valid concerns. It is also obvious the respondents will continue to be inconvenienced by the prolonged litigation, but in my humble view, that is the price one has to pay while defending their rights and the prejudice can be compensated by costs…"

counsel for the applicants has submitted that the principles espoused in that case apply to this case.

21. Arguing that the applicants have explained the delay in bringing the application for revival of the appeal and the application for substitution of the deceased person (delay attributed to the applicants' ill health, lack of proper legal advice, confusion due to other litigation associated with the dispute herein), counsel for the applicants submits that it will only be fair to give the applicants a chance to have the

issues raised in the appeal determined on their merits as opposed to on technicalities.

22. On the merits of the appeal, it is submitted that the appeal was filed by a person who was not a party to the initial proceedings; that the fact of the applicants' possession of the suit property was not considered and that the issue of the law applicable to the transaction in question was not considered.

23. Maintaining that it is fair and just, in the circumstances of this case, to revive the appeal for the purposes of being heard on its merit, counsel for the applicants urges this court to revive the application, substitute the applicants in place of the deceased person and to order a stay of the orders issued in the lower court in order to protect the suit property pending the hearing and determination of the appeal.

24. With regard to costs of the application, counsel for the applicants urges the court to order that they abide the outcome of the appeal or made any other order in respect thereof as it may deem fit and just to grant.

Respondent's submissions

25. On behalf of the respondent, a brief overview of the applicants' case is provided and submitted that from the authorities cited by the applicants, its trite law that the power to revive an abated Appeal is a matter of judicial discretion and that under provisions of **Order 24 Rules 3(2)** and **7(2)** of the Civil Procedure Rules, 2010, a person seeking to revive an abated suit/appeal must prove that they were prevented by a sufficient cause from continuing the suit.

26. It is further submitted that in considering an application for revival of an abated suit/appeal, the court is guided by such principles as the length of delay, reason for delay, the chances of the appeal succeeding if the application is granted and degree of prejudice to the respondent if the application is granted.

27. Explaining that the appeal herein was preferred in 1973 and that it abated on 23rd September, 2009, counsel for the respondent has submitted that there has been inordinate delay in bringing the application for revival of the suit and substitution of the applicants (a delay of fourteen and half (14 ½) years).

28. Counsel for the respondent blames the delay in revival of the suit and substitution of the applicants on the conduct of the applicants of bringing parallel proceedings instead of pursuing the appeal. He maintains that there has been inordinate delay in bringing the application for revival and substitution of the deceased person and that the delay has not been properly explained.

29. The application is also said to be bad in law because the applicants have not applied for extension of time within which to apply for substitution of the deceased person.

30. As for the authorities cited in support of the applicants' case, counsel for the respondent has submitted that they are distinguishable because the delay in those cases ranges from two to five years, while the delay in the instant case is nearly 15 years.

31. For the foregoing reasons, it is submitted that the respondent will highly be prejudiced if the orders sought are granted.

Analysis and determination

32. I have read and considered the pleadings filed in this application and the submissions made in respect thereof.

33. The main issue for determination is whether the applicants have made up a case for revival of the abated appeal. This is so because, unless the appeal is revived, there will be no basis for considering the other issues raised in the application.

34. With regard to this issue, it is common ground that there has been inordinate delay in bringing the application, the same having been brought nearly 15 years from the time the appeal abated.

35. Whilst acknowledging that this court has discretion to revive a suit that has abated, counsel for the respondent has submitted that the delay in bringing the application for revival of the appeal herein is not only inordinate but also not properly accounted for.

36. Referring to the cases cited by the applicants' in support of their application to wit:-**Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 Others** (2012)e KLR; **Gachihi Wang'ombe v. James Muriuki Maina & Another** (2011) e KLR; **Njonjo Njubi v. Njubi Karungari** (2013)e KLR; **Rosemary Bunny v. Gichuru Kamotho** (2005) e KLR **Geoffrey Mwangi Kihara v. Mwihoko Housing Company Ltd & 3 others** (2015) e KLR; and **M'Mucheke Kiraithi v. Tyres Mbae Kiraithe & Another** (2009) e KLR, counsel for the respondent has submitted that the circumstances of this case and the circumstances which obtained in those cases are different. In that regard, he argues that the delay in those cases was not as in ordinate as the delay in the instant case.

37. Whereas it is true that the period of delay in the cases cited by the applicants is less compared to the delay in the instant case, upon reading and considering the application alongside the principles espoused in the cases cited by the applicants' advocate and in particular the case of **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 Others** (***supra***) , I hold the view that the delay, though inordinate, has been adequately explained in that the applicants who were all along represented by advocates were misadvised on how to approach the dispute between them and the respondent. Bearing in mind the special circumstances of this case, the applicants are in occupation of the suit property and have been in occupation for over four decades, I hold the view that it is in the interest of justice to have the issues raised concerning the suit property, and which issues I find to be arguable, heard and determined on their merit.

38. With regard to the prayer for setting aside the order declaring the appeal as abated, being of the view that the appeal should be revived to enable the issues in dispute between the applicants and the respondent heard and determined on their merits and for the purpose of giving efficacy to the order for revival of the abated appeal, I hold the view that it is necessary to set aside the orders declaring it as having abated in order to avoid a situation where there are contradictory orders concerning the appeal, I set aside/ vacate the order declaring the appeal as abated.

39. On whether the applicants should be substituted for the deceased, despite there being no application for extension of the time within which the application for substitution, as contemplated under **Order 50 Rule 5**, being of the view that the applicants are necessary parties for the purpose of assisting the court to effectually hear and determine the issues raised in thisappeal, using the power given to this court under **Section 3A** of the Civil Procedure Act, for purposes of giving effect to the overriding objective of the court under **Article 159** of the Constitution as read with Section **1A** and **1B** of the Civil Procedure Act, I, of my own motion, enlarge the time within which an application for substitution of the applicants ought to have been made and treat the prayer for substitution to be premised on an application for enlargement of time, which I hereby grant.

40. On whether this court should order for stay of execution of the orders issued in the decree appealed from, owing to the inordinate delay in bringing the application for stay and cognizance of the fact that a similar prayer was sought and denied by a court of competent jurisdiction, I find and hold the prayer to be *res judicata*. Be that as it may, bearing in mind the special circumstances of this case, and to be specific, the fact that the applicants are in occupation of the suit property, I find and hold that the order that recommends itself in the circumstances of this case is an order for maintenance of status quo.

41. As for costs, bearing in mind the manner in which the applicants have conducted themselves in prosecuting this matter, I condemn them to pay the costs of the application.

42. The upshot of the foregoing is that the application dated **27th March, 2015** is allowed in terms of prayers 2, 3, and 4. In lieu of the order of stay sought in prayer 5 and 6, an order of maintenance of

status quo shall issue pending the hearing and determination of the appeal.

43. To ensure that the appeal is heard and determined without further delay, the applicants are ordered to ensure that the appeal is heard and determined within a period of one (1) year from the date of this ruling failing which, the orders issued in favour of the applicants shall stand vacated.

Orders accordingly.

Dated, signed and delivered at Nyeri this 1st day of March, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. P.K. Njuguna for the applicant

Mr. Machira h/b for Mr. Kahiga for the respondents

Court assistant - Lydia