Karega & 17 others v Nthautho (Environment and Land Appeal 104 of 2014) [2025] KEELC 3041 (KLR) (25 February 2025) (Ruling)

Neutral citation: [2025] KEELC 3041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL 104 OF 2014

AK BOR, J

FEBRUARY 25, 2025

BETWEEN

ROBERT NJERU KAREGA & 17 OTHERS ..... PLAINTIFF

AND

MUTOKAA NTHAUTHO ..... DEFENDANT

RULING

1. The Plaintiffs brought the application dated 7/11/2022 seeking enlargement of time within which to apply to substitute the dead defendant with his legal representatives and for the court to substitute the deceased defendant with his legal representatives and proceed with the suit. They also sought to have the suit revived and for it to proceed from where it abated.

2. The application was made on the grounds that the Defendant died during the pendency of this suit and the suit abated after one year pursuant to Order 24 of the Civil Procedure Rules.

3. The reason given by the Plaintiffs for failing to apply for substitution of the Defendant within time was that they relied on the counsel of their advocate who advised them to await the outcome of ELC Petition No. 2 of 2018 which raised issues similar to the ones in this case. They urged that the mistake of their advocate should not be visited upon them. Further, that the grant of representation to the defendant's estate was confirmed in favour of Virginia Ngunyi Mutokaaa and James Njue Mutokaa Siakago Succession Cause No. 47 of 2019 on the 16/8/2019 but has since been stayed. The Plaintiffs contended that no prejudice would be occasioned to the Defendant or his estate if the application were allowed.

4. John Mwaniki Munyi, the 7th Plaintiff, swore the affidavit in support of the application and attached a copy of the certificate of confirmation of grant issued on 16/8/2019 together with the order dated 29/6/2022 staying its execution.

5. The application was opposed through the replying affidavit of the 1st Intended Defendant, Virginia Ngunyi Mutokaa who averred that she was the widow of the deceased defendant and the administrator of his estate together with her son James Njue Mutokaa. She urged that the application was res judicata having been dealt with by this court in its ruling of 6/10/2022. Further, that the delay in prosecuting this suit was inordinate and the reasons given by the Plaintiffs were inexcusable. The administrators of the Defendant's estate averred that they would be greatly prejudiced if the application were allowed and prayed for its dismissal.

6. The Plaintiffs submitted that the present application was not res judicata and contended that the previous application was dismissed for being incurably defective in form as it omitted to seek the enlargement of time which is a prerequisite for consideration of an application for substitution of a deceased litigant and the revival of an abated suit. They urged that they had made good the error and addressed the defect in the previous application by including a prayer for enlargement of time. They emphasised that the delay in applying for substitution of the dead Defendant was based on the legal advice they got from their former counsel which was an honest mistake and should not be held against them.

7. The 1st and 2nd Intended Defendants submitted that a final determination having been rendered on the issues directly and substantially in issue in the current application, the court is bound by the said ruling and is functus officio. Further, that sufficient cause had not been shown by the Plaintiffs to allow the application as was observed by this court in its ruling. They added that no evidence had been proffered to show that any court orders existed for stay which prevented the Plaintiff's from prosecuting this suit as alleged. They implored the court to dismiss the application.

8. The issue for determination is whether the court should enlarge the time for the Plaintiffs to apply to substitute the dead defendant and substitute him, revive the abated suit and allow it to proceed from the point it had reached when it abated.

9. From the court record, it is apparent that on 15/2/2021, the Plaintiffs filed a similar application seeking to substitute the Defendant, revive the suit, amend the plaint and adopt a consent annexed to the application. That application was made on the same grounds as the present application. In its ruling delivered on 6/10/2022, the court disallowed the application because it was not satisfied that there was sufficient cause shown for the delay in reviving the suit. The court also found that that application was defective for failing to seek the extension of time to bring the application which is a prerequisite to reviving an abated suit under the law.

10. The Plaintiffs now claim that they have rectified the error in the present application. The court has to be satisfied that there are sufficient reasons advanced for the delay in reviving the suit as stipulated by Order 24 Rule 7 of the Civil Procedure Rules. In its ruling of 6/10/2022, this court pronounced itself on that issue and it bears no repeating. The court also dealt with the issue as to whether the outcome of ELC Petition No. 2 of 2018 would affect the subject matter in this suit and found that the reliefs sought in the two suits were different. The Learned Judge did not see how the outcome of the petition would have prevented the Plaintiffs from prosecuting this case. The Judge also found that no sufficient cause had been shown as to why the applicants delayed in reviving the suit which abated on 3/8/2019 after the Defendant died on 3/8/2018. The Plaintiffs seek to litigate the same issues again in the present application yet this court already pronounced itself on those issues.

11. The court declines to grant the orders sought in the application dated 7/11/2022. Each party will bear its costs.

DATED AT EMBU THIS 25TH DAY OF FEBRUARY 2025.

K. BOR

JUDGE

In the presence of: -

Ms. N. Okumaruti holding brief for Mr. B. Khaemba for the Plaintiffs

Ms. Harriet- Court Assistant

No appearance for the Defendant