



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 50 OF 2012

(Formerly HCC 14 OF 2000)

AUGUSTINE KIPSANG KIPTOO.....PLAINTIFF

VS

CHERUIYOT ARAP SAWE.....DEFENDANT

RULING

The application before court is dated 5/1/2015 wherein the the applicant seeks for orders that the plaintiff's suit against the defendant be revived. And that this Honourable court do grant the applicant leave to take over the conduct of this suit for and on behalf of the deceased plaintiffs estate and that upon grant of prayer (b) above the applicant be substituted in place of the deceased. The application is based on the grounds that Augustine Kipsang Kiptoo the plaintiff herein died on 13th February 2012. That the applicant did not know of the existence of the suit herein until on or about June, 2014 when he was informed by the Mr. Alfred Kingoina Nyairo, his late father's advocate on record that the suit herein existed. That prior to being informed by Mr. Alfred King'oina Nyairo of the existence of this suit the applicant did not know of it's existence. Upon being informed of the existence of this suit, the applicant herein took out a special Limited Grant ad Litem to enable him be substituted in place of Augustine Kipsang Kiptoo and continue prosecuting the suit herein for and on behalf of the deceased's estate.

However, by the time the Applicant took out the special Limited Grant Ad Litem, more than one year had lapsed hence the suit against the defendant/respondent had abated. He believes that the delay in taking out Letters of Administration and applying for substitution was caused by factors beyond the applicant's control. Unless the applicant is heard on this application and the orders sought issued the the Estate of the late Augustine Kipsang Kiptoo will go to waste to the detriment of the beneficiaries hence this application. According to the applicant no party will suffer prejudice if the orders sought are granted and that it is the best interest of justice that this application be allowed and the orders sought granted to enable this matter be determined on tis merits.

The application is supported by the affidavit of **Joseph Kiprono Sang** who states that he is the son to the late Augustine Kipsang Kiptoo, the plaintiff herein who died on 13th February, 2012. On or about 26th June, 2014, he was informed by Mr. Alfred Kingoina Nyairo, his late father's Advocate on record which information he verily believed to be true and correct that before his demise the Plaintiff had instituted the suit herein against the defendant/respondent which suit was still pending in court at the time of his death. That he was further advised by Mr. Alfred Kingoina Nyairo that he needed to take out letters of administration in order to enable him take conduct of this suit and protect the interest of the deceased's estate. That prior to him being informed by Mr. Alfred King'oina Nyairo he was not aware of the existence of this suit. That vide an application dated 14/7/2014 he applied for a Special Limited Grant Ad Litem and was issued with a special Limited Grant Ad Litem on 13/8/2014 in respect of the estate of the

late Augustine Kipsang Kiptoo.

Later he was informed by Mr. Alfred King'oina Nyairo which information he verily believed to be true that substitution was to be done within one year and more than one year had lapsed since the death of Augustine Kipsang Kiptoo the plaintiff herein and as such the suit herein had abated. That the delay in making the application for grant of Letters of administration to enable him take over the conduct of this suit was due to the inability of M/s Nyairo and Company Advocates to reach him as they did not have his postal address and/or telephone number. M/s Nyairo & Co advocates later managed to contact him in or about June 2014 and informed him of the existence of the suit and that the delay in taking out letters of administration and making this application was due to reasons beyond his control.

That he prays that this court exercises its discretion in his favour and allow the application before court and he states that unless orders herein issue to Estate of the Late Augustine Kipsang Kiptoo stands to be wasted and/or will go to waste to the beneficiaries detriment. He believes that none of the parties to this suit will be prejudiced if the orders sought issue as the defendant/respondent has a counter-claim against the plaintiff and as such it is in the best interest of justice and fairness that the orders sought herein do issue to allow this matter to be heard and determined on its merits upon hearing all the affected parties. He is opined that this court has the power to grant the orders sought in the interest of justice.

The application is opposed by the defendant who has filed grounds of opposition whose import is that the applicant is guilty of laches. According to the defendant, no exceptional circumstances have been pleaded as to why the application was not timeously presented and prosecuted. There being no application for enlargement of time as contemplated by order **25 Rule 3 (2) of the Civil Procedure Rules 2010**, the application as present is a gross abuse of the due process. The grant of letters which is the basis of the application was sought 2 years after death which is outside the prescribed time. Moreover the defendant argues that from October 2014 the applicant waited for a whole 3 months before applying for substitution. The defendant has been in court since 2000 when this suit was instituted and has already suffered great prejudice and to allow or entertain the current applicant is too much. To the extent that the cause has abated and the applicant is seeking revival before substitution is an anomaly since no stranger can qualify to make such such an application.

Mrs Khayo for applicant argues that the applicant was not aware of the suit until June 2014 that is when he learnt of the existence of the suit through Nyairo and Company advocate. On the 14/7/2014 he applied for letters of administration Ad Litem. The same were issued on 13/8/2014 and subsequently he filed the present application on 12/1/2015.

Mr. Mbugua for the defendant argues that there is no prayer for enlargement of time and therefore the application in is a non starter. He further argues that there is inordinate delay as the grant was made more than a year before the filing of the suit. He further argues that the firm of Nyairo is hiding behind their client in their failure to make the application for substitution.

I have considered the application, grounds of opposition and submissions by both counsel and do find that the suit herein was commenced by way of plaint on 5/5/2000 by Augustine Kipsang Kiptoo. Unfortunately the plaintiff died on the 13/2/2012. The applicant intends to revive the suit so that he can take over the conduct of the same in substitution for the plaintiff.

On this issue, **Mr. Ngigi Mbugua** argues that there being no application for enlargement of time as contemplated by order 25 rule 3 (2) of the Civil Procedure Rules 2010, the application is incompetent. I do agree with Mr. Ngigi Mbugua that there is no application for enlargement of time as contemplated by the Civil Procedure Rules 2010 and the prayers sought cannot be granted. The court has no power to revive a suit that has abated without enlargement of time.

The court finds that it took the applicant almost three years to prepare this application and even after preparing this application it took him 6 days to file the same in court. He claims that he was not aware of the existence of the suit. The applicant is a son of the deceased plaintiff, and he claims to have been unaware of this suit? I do not believe him due to the fact that as the son of the deceased plaintiff, if he

was vigilant enough, he ought to have been aware of the existence of the suit. However for the benefit of doubt and since there is no evidence to the contrary I would settle on the presupposition that he was not aware of the existence of the suit.

The applicant states that he became aware of the existence of the suit in the Month of June 2014, and applied for a grant of special limited grant ad litem on 14/7/2014. I am unable to know how long he took to apply for the letters of administration after receiving the information of the existence of the suit however it is on record that he took a period of approximately 15 days to apply for the special grant ad litem. He was issued with the grant on the 13/8/2014 and prepared the application on 5/1/2015 and filed the same on 12/1/2015.

I have given the applicant the benefit of doubt that he was not aware of the suit and also do find that 14 days between the day he received the information of the existence of the suit and the filing of the application for the special grant is a delay but not inordinate.

The issue for determination is whether the period of approximately 120 days between 13/8/2014 when he was issued with the special grant and 12/1/2015 when he filed the application is inordinate delay. For a delay to be described as inordinate depends on the circumstances of the case and each case has its own unique facts and circumstances,

I do find that a delay of 120 days is inordinate and sufficient reasons should be given to enable the court to exercise its discretion. The orders sought are discretionary hence a party seeking such orders ought to be candid. The applicant has not attempted to explain this delay. It is trite law that the discretionary powers of the court cannot be exercised capriciously or whimsically but should be exercised Judiciously. The applicant argues that none of the parties will suffer prejudice if the orders are granted. This court finds any delay in taking a step in the prosecution of the suit by the plaintiff is prejudicial to the defendant as justice delayed is justice denied. For the foregoing reasons the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 22ND DAY OF APRIL 2015.

ANTONY OMBWAYO

JUDGE