



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 155 OF 2012

**BHAVESH TRIBHOVAN VORALIA (Administrator of the estate of the late LAUJURUDA
DAYLJI RAJA VORALIA & KARSAN DEWSHI.....PLAINTIFF**

VERSUS

JOHNSON KAMAU MACHARIA & 15 OTHERS.....DEFENDANTS

RULING

(Application to revive an abated suit; application allowed)

The application before me is that dated 28 March 2012 filed by the plaintiff and said to be brought under the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules, Order 5 Rule 1 and Sections 3A, 1A and 1B of the Civil Procedure Act. It seeks the following prayers:-

1. That this Honorable Court be pleased to order that the suit herein be revived.
2. That costs of this application be in the cause.

The grounds upon which the application is made are as follows :-

- (a) That the suit herein has abated, the plaintiff having died on 30 May 2003 during the pendency of this suit.
- (b) That the cause of action still survives and continues to survive.
- (c) That the applicant who was substituted in the suit as the plaintiff and was under the directions of his former counsel on record that the suit was still subsisting.
- (d) That the suit abated due to non-communication by counsel to the applicant and this is purely a mistake of counsel which should not be visited on an innocent litigant.
- (e) That it will be fair and just that in the interest of justice that this suit be revived and the same be heard and determined finally.
- (f) That the subject matter of this suit is right to land and if the same is let to abate, the applicant stands to suffer irreparably.

The application is supported by the affidavit of Bhavesh Tribhovan Voralia. He has deponed that the

original plaintiff, Tribhovan Hirji Peshavaria died on 30 May 2003 while this suit was pending. Bhavesh filed and obtained Letters of Administration for the Estate of Hirji Peshavaria and an application to amend the plaint was made to have him substituted which application was allowed. The applicant has stated that he has all along thought that the suit is subsisting until November 2011, when he attended court for hearing. He has stated that it is fair and just to have the suit revived to enable him pursue the suit.

The application had initially been set to be canvassed before my sister Waithaka J on 7 May 2013, but certain issues arose, including whether the Grounds of Opposition filed were within time, and whether counsels had right of audience as they had not paid court adjournment fees and costs earlier ordered. In a ruling made on 10 May 2013, Waithaka J, struck out the Grounds of Opposition as having been filed out of time and ordered counsels for the respondents to pay further court adjournment fees and costs to the plaintiff. On the day of the hearing of the application, only Mr. Ntabo for the applicant attended. It could be that counsels for the respondents did not appear for want of payment of the adjournment fees and costs. Save for the Grounds of Opposition, which were struck out, there was a replying affidavit filed by the 8th defendant. But before I go to the matters raised in the Replying Affidavit, I think this is an opportune time for me to lay out a little background on this case.

The suit was commenced on 1 August 2003 by way of plaint. At that time, the plaintiff was being represented by the law firm of M/s Cherutich & Company Advocates. The original plaintiff is Tribhovan Hirji Peshavaria (Hirji) suing as administrator of the Estate of the late Lavji Ruda, Dayalji Raja Voralia and Karsan Dewshi. It was pleaded that Ruda, Voralia and Dewshi, were the registered owners of the land parcel Nakuru Municipality/Block 21/26 (the suit land). It was stated that the 1st defendant fraudulently had himself transferred as proprietor of the suit land by way of fraud and latter subdivided the said parcel into several plots which were sold to the 3rd to 16th defendant. The prayers sought are for a declaration that the deceased estate is the lawful owner of the suit land; a declaration that the titles issued are null and void; a declaration that the 3rd-16th defendants are trespassers; general damages for trespass; a permanent injunction and costs.

The defendants entered appearance and filed defence through various law firms. They have refuted the claims of the plaintiff and asserted that they acquired title procedurally.

Not much seems to have happened to the suit until 6 April 2009, when an application for amendment of plaint was filed pursuant to the provisions of the then Order VIA Rule 3, 5 and 8, which allowed for amendment of plaints. The reasons for seeking to amend the plaint were that Hirji had died and the plaint needed to be amended to reflect the name of Bhavesh as plaintiff. To the application, Bhavesh annexed a copy of an amended grant of letters of administration for the estate of Lavji Ruda. The application was allowed on 15 December 2010 and the plaint was amended to have Bhavesh as the plaintiff in place of Hirji .

On 25 January 2012, a Notice of Preliminary Objection dated 7 December 2011, was filed by M/s Ikua Mwangi & Company Advocates, representing the 6th and 11th defendants. The objection was on grounds that:-

1. The suit herein abated on or about 30th May 2006 following the death of the plaintiff who died on 30th May 2005.
2. The purported amendment of the plaint to replace the plaintiff is null and void the same having been filed when the suit had already abated.
3. To date there is no application to substitute the plaintiff as required by law, which application ought to have been filed within 1 year of the death of the plaintiff.

They asked that the suit be struck out with costs.

On 12 March 2012, the plaintiff appointed the law firm of M/s M.G Ntabo & Company Advocates in

place of M/s Cherutich & Company Advocates. Subsequently, this application was filed on 29 March 2012, probably to take care of the issues raised in the preliminary objection.

In the Replying Affidavit of the 8th defendant, it is averred that the suit herein abated on or about the 30th May 2006 following the death of Hirji. It is stated that it took five years following his death for the plaintiff to amend the plaint, but even then, the suit had already abated. It is said that the plaintiff has never taken any steps to revive the suit. It is further averred that the plaintiff cannot blame his former advocates as he should have been diligent himself to approach his advocate.

I have considered the application. I have noted that Bhavesh was introduced into this suit as plaintiff through the application to amend that was filed on 6 April 2009. Strictly speaking, that application ought not to have come under Order VIA Rules 3, 5, and 8, which covered the general power to amend, but rather under the then Order XXIV which dealt with substitution of deceased parties. The prudent thing would have been to file an application for substitution, and at the same time seek the revival of the abated suit, rather than filing a simple application for amendment of plaint. Although proper procedure was not followed in the manner in which Bhavesh was introduced as plaintiff in the case, I guess that no party has been adversely affected by his admission as plaintiff in place of Hirji. In any event, Bhavesh is now the administrator of Lavji Ruda, and I think reopening the issue is not bound to change anything. I am prepared to overlook the procedural technicality.

But the failure to seek revival, of an otherwise abated suit, has now come to haunt the plaintiff hence this application. Order 24 Rule 7 does allow the revival of an abated suit. I think in the circumstances of this case, it will only be fair that I allow the application. It seems to me as if the plaintiff was not properly guided by his erstwhile advocates on what to do. In my view, considering all the surrounding circumstances, it will be harsh to visit the plaintiff for the omissions of his counsel. The issues raised in the plaint are also not frivolous and I think it is fair that each party be given a chance to ventilate their respective cases. I therefore allow this application. The costs will be in the cause.

Before I finish, I feel compelled to address two points not related to the application at hand. The first is on representation of the parties herein, and finally, on the obedience of court orders. On the first point, I note that after summons were served, the law firm of M/s B.W Mathenge & Company Advocates filed appearance for the 1st, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th defendants on 15th August 2003. The joint defence filed by the said law firm on 2nd September 2003, however excluded the 8th and 12th defendants. On 29 August 2003, the law firm of M/s N. Ikua & Company Advocates filed a Memorandum of Appearance for the 6th and 11th defendants. This was certainly irregular, since the law firm of M/s B.W. Mathenge & Company Advocates was already on record for the 6th and 11th defendants and what ought to have been filed was a Notice of Change of Advocates. On 9th September, 2003 the law firm of M/s J.K Ayusa & Company Advocates, filed a Defence in respect of the 12th defendant. No notice of change was filed by the said law firm to come on record for M/s B.W Mathenge & Company Advocates who it will be recalled had filed appearance on behalf of the 12th defendant as well. On 8th October 2003, the law firm of L.R. Kipsang & Company Advocates filed a Notice of Appointment of Advocates and a Defence for the 10th defendant. Again, this was irregular, since the law firm of M/s B.W Mathenge had already filed a defence for the 10th defendant. The Replying Affidavit of the 8th defendant was filed by M/s Aming'a Opiyo & Masese Advocates, but I do not have any record of when they came into the picture. The only other firm that I can see, is M/s Mungai Mbugua & Company Advocates for the 3rd defendant. Clearly, the issue of representation and which pleadings are to remain on record needs to be sorted out.

The second issue is on obedience of court orders. There have been various orders directed at some of the defendants on payment of costs and court adjournment fees. These, apparently, have been ignored. Court orders are not issued in vain and need to be obeyed. Unless the defendants settle the matter of costs, I do not see why they should approach the same court, whose orders they are disobeying, for redress. If they do not pay the costs and adjournment fees as ordered, I reserve the discretion not to hear them.

It is so ordered.

Dated, signed and delivered in open court at Nakuru this 12th day of February 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

AT NAKURU

In presence of:-

Mr R M Machage holding brief for Mr. Ntabo for plaintiff/applicant

N/A for defendants

Emmanuel Maelo : Court Assistant

MUNYAO SILA

JUDGE

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