



Maitai (As a Personal Attorney of John S Ole Maitai) v Saitieu; Olormaitai (As a Personal Representative of the Estate of John S. Ole Maitai - Deceased) (Applicant) (Environmental and Land Originating Summons E006 of 2021) [2024] KEELC 1497 (KLR) (19 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1497 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2021
CG MBOGO, J
MARCH 19, 2024**

BETWEEN

EMMANUEL KOTOINE MAITAI (AS A PERSONAL ATTORNEY OF JOHN S OLE MAITAI) PLAINTIFF

AND

KOITAAT OLE SAITIEU RESPONDENT

AND

TOPOIKA OLORMAITAI (AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN S. OLE MAITAI - DECEASED) APPLICANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 13th December, 2023 filed by the applicant herein and it is expressed to be brought under Order 24 Rule 3 (1) and 7 (2) of the Civil Procedure Rules, and Sections 3, 3A of the Civil Procedure Act seeking the following orders: -
 1. Spent.
 2. That this honourable court be pleased to revive this suit.
 3. That consequently, the applicant herein (Topoika Olormaitai) do substitute the plaintiff herein (John S. Ole Maitai)
 4. That this honourable court be pleased to make any other order it deems necessary in the circumstance.
 5. That cost be provided for.



2. The application is premised on the grounds inter alia that on 5th December, 2023 this court declared this suit as abated and that failure to apply for substitution in good time was not deliberate.
3. The application is supported by the affidavit of the applicant sworn on 14th December, 2023. The applicant deposed that John S. Ole Maitai died on 14th September, 2022 and with him, died the power of attorney he had donated to Emmanuel Kotoine Maitai who was prosecuting the suit. Further, he deposed that it was not clear what was happening in court, as the issue was between the deceased and Emmanuel Kotoine Maitai, and it took time before the family knew what was taking place as the said Emmanuel had relocated to Tanzania.
4. The applicant further deposed that upon enquiry, they took out letters of administration ad litem for purposes of prosecuting this suit. Further, that at the time the grant was signed, the matter had already abated though the court had not declared it as abated.
5. The applicant further deposed that after acquiring the grant that was issued on 12th September, 2023, they embarked on looking for resources for giving instructions and on 5th December, 2023, this matter came up for hearing, but it was declared as abated.
6. He further deposed that it is 3 weeks since the suit was declared as abated, and the application cannot be deemed as inordinate. Also, that the entire family resides on the suit land, the subject of this suit, and it would be in the interest of justice that the deceased estate, be granted a chance to ventilate their case.
7. The application was opposed vide the replying affidavit of the defendant/ respondent sworn on 12th February, 2024. The defendant/respondent deposed that the applicant filed two applications which were both dismissed, and that the applicant never took any steps to have the matter set down for hearing. Further, that the applicant has been indolent in prosecuting the matter, a fact which has been shown by his conduct in failing to attend court, when the matter came up for mention severally and for hearing on 5th December, 2023.
8. The defendant/respondent further deposed that no evidence has been provided that the plaintiff was away and never communicated to them what was happening in the matter. Further, that the applicant is guilty of laches and has not adduced sufficient reasons to warrant the grant of the orders sought.
9. The application was canvassed by way of written submissions. On the 19th February, 2024 the applicant filed his written submissions of even date where he raised two issues for determination as listed below: -
 1. Whether there is inordinate delay in bringing this application.
 2. Whether the application should be allowed in the interest of justice.
10. On the first issue, the applicant submitted that the suit was prosecuted by a personal attorney of the deceased plaintiff and that when the plaintiff passed on, the power of attorney ended with his demise, and the suit thereafter became a family matter.
11. The applicant submitted that the delay of 3 months in bringing the application cannot be said to be inordinate since the family needed to sit and discuss. Also, that the family still intends to prosecute the suit, as the suit land is in their occupation.
12. On the second issue, the applicant submitted that this is a case of adverse possession, where the deceased plaintiff has resided on the suit land for 41 years and it is in the interest of justice that the application be allowed in order for the estate to ventilate the case left pending by the deceased.
13. On the 15th February, 2024 the defendant/respondent filed his written submissions of even date where he raised two issues for determination as follows: -



- a. Whether the applicant’s motion satisfies the requirements for grant of orders of revival of the suit under the provisions of Order 24 Rule 3 (1) & (2) and 24 Rule 7 (2) of the Civil Procedure Rules.
 - b. Who bears the costs of the application.
14. On the first issue, the defendant/respondent submitted that it is not disputed that the plaintiff died on 4th September, 2022. However, his personal representatives took no steps to apply for substitution within one year and subsequently, the suit abated. He submitted that where a suit has abated, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented.
 15. The defendant/respondent submitted that the application flouts the procedure as the applicant should have sought for extension of time to enable him apply for joinder as the deceased legal representative. That it is after time has been extended that the legal representative can have the capacity to apply to be made a party. The defendant/respondent relied on the cases of Said Sweilem Saanum versus Commissioner of Lands (being sued through the Attorney General) & 5 Others Civil Appeal No. 16 of 2015 [2015] eKLR and Rebecca Mijide Mungole versus Kenya Power Company Limited Civil Appeal No. 283 of 2015 [2017] eKLR.
 16. The defendant/respondent submitted that it is after time to apply has been enlarged, and the legal representative has been joined that the focus and burden shifts to him, to show cause why the abated suit should be revived. Further, that the reasons adduced for failing to make the application for joinder and revival in good time are not convincing and consist of made up stories, seeking to attract the court’s sympathy.
 17. On the second issue, the defendant/respondent submitted that costs follow event and, in this case, the application ought to be dismissed with costs.
 18. I have carefully considered the application, the replying affidavit and the written submissions filed by the rival parties and, in my view, the issue for determination is whether the application is merited.
 19. It is not in dispute that the plaintiff herein, John Salimanai Ololmaitai died on 4th September, 2022. The deceased, instituted the Originating Summons through the power of attorney donated to Emmanuel Kotoine Maitai. The applicant herein contended that the power of attorney died with the plaintiff and since Emmanuel Kotoine Maitai did not have capacity upon the death of the plaintiff, it took him time to obtain grant for purposes of prosecuting the instant suit.
 20. Order 24 of the Civil Procedure Rules provides as follows: -
 - “ 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
 2.
 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 sub-rule (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.

4.

5.

6.

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".(with emphasis)

21. It will be seen from a reading of the above, that the suit against the defendant/respondent abated on 4th September, 2023, which necessitated the filing of the instant application.
22. The instant application was filed on 13th December, 2023 seeking revival of the suit, and that the applicant herein do substitute the deceased plaintiff.
23. However, the applicant did not seek for extension of time as rightly averred by the defendant/respondent to enable this court to consider whether indeed, sufficient causes have been shown to grant the said orders.
24. I place reliance in the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, where the Court of Appeal held as follows: -

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the



suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of *Joseph Gachubi Muthanji* (supra) was therefore right in dealing with that aspect of the application in the manner he did.”(with emphasis)

25. From the above, the applicant herein has not followed due procedure in seeking extension of time after the abatement of the suit and for that reason, the application must fail.
26. The Notice of Motion Application dated 13th December, 2023 is hereby dismissed. I make no orders as to costs.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 19TH DAY OF MARCH, 2024.

HON. MBOGO C.G.

JUDGE

19/03/2024

In the presence of: -

Mr. Meyoki Pere – C. A

