



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CIVIL CASE NO. 64 OF 2007**

***(Formally Msa HCCC No. 11 of 2001)***

**WILIAM OLE NABALA.....PLAINTIFF**

**=VERSUS=**

- 1. ATTORNEY GENERAL**
- 2. SAMMY NJUGUNA**
- 3. MWANATUMU ATHUMAN ARTHUR**
- 4. RHODA MUGURE NGANGA**
- 5. GRACE NYOKABI GITHOME**
- 6. THE REGISTRAR OF TITLES.....DEFENDANTS**

**R U L I N G**

**Introduction:**

1. The Application before me is the one dated 8<sup>th</sup> May, 2015 by the 2<sup>nd</sup> Defendant's legal representative.
2. In the Application, the Applicant is seeking for the following reliefs:

**(a) THAT the court be pleased to abridge time to file and serve notice of intention to appeal under Section 7 of the Appellate Jurisdiction Act, on the ground that the applicant learnt about the Judgment of court pronounced on 6.3.15 from the third defendant, after time to lodge and serve notice of appeal had passed, and subsequently suffered delay in the unsuccessful process of retrieving her file of papers on this case from her erstwhile counsel.**

**(b) THAT An order of review do issue on the ground that there are many mistakes and errors on the face of the record which render the proceedings which culminated in the impugned judgment read on 6.3.15 a nullity, and the court has jurisdiction to review and set aside the impugned proceedings and judgment in the interests of justice, and to afford all the parties a just and fair hearing in the matter;**

**(c) THAT in the interim, the court is pleased to maintain the status quo ante as to prevent success in this application, or the intended appeal pyrrhic; pending the hearing of this application and subsequently, the intended appeal, or any like application that may be made to the court to which the appeal will be preferred; or as the court may deem fair and just to order, so as to allow the applicant to exercise her undoubted right to seek review and or appeal.**

**(d) Directions on service of this application and any order given ex parte on all the parties affected or interested, are given.**

**(e) The costs of this application be provided for.**

#### **The Applicant's case:**

3. The Applicant has deponed that her former advocates filed an Application to be joined in this suit in place of her deceased husband on 19<sup>th</sup> February, 2009; that her husband died on 23<sup>rd</sup> August, 2007 and that the claim against the deceased had abated by the time the application to join her in the suit was made.

4. It is the Applicant's case that her late husband purchased a portion of the suit land from the owners in 1986; that they developed the land and that the land known as Kilifi/Mtwapa/592 was subdivided and created plot numbers 1348, 1349, 1350, 1351 and 1352 and were registered as separate titles on 4<sup>th</sup> October 1995.

5. The Applicant has deponed that even after instructing her advocate to represent her, the said advocate never directly wrote to her inviting her to attend court.

6. According to the Applicant, there are glaring errors on the face of the record entitling this court to review its decision; that her husband's title has been cancelled without due process and that the time within which to file an appeal lapsed when she was chasing her file from her former advocate.

#### **The Plaintiff's/Respondent's case**

7. The Plaintiff deponed that the Applicant cannot with one side of her mouth allege that the suit against the Estate of her late husband has abated and on the other hand be seeking orders in the same suit; that the Applicant was part of this suit and was represented and that the failure by the Applicant to file a defence is not an error on the face of the record.

8. The Plaintiff/Respondent finally deponed that due process was adhered to and the Application is an abuse of the Court process.

#### **The Applicant's submissions:**

9. The Applicant's counsel submitted that abatement of a suit ensues by operation of law; that the Application to join the Applicant in the suit was made way after the lapse of 12 months and that the proceedings and all other steps taken on the application for leave to join the Applicant in this suit were in error, as the claim against the Defendant had abated.

10. Even if it is assumed that the proceedings were valid after the joinder of the Applicant, counsel submitted that it was necessary for the Plaintiff to amend the Plaintiff upon the joinder of the Applicant to include her name and new status.

11. According to counsel, it is only upon such amendment that the added party can be able to file a defence that is suitable to her status.

12. The Applicant's counsel submitted that all the proceedings taken upon abatement of suit are a nullity as the court could not pronounce itself against a deceased man and that review is the remedy available to

the applicant as the administrator ad litem

13. The Applicant's advocate finally submitted that this court has the power to abridge time for purpose of filing and serving a notice of intention to appeal under Section 7 of the Appellate Jurisdiction Act.

**The Plaintiff's/Respondent's advocates submissions:**

14. The Plaintiff's advocate submitted that if indeed the suit had abated, then the correct application would not be for review of the orders but a complete setting aside of the Judgment; that the Applicant participated in these proceedings through her advocate and that it is apparent that the Applicant is not saying how her participation would have changed the decision of court.

**Analysis and findings:-**

15. This suit was commenced in the High Court at Mombasa in the year 2001. In the Plaintiff, the Plaintiff averred that the late Juma Omar Abdalla, together with the 3<sup>rd</sup> Defendant were proprietors in equal share of plot number 592 Sections III/MN.

16. It was the Plaintiff's case that the 3<sup>rd</sup> Defendant unprocedurally subdivided the land and allocated herself a bigger share, after which she went a head to subdivide further what she claimed to be her share and sold the subdivisions to the 2<sup>nd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants.

17. On 6<sup>th</sup> March, 2015, this court delivered its Judgment and allowed the Plaintiff's claim.

18. The Applicant, who is the legal representative of the 2<sup>nd</sup> Defendant herein wants this court to review the Judgment because the said Judgment is replete with errors.

19. The Applicant is also seeking for the leave of the court to file her Notice of Appeal out of time.

20. The errors that are apparent on the face of the record, according to the Applicant, are that she was not advised to file a defence after she was joined in the suit as a legal representative; that by the time she was joined in the suit, the claim against her husband had abated; that the claim against her husband has never been revived and that her advocate never informed her when the matter came up for hearing.

21. It is not in dispute that initially, the firm of Gikandi and Company Advocates appeared for the 2<sup>nd</sup> Defendant. Later on, the firm of Cootow & Associates was appointed to act for the 2<sup>nd</sup> Defendant.

22. The record shows that when the 2<sup>nd</sup> Defendant died on 23<sup>rd</sup> August, 2007, the firm of Cootow, on behalf of the 2<sup>nd</sup> Defendant, filed an Application for joinder of the Applicant as the legal representative of the 2<sup>nd</sup> Defendant. The said Application was filed on 19<sup>th</sup> February, 2009.

23. On 14<sup>th</sup> May, 2009, the Applicant's Application was allowed and the Applicant was made a party in the suit "as 2<sup>nd</sup> Defendant in place of Sammy Njuguna who is now deceased".

24. The court was clear in its orders that the Applicant had been joined in the suit as the 2<sup>nd</sup> Defendant.

25. Having been joined in the suit as the 2<sup>nd</sup> Defendant "in place of Sammy Njuguna", it was not mandatory or necessary for the Plaintiff to amend the Plaintiff to specifically indicate that the Applicant had been joined in the suit.

26. Indeed, all that happened was the replacement of the deceased with the Applicant, meaning that the Applicant was to continue defending the suit using the already filed Defence.

27. The scenario in this case is different from a situation where the Plaintiff sues a legal representative at

the commencement of the suit. In that case, order 4 Rule 4 of the Civil Procedure Rules requires the Plaintiff to state the capacity in which he sues a party in a representative capacity. That is not the case in this matter.

28. However, if the Applicant, after being joined in the suit wanted to introduce her character as a legal representative of the deceased, it was upon her to file an amended Defence pursuant to the provisions of Order 24 Rule 4(2) of the Civil Procedure Rules. She cannot blame the Plaintiff or the court for not receiving proper legal advice from the advocate.

29. It is true, as submitted by the Applicant's counsel, that as at the time the Application for joinder of the Applicant was being made, the suit as against the 2<sup>nd</sup> Defendant had abated.

30. Indeed, under the provisions of Order 24 Rule 4(3) of the Civil Procedure Rules, where within one year no application is made to substitute a deceased Defendant is made, the suit, by operation of law, abates as against the deceased Defendant.

31. Even after the suit abated after the death of the 2<sup>nd</sup> Defendant, the Applicant herein filed an Application dated 10<sup>th</sup> February, 2009 in which she sought to be made a party and to proceed with the suit on behalf of the 2<sup>nd</sup> Defendant. That Application was allowed.

32. Having insisted on being allowed to proceed with the suit on behalf of the 2<sup>nd</sup> Defendant, and having been allowed by the court to do so, the Applicant, by her own actions revived the suit as against the 2<sup>nd</sup> Defendant.

33. The filing of the Application by the Applicant to be enjoined in the suit after the abatement of the suit, and the Application having been allowed could only have meant that the Applicant did not wish the suit to abate against her dead husband and by implied consent had the suit revived.

34. After being joined in the suit, on 22<sup>nd</sup> September, 2011, the Applicant, through her advocate, participated in the trial. Indeed, on 22<sup>nd</sup> September, 2011, the Applicant's counsel closed the Applicant's case without calling her when the matter came up for defence hearing.

35. In Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 16 at paragraph 1184, the author states as follows:-

**“The statement of counsel, if made on the trial of an action or in the course of any interlocutory proceedings in the presence of the client, his solicitor or someone authorised to represent the solicitor; and not repudiated at the time, bind the client and may be used as evidence against him”.**

At paragraph 1183, it provides as follows:-

**“But a person who has consented to a compromise, will not be allowed to withdraw his consent because he subsequently discovers that he has a good defence.”**

36. For the Applicant to bring an application after a period of six years after she was joined in the suit purporting that the suit should not have proceeded as against her because it had abated is guilty of laches. Her demands that the Plaintiff's claim is a nullity as against her late husband is stale and having slept upon her rights and acquiesced, she cannot be heard to say that the Judgment of this court is replete with errors.

37. In any event, the issue as to whether the suit had abated and whether the Plaintiff should have filed an Amended Plaint after the joinder of the Applicant cannot be said to be self evidence which do not require elaborate arguments.

38. If this court proceeded on an incorrect exposition of the law on the issue of abated suits and joinder

and arrived at an erroneous decision, then that is an issue for appeal and not review.

39. The Applicant is seeking for the leave of this court to file her Notice of Appeal out of time.

40. I have always held the view that it is only the Court of Appeal, under its Rules that can grant to a party who wishes to file an Appeal out of time, leave to do so.

41. I say so because an Appeal is commenced by a party by filing a Notice of Appeal. It is therefore the Court of Appeal that will have to allow a party to move it and explain why the court should allow him to file an Appeal out of time. The trial court has nothing to do with a matter that has been escalated to the Court of Appeal and more so granting a party leave to move the Court of Appeal out of time.

42. In any event, it is a paradox for the Applicant to seek an order to review the Judgment of this court and at the same time seek the leave of the court to file an appeal out of time. The Applicant should have made up her mind as to whether she wants to review the Judgment of the Court or appeal against the said Judgment. She cannot have both.

43. It is for the reasons I have given above that I dismiss the Applicant's Application dated 8<sup>th</sup> May, 2015 with costs.

Dated, signed and delivered in Malindi this 22<sup>nd</sup> day of **September**, 2016.

**O. A. Angote**

**Judge**