REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 117 OF 2012

Formerly HCC 53 OF 2003

HENRY KIPTALAM BARNGETUNY.....PLAINTIFF

VS

STANLEY A. NGETICH.....DEFENDANT

(Abatement of suit; application to revive an abated suit; sufficient reasons must be provided; Article 159 2(d) of the constitution; when and how the same may be applied to override Rules of procedure; Application dismissed).

RULING

1. The application before me is the Motion dated 20 May 2013 filed by one Joseph Kimeli Talam who holds a grant of letters of administration ad litem for the estate of Henry Kiptalam Barngetuny (deceased) who is the original plaintiff. The application is filed pursuant to the provisions of Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 24 Rule 1, 3(1) and (2), and Article 159 of the Constitution. The applicant is seeking orders that :-

(a) This suit be revived.

(b) The legal representative of the deceased plaintiff be made a party to this suit in place of the plaintiff.

(c) The applicant be granted leave to amend the plaint in consonance with the aforesaid substitution.

(d) Costs of the application be costs in the cause.

2. The application is founded on the grounds inter alia that the plaintiff died on 29/4/2010; that the plaintiff's legal representative is desirous of proceeding with this suit; and that the applicant was prevented by sufficient cause from proceeding with substitution within one year. The application is supported by a brief affidavit sworn by the applicant. He has deponed that the original plaintiff died on 29 April 2010 and that he obtained a grant of letters of administration ad litem on 28 March 2012. He has deponed that the delay in processing and obtaining the grant was due to circumstances beyond his control due to financial constraints. He has stated that by the time the grant was obtained, the suit had abated and that it is in the interests of justice if the suit was revived for it to be heard and determined.

3. The application is opposed by the defendant who has filed a replying affidavit. The defendant has deponed that this suit was filed in the year 2003 and since then, the matter has never proceeded for hearing. He has deponed that more than one year has lapsed since the plaintiff died in the year 2010. In his view, no sufficient reason has been given as to the delay in substituting the plaintiff. He has stated that

he will greatly be prejudiced as the applicant has invaded the land which is the subject matter of the suit. He has averred that it is fair and just that the suit be dismissed as the same has already abated.

4. Miss J. Kosgei for the applicant urged me to allow the application. She stated that the plaintiff died and the applicant is now desirous of continuing with the suit. She repeated the averment in the affidavit that the main reason why substitution was not done within time is owing to financial constraints. It was further her view that the defendant will not be prejudiced if the application was allowed.

5. Mr. Nyachiro for the defendant was not unsurprisingly of a contrary opinion. He highlighted Order 24 Rule 3 (1) and averred that an application for substitution must be made within one year of death or else the suit abates. He further averred that the application herein has not sought to extend time. He was also of the view that sufficient reason has not been demonstrated, as to why the grant of letters of administration ad litem, was obtained two years after death. He pointed out that the present application, was filed one year after obtaining the grant of letters of administration ad litem, which period has not been explained. He also stated that there is another suit touching on the same issues and asked that the application be dismissed.

6. In reply, Miss. Kosgei stated that the other suit had been filed by the defendant and that the parties are different although the subject matter is the same.

7. I have considered the application, the affidavit in support and the opposition by the defendant. Order 24 of the Civil Procedure Rules makes provision for death and bankruptcy of parties. Order 24 Rule 3 specifically provides for instances where a sole plaintiff dies. It provides as follows :-

Rule 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.

8. It will be seen from the above provision that where a sole plaintiff dies, and the cause of action survives or continues, the court on application is to cause the legal representative of the deceased plaintiff to be made a party to the suit and the matter is to proceed. However, such application for substitution, must be made within one year and if it is not so made, the suit shall abate. It appears as though the abatement of a suit is by operation of law and an application seeking to have a suit marked as abated is strictly not necessary. A suit abates one year after death, and upon abatement, the defendant is at liberty to apply for the costs of the suit to be recovered from the estate of the deceased plaintiff. The proviso to Rule 3 above, however gives leeway for time to be extended, if good reason is shown.

9. The plaintiff in this case died on 29 April 2010. The suit therefore abated on 29 April 2011 subject of course to any order to extend time. Rule 7 of Order 24 gives the court power to revive a suit that has abated. It provides as follows :-

Rule 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.

10. It will be discerned that if an applicant demonstrates that he was prevented by any sufficient cause from continuing the suit, the court is obliged to revive the suit, subject to any orders as to costs that may befit the circumstances of the case.

11. There is no doubt that this suit abated and what the applicant is now seeking is to revive the abated suit. Pursuant to the provisions of Order 24 Rule 7, it is necessary for the applicant to demonstrate "sufficient cause" as to why he could not continue the suit before the same abated.

12. In my view, there are no defined boundaries of the term "sufficient cause". It is upon the court to determine whether a reason given attains the threshold of "sufficient cause". However, in every case, good reason must be given and such reason must be supported by cogent evidence. In my view, it is not enough for one to make general sweeping statements that are unsupported by any evidence and hope that the court will have sympathy and allow the application to revive suit. An application to revive an abated suit will not be given as a matter of course, sufficient reason must be given, and there must be some evidence to support the given reasons.

13. The reasons given by the applicant is that the delay in processing and obtaining the grant was due to circumstances beyond his control, due to what he has termed as “financial constraints”. The applicant has not demonstrated the said financial constraints. He has not stated what his income is, or what level of financial commitment the application to obtain the grant ad litem required, and that he was unable to raise the said funds given his financial situation.

14. I can see that the grant ad litem was obtained on 28 March 2012. This application was filed on 21 May 2013 more than one year after the grant ad litem was obtained. The applicant has offered no reason whatsoever as to why he waited for more than one year after receiving the grant ad litem, before making the decision to file the application for substitution and revival of the abated suit. If the delay in filing an application for the grant ad litem was due to “financial constraints”, the delay of more than one year after receiving the grant ad litem has not been explained at all. No attempt whatsoever has been made to provide a reason for this delay. I am afraid that since no reason has been offered, no sufficient cause for this delay has been demonstrated.

15. I am aware of the provisions of Article 159 (2) (d) of the Constitution, which obliges the court to do justice to the parties, and not to be too constrained by technicalities. The same provides as follows:-

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) justice shall be administered without undue regard to procedural technicalities;

In applying the provisions of Article 159 (2) (d), the court in my view, must look at the totality of the circumstances surrounding the matter before it, and those circumstances, must be so overwhelming and so deserving, to enable the court override any rules of procedure.

16. Probably, in a case of better merit, I would have been moved to exercise my discretion under Article 159 (2) (d) of the Constitution to override Rule 7 of Order 24, and accord the applicant the opportunity to ventilate his case, despite sufficient cause not having been demonstrated to revive the abated suit. But I do not think that given the totality of the circumstances of this case, I will be doing justice by reviving this suit.

17. I have seen that this suit was filed in the year 2003 and only once, in the year 2005, was the plaintiff ready to proceed with hearing of the suit. There had already been unnecessary delay on the part of the plaintiff even before he died. I have also considered the cause of action. The cause of action of the plaintiff is that in the year 1969 he bought 10 acres of land parcel Nandi/Kipkarren/335 from the defendant which land parcel measured 71.25 acres in total. The plaintiff further pleaded that in the year 1971, the defendant approached him, to assist him in offsetting a loan on the promise that he would

equally divide the remaining 61.25 acres with the plaintiff. The plaintiff alleges that despite tendering in some money, the defendant failed to give him the half share as promised but only surrendered 11.5 acres yet in his view, he was entitled to an additional 29.125 acres.

18. I can see that the claims of the plaintiff are based on promises allegedly made in the year 1971. The suit was filed in the year 2003 and in all probability the suit has been caught up by the Limitation of Actions Act, (CAP 22) Laws of Kenya which under section 7 requires that suits for the recovery of land be filed within 12 years of the cause of action.

19. I have also seen that there was another suit before the Land Disputes Tribunal, which decision appears to have been adopted as an order of the court pursuant to the provisions of Section 7 of the Land Disputes Tribunal Act, Act No. 18 of 1990 (now repealed by the Environment and Land court Act, Act No 19 of 2011). The decree was that the plaintiff be awarded 11.5 acres of the suit land. Probably, this is the 11.5 acres that the plaintiff alleges that the defendant surrendered. Although the plaintiff alleges that the tribunal did not have jurisdiction to entertain the dispute, he seems to enjoy the 11.5 acres that he received arising from the same decree that he alleges was made without jurisdiction and he has no apologies to make for this. Moreover, that decree has never been set aside and it may very well be that this suit is therefore *res judicata*.

20. For these reasons, I am unable to exercise my discretion under the provisions of Article 159 (2) (d) of the Constitution.

21. I have already held that the applicant has not demonstrated sufficient reason to enable me revive the abated suit, and given the totality of the circumstances surrounding this case, I am not inclined to exercise the wide discretion donated to me pursuant to the provisions of Article 159 (2) (d) of the Constitution. This application must therefore fail and I dismiss the same with costs. This suit shall now be formally marked as abated.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 2ND DAY OF OCTOBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Miss R. Ayuma holding brief for Mr. Chepkwony for the Plaintiff/applicant

Miss J.C. Cherutich present for the defendant/respondent