Nyamweya v Nyamweya (Deceased); Nyambane & 2 others (Respondent) (Environment & Land Case 26 of 2003) [2024] KEELC 729 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEELC 729 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 26 OF 2003

FO NYAGAKA, J

FEBRUARY 20, 2024

BETWEEN

SAMSON K NYAMWEYA ..... PLAINTIFF

AND

SAMSON NYAMBATI NYAMWEYA (DECEASED) ..... DEFENDANT

AND

JUDSON NYAMBANE ..... RESPONDENT

ALICE KERUBO NYAMBATI ..... RESPONDENT

CHARLES RATEMO ..... RESPONDENT

RULING

The Application

1. The Notice of Motion Application, subject of this Ruling, was instituted by Samson K. Nyamweya, the Plaintiff herein. It is dated 28/08/2023 and is supported by his Affidavit deposed to on a similar date.

2. It seeks the following reliefs;

    a. Spent

    b. That this Honourable Court be pleased to issue an order of revival of this suit.

    c. That this honourable court be pleased to substitute the names of the deceased Defendant with the names of the Respondents as Defendants 1, 2, and 3 respectively.

    d. That costs of this application be provided for.

3. The grounds in support of the Application and Affidavit in support of the Application mirror each other. I will therefore crystallize their contents hereunder.

4. The Applicant stated that the Defendant in the suit, Samson Nyambati Nyamweya, died on 30th September 2013. He stated that on 09/07/2007, despite serving the deceased defendant with summons to enter appearance, he did not attend Court and as such he testified in ex-parte proceedings, produced his documents and closed his case. Hon. Justice A. Ochieng, while referring to case High Court Civil Case No. 49 of 1997 where the deceased was acting through a guardian declined to deliver Judgment.

5. The Applicant deposed further that there was confusion as to the true mental status of the deceased in so far as Kisii High Court Civil Suit No. 33 of 2009, *Jackton Ocharo & Samson Nyambati Nyamweya -vs- Charles Ratemo Nyamweya & John Bosco Mboga* was concerned since he had no guardian but was swearing affidavits verifying soundness of mind.

6. The Applicant contended that in so far as the main suit was concerned, the deceased and his family proposed an out of Court settlement. It was his case that in the meeting of 04/12/2009 the deceased in a fresh written agreement for sale increased the size of land sold to him to 60 acres at Kshs. 15,000,000/- while the previous payment of Kshs. 5,000,000/- was treated as deposit.

7. Recently, he became aware that the Respondents herein had been appointed as legal representatives of the estate of the deceased by a grant dated 12th July 2022.

8. The Applicant claimed that the deceased together with his spouse, Alice Nyambati received over Kshs. 3,700,000/- from the Applicant which was beyond the agreed price.

9. He deposed that he was forcibly evicted from the land which he had taken possession of and the same subsequently leased out to several different people. His deposition was that in the survey completed in April 2022 each of the partners, including the deceased had a deed plan for their respective entitlement of approximately 115 acres. In the premises, the Applicant urged the Court, in the interests of justice, to allow the Application.

The Submissions

10. The Applicant filed written submissions dated 23/10/2023. He argued that he had made a case for revival of the suit as per the provision of Order 24 Rule 7(2) of the *Civil Procedure Rules*. He relied on the decision in Civil Appeal No. 133 of 2011, The *Hon A.G -vs- the Law Society of Kenya & Another* where sufficient cause or good cause was discussed to mean a rational, plausible, logical, convincing, reasonable and truthful. He argued that the delay in filing the relevant Application was occasioned by serious family wrangles after the death of the deceased.

11. Further, he submitted that he learnt that the Respondents had been appointed legal representatives of the deceased by the grant dated 12/07/2022 and consequently filed the instant Application. He beseeched the court to be guided by overriding objection of civil litigation and to allow the Application. To bolster its case, reference was made to the decision in *Essaji -vs- Solanki* 1968 (EA) 218 to where it was observed that;

> The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily debar a litigant from pursuing his rights.

12. In conclusion, he submitted that it would suffer extreme prejudice if its case was not heard on merit. The decision in Civil Appeal No. 33 of 2003, *Abbas Sherally & Another -vs- Abdul Fazaiboiy*, was cited where it was observed;

> The right to a party to be heard before adverse action or decision is taken against party is so basic that a decision which is arrived at in violation of it will be nullified.

The 1st and 2nd Respondent's Case

13. Judson Nyambane and Alice Kerubo Nyambati opposed the Application through their Replying Affidavit deposed to on 02/10/2023. They contended that the Application was frivolous and an abuse of Court process for failing to show any justifiable grounds upon which it could be allowed.

14. They deposed that they are not aware of the proceedings referred to by the Application presided over by Hon. Justice Ochieng and the Applicant has failed to annex a copy thereof to aid them in making a response.

15. In reference to annexures SKN-1 and SKN-2, documents relied upon by the Applicant to demonstrate the deceased's sound mind, it was the 1st and 2nd Respondents' case that if indeed the deceased was of sound mind, that information was availed to the Court two years after the closure of the Applicant's case on 09/07/2007.

16. The Respondents asserted the position that equity aids the vigilant and not the indolent. That under the Civil Procedure Rules, a suit abates after 1 year of the demise of a defendant where no application is made by a party wishing to substitute the defendant with their legal representative. They deposed further that a party wishing to extend time within which to revive a suit after the lapse of one year ought to make an application before a Court for extension of time.

17. To that end, they claimed that the Applicant has not shown steps he took from 30/09/2013, when the deceased died to continue the suit or to seek extension of time to substitute the Defendant. To them, for an order of revival of suit to ensue, the Applicant must prove that they were prevented by sufficient cause from continuing a suit.

18. In challenging the contract attached by the Applicant, they deposed that the doctrine of privity of contract protects them from the Applicant's claim.

19. They deposed that Letters of Administration had been issued in the deceased's estate in Kisii Succession Cause No. 31 of 2016 a matter that has been challenged by the 3rd Respondent herein on the ground that he (the 3rd Respondent) wanted to be the sole Executor in the deceased's estate. In conclusion, they swore that the Application was frivolous and in the interests of justice and fairness it be dismissed.

The submissions

20. The 1st and 2nd Respondent filed written submissions dated 3rd November 2023. They submitted that the Applicant had deviated from the arguments advanced in its application and argued on abatement of suit whereas his application was that of revival of a suit.

21. They argued that, in accordance to the decision in *IEBC & Another -vs- Mutinda Mule & 3 Others* (2014) eKLR, parties are bound by their pleadings and as such, the Applicant is not allowed to travel outside its Pleadings.

22. In reference to exhibits SKN-1 and SKN-2, they submitted that the deceased participated in withdrawal of suit as of 08/06/2009, a clear demonstration that he indeed was of sound mind and competent to

defend the suit, two years after the close of his case. They argued that the totality of the circumstances of the suit was that the Applicant took no steps to enforce his rights for a period of 16 years.

3rd Respondent's Case

23. Charles Ratemo opposed the Application through his Replying Affidavit deposed to on 25/10/2023 and Grounds of Opposition dated 26/10/2023.

24. In the Replying Affidavit he deposed that the Applicant had not disclosed the fact that since the year 2006, the defendant had not been able to prosecute the suit since he had no capacity to do so. That the instant Application was supported by forged documents and that as of the year 2006, the deceased had lost the ability to sign affidavits or to give instructions to anyone. Further, that therefore the purported affidavit sworn on 08/06/2009 was a forgery and so was the purported sale agreement for sale dated 04/12/2009.

25. In the Grounds of Opposition, the 3rd Respondent stated that since the Applicant's Advocate became aware of his client's incapacity, he ought to have prosecuted the suit through his wife between the year 2006 and 30/09/2013 when the Applicant died.

26. His position was that the Applicant was barred by the doctrine of laches since he did not apply to have the deceased's wife to be appointed as a legal representative for the purpose of continuing with the suit after her husband died on 30/09/2013. Further, that the Applicant could not explain why he had not applied for revival of the suit for more than 10 years. He claimed that he was guilty of not disclosing the fact that he had a person to proceed the suit against since the year 2006.

27. In conclusion, the 3rd Respondent, while citing the decision in *Nabro Properties Limited -vs- Sky Structures Limited* (2002) Vol. 2 KLR, stated that no one is allowed to benefit from their own wrong doing.

The Submissions

28. The 3rd Respondent filed written submissions dated 01/11/2023. He argued that the Applicant has slept on his rights for 17 years a period that can neither be aided by Article 159 of *the Constitution* nor Section 1A, B and 3A of the *Civil Procedure Act* and Order 24 Rues 1, 2, 3(1) and (4) of the *Civil Procedure Rules*. His view was that under Order 24 Rule 3(4) of the *Civil Procedure Rules* the suit abated on 30/09/2014 since the Applicant had one year upon the demise of the deceased.

29. He stated that the Applicant had not shown sufficient cause to reopen the case. His argument was that the Application was an abuse of process since the Counsel for the deceased or the applicant knew of the mental status of the Applicant when the proceeding of the case was set aside on 09/07/2007. He urged the court to order learned Counsel on record for the applicant to personally bear the costs of the Application because of his conduct in this matter.

Issues for determination

30. The issues that would conclusively settle the what is in dispute herein are as follows;

    i. Whether the Applicant has made out a case for revival of the suit.

    ii. Depending on (i) above, whether the deceased Respondent can be substituted with the proposed 1st-3rd Respondents.

31. I will hence consider the issues sequentially.

Analysis and determination

i. Whether the Applicant has made out a case to revival of the suit.

32. The Application before this Court was instituted on the basis of the provisions of Order 24 Rule 1, 2, 3(1), (2) & (4) which generally is on Death and Bankruptcy of Parties. It provides as follows;

> Death and Bankruptcy of Parties
>
> [Order 24, rule 1.] No abatement by party's death if right survives.
>
> 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
>
> [Order 24, rule 2.] Procedure where one several plaintiffs and right to sue survives.
>
> 2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or of continues to the surviving plaintiff or plaintiffs alone or against the or defendants dies surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.
>
> [Order 24, rule 3].] Procedure in case of death of one of several plaintiffs' or of sole plaintiff.
>
> 3.
>
> (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.
>
> (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff: Provided the court may, for good reason on application, extend the time.
>
> (3) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
>
> [Order 24, rule 7.] Effect of abatement or dismissal
>
> 7.
>
> (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.

33. The provisions above are clear on when and how abatement of a suit occurs besides revival of a suit that has abated. I will briefly interrogate the circumstances of the suit herein.

34. In the year 2007, this suit was heard in absence of the Defendant, Samson Nyambati Nyamweya, now deceased. Before delivering its Judgment, the Court discovered that in Kitale High Court Civil Case No. 49 of 1997, where the deceased was a party, a consent Order was recorded on 25/10/2006 to the effect that the deceased was of unsound mind and therefore unfit to participate in the proceedings. The Court noted this state of things in its ruling dated 24/07/2007. It is clear from the foregoing that as of the year 2006, the Applicant herein and his learned counsel were aware that the Defendant was of unsound mind and unsuitable to participate in legal proceedings, particularly given the fact that by the consent order recorded his learned counsel then and who is still acting for him currently participated in the consent. Despite that fact, learned counsel for the Applicant decided to proceed with his case and closed it. Thus, proceeding in the hearing that led to the ruling being delivered while the Applicant and learned counsel knew of the deceased's status of unsound mind greatly disturbed the learned trial judge then. The learned judge proposed to set aside all the proceedings that were based on the purported service on the Defendant who later died.

35. Thereafter, the case went cold. As fate would have it, on 30/09/2013, six years after the close of the Applicant's case and the proposal by the judge to set aside the proceedings, the Defendant died. No substitution of the deceased was done.

36. I now turn to Order 24 Rule 4 of the *Civil Procedure Rules*, 2010. It sets the procedure in instances where there is death of a defendant. It provides as follows;

> Procedure in case of death of one of several defendants or of sole defendant.
>
> 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.

37. I have carefully perused the record herein. The time within which an Applicant must substitute a deceased defendant is not open ended. Order 24 Rule 3 sets the time limit in the following terms;

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

38. The consequences of an abated suit are set out in Order 24 Rule 7. It provides;

> 7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

39. In the instant matter the Applicant took no steps to substitute the Defendant as per the dictates of the Order 24 Rule 4 of the *Civil Procedure Rules*. In his submissions, the Applicant abandoned Order 24 Rule 4 as the basis of his application. He adopted and argued under Order 24 Rule 7 in bid to redeem his case. But this Court is of the humble view that Order 24 Rule 7 is only invoked where

the Applicant must satisfy the Court that he was, for sufficient cause, prevented from continuing the suit. The operative phrase in the sub-rule 2 is "prevented by" any sufficient cause. Is sitting indolently and waiting for parties who are not keen to act an act or occurrence that may "prevent" a party from continuing with the suit? In my humble view, it is not. One must set in motion or set to commence the process of continuing with the suit and then a "sufficient cause" prevents him/ her.

40. What I gather as the explanation for the delay in continuing the suit is the claim that the deceased Defendant's family was going through a lot of wrangles when he passed on. There is also the claim that the delay was occasioned by the attempt to resolve the matter amicably in the year 2009. That did not prevent the Applicant from taking out a citation against the family of the deceased and they bring their dispute or wrangles into the citation. If that happened and it took time to resolve them before the citation could be completed that could have amounted to sufficient cause. It was not the case here.

41. It is possible that from the time the party sought to be substituted died the persons entitled to take out letters of administration did not take steps to do so in order to prosecute his case. Well, that may be the case. However, whenever a party has a matter against another who dies and whom the suit survives, diligence and reason gives an obligation to the party who has an interest in the matter to notify the estate or persons legally entitled to take out letters of administration to do so within the soonest time possible. This is in a bid to have the suit proceed without abatement as provided in the law. Where the party requests the estate of beneficiaries to take out letters of administration that may enable them to proceed with the matter but they do not take such steps so that they may be substituted, the party obligated both in law and equity to move with speed and cite the persons in order to compel them to take out letters or the Court issues orders as may be deemed appropriate. It is not open for a party to relax and do nothing for as many years as it may take for the estate or persons entitled to take out letters and then he wakes up from slumber to move the Court to revive a suit that has abated. Reasonableness, equity and diligence act the same way to lay on a party the burden to move the Court within the shortest time possible. Where he attempts to move the Court but, and for one reason or other which must demonstrate clearly that he did his best to move the Court but for circumstances beyond his control, he was prevented from carrying out the substitution and the suit thereby abated, he may move the Court to have the suit revived and substitution done. But where he does nothing in that regard the Court should not hesitate to reject the application for revival of the suit.

42. The Applicant further seeks to cure the delay by virtue of overriding objective of civil litigation.

43. The Objective of the Act is provided for in section 1A (1)(2), 1B(1)(a), (b), (c) and (d) in the following manner;

> 1A. Objective of Act
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
>
> (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
>
> 1B. Duty of Court
>
> (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court; (c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties;

(e) the use of suitable technology

44. At the core of the Overriding Objective of Civil Litigation is the just, expeditious, proportionate and affordable resolution of suits. The Application before this Court is an invitation directly in conflict with the very purpose of the Oxygen principle. The Applicant having failed to take steps to substitute the Defendant the whole concept of Overriding Objective, 6 years down the line worked against him. If limitation of actions catches up with people's indolence so does the Overriding Objective.

45. Having said so, I now turn to the what Courts have said on revival of suits.

46. My attention is immediately drawn to the Court of Appeal decision in *Said Sweilem Gheithan Saanum -vs- Commissioner of Lands (being sued through Attorney General) & 5 others* [2015] eKLR. The learned Judges had occasion to address the issue of revival of suits in the new constitutional dispensation. They observed thus:

> " The fact that the dispute involved land which is claimed to be the only asset of the deceased's estate and is of high value per se ought to have been the more reason for both the appellant and her counsel to be vigilant. Other reasons advanced for the revival of the suit, such as the appellant's lack of literacy, poor health, advanced age, bereavement, depending on the circumstances may be relevant considerations but do not in themselves constitute sufficient cause, particularly in view of the fact that the appellant was represented by counsel.....
>
> "Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases.....We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The Court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them."

47. The circumstances of this case align perfectly with the dispute that was before the Court of Appeal in the above captioned case (*Said Sweilem Gheithan Saanum -vs- Commissioner of Lands*). This Court need not say more. Learned counsel for the Applicant having participated throughout the suit and let his client sleep through his rights cannot justifiably "walk" his client to this court after such an inordinately long lapse of time and expect revival of an abated suit that is as good as stale. In the premises, I find the Application to be without merits and I hereby dismiss it with costs to the Respondents.

48. It is so Ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 20TH DAY OF FEBRUARY, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE