REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

CIVIL APPEAL NO. 95 OF 2001

KABUI NJEBERE …..…….... APPELLANT

-VERSUS-

PETER MAINA MURIUKI …..... 1ST RESPONDENT

MURIUKI KARIUNGI NJEBERE ……..... 2ND RESPONDENT

MARGARET WAMBUI KUNG'U ….... 3RD RESPONDENT

RULING

1. The notice of motion dated **18th January, 2016**, brought under **Order 24 Rule 7(2), 9** of the Civil Procedure Rules, seeks to, *inter alia*, revive the appeal herein. The appeal abated by operation of law on 30th July, 2007 following the passing on of the appellant (Kabui Njebere) on 30th June, 2006. It was declared as such on 4th March, 2008 following an application by the respondents for the appeal to be declared as having abated.

2. On 19th January, 2016 Stephen Kariuki Kabui (hereinafter called the applicant) filed the application herein seeking to revive the appeal on the grounds that owing to lack of proper advice from the advocates for the appellant, the appellant was not substituted within the time stipulated in law; that the appeal has high chances of success and that the estate of the appellant should not be condemned unheard.

3. The application is supported by the affidavit of the applicant, sworn on **18th January, 2016**, in which the grounds on the face of the application are reiterated.

4. The application is opposed through the replying affidavit of Peter Maina Muriuki (the 1st respondent herein) in which it is contended that there has been inordinate delay in filing the application; that no good reasons have been given for the appellant's failure to prosecute the appeal or for failure of the appellant's to apply for substitution of the appellant or revival of the suit without delay; that the appeal should not be revived because the applicant can challenge their entitlement to the suit property through the Succession proceeding pending in court and that the court should not exercise the discretion vested in it in favour of the applicant because he has been indolent.

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

Applicants' submissions

6. In the submissions filed on behalf of the applicants, a brief background of the circumstances leading to filing of the application is given and based on the provisions o**f Order 24 Rule 7 Sub Rule 2** of the Civil procedure rules and the principles set down in the case of **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others (2012) eKLR** it is submitted that this court has power to grant the order sought.

7. Counsel for the applicant admits that there has been inordinate delay in applying for revival of the abated appeal but explains that the delay was caused by errors on the part of advocates of the appellant. The advocates are said to have failed to properly advice the estate of the deceased on what they needed to do in order to keep the appeal alive or to revive it after it abated. The estate of the deceased is said to have been under false impression that the issues raised in the appeal could be determined through the succession proceedings taken up following the passing on of the appellant.

8. Pointing out that the subject matter of the suit is family land and arguing that there are substantial and weighty grounds touching on the jurisdiction of the defunct Land Disputes Tribunals established under the Land disputes Tribunal Act, No.18 of 1990 (now repealed), based on the decisions in the cases of **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others** (*supra*), **Rosemary bunny v. Gichuru Kamotho (2005) eKLR** and **Peterson Gichohi v. Maina Johana Miano alias Joseph Miana Miano Nyeri ELC No.14 of 2015**; and the duty imposed on the court under **Article 159** of the constitution, the applicant urges the court to allow the application in order to do justice to all the parties in this case.

9. In **Issa Masudi Mwabumba v. Alice Kavenya Mutunga & 4 others** (*supra*), the Court of Appeal, **Koome J.A**, observed:-

> **"…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; although 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.**
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> **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…"**

10. In **Rose Mary Bunny v. Gichuru Kamotho (2005) eKLR** it was stated:-

> **"As was held by the Court of Appeal in Trust Bank Limited v. Amalo Company Ltd C.A Civil Appeal No.215 of 2000 (Kisumu) (unreported) at page 4**
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> **"The principles which guide the court in the administration of justice when adjudicating on any dispute is that; where possible disputes should be heard on their own merit. This was**

succinctly put a while ago by C.J. (Tanzania in the case of Essanji & Anor –vs- Solanki (1968) E.A. at page 224."

The applicant has established sufficient reasons to enable this court exercise its discretion in her favour….in the circumstances of this case, it is only proper that the estate of the deceased is allowed to ventilate its case to its natural conclusion on merit."

11. In **Peterson Gichohi v. Maina Johana Miano** (supra) this court stated:-

"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 merits."

Respondent's submissions

12. On behalf of the respondent, a brief overview of the applicants' case is provided and submitted that there has been inordinate delay in prosecution of the appeal and in applying for revival of the abated suit. Terming the behavior of the applicant reactionary, the respondents argue that the appellant and the applicant are to blame for delay in prosecution and revival of the appeal.

13. From the authorities cited by the applicants, it is submitted 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.

14. Terming the delay of close to nine (9) years, in bringing the application for revival of the appeal herein not explained, the respondents contend that the appeal has no chances of success.

15. The applicant is also said to have failed to demonstrate that the appeal has chances of success.

16. It is further contended that the application is calculated at stopping the execution of the decree issued in favour of the respondents in Karatina Resident Magistrates Court.

17. Pointing out that the respondents have been kept away from the fruits of their judgment for over 16 years, the respondents urge the court not to assist the applicant who has been indolent by issuing the orders sought.

Analysis and determination

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

19. The main issue for determination is whether the applicant has made up a case for revival of the abated appeal.

20. With regard to this issue, despite the fact that there has been inordinate delay in bringing the application for revival of the appeal, the same having been brought 10 years from the time the appeal abated, just like in the case of **Peterson Gichohi v. Maina Johana Miano** (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.

21. Bearing in mind the special circumstances of this case, I hold the view that it is in the interest of justice to have the issues raised concerning the judgment appealed from and which issues I find to be arguable, heard and determined on their merits.

22. The upshot of the foregoing is that the application has merit and is allowed in terms of prayer (ii).

23. The costs of the application shall abide the outcome of the appeal.

Orders accordingly.

Dated, signed and delivered at Nyeri this 17th day of October, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Karweru h/b for Mr. Muthigani for the appellant

Ms Kainga h/b for Mr. Kibuka Wachira for the respondent

Court assistant - Lydia