IN THE COURT OF APPEAL

AT NYERI

(CORAM: NAMBUYE, SICHALE & KANTAI JJ.A)

CIVIL APPEAL NO. 51 OF 2016

BETWEEN

MAINA JOHANA MIANO ALIAS

JOSEPH MAINA MIANO .....APPELLANT

AND

LEAH WANYARA GICHOHI ..... 1ST RESPONDENT

LEAH WAMBUI GICHOHI ..... 2ND RESPONDENT

(Being an appeal from the Ruling of the High Court of Kenya at Nyeri (L.N Waithaka) dated 1st March 2016

In

E.L.C Civil Appeal No. 14 of 2015) Formerly Nyeri HCC Appeal No. 8 of 1973)

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JUDGMENT OF THE COURT

This is an appeal emanating from a ruling of **Waithaka, J.** dated **1st March 2016.** A brief background to this appeal is that **Peterson Gichohi Hiuhu** (hereinafter the deceased) filed Kerugoya District Court Civil **Appeal No. 2 of 1972** against the decision of Kerugoya DM III in **Succession Cause No. 29 of 1970** that had ordered that the suit land **Mwerua/Mukure/235** be registered in the name of **Maina Johana Miano** alias **Joseph Maina Miano** the appellant herein. The deceased was unsuccessful and he lodged **Nyeri HCCA No. 8 of 1973** which remained unprosecuted until the demise of the deceased on **23rd September, 1998.** On **21st July, 2009**, **Makhandia, J** (as he then was) marked the appeal as having abated. It is this abatement that led to the filing of the Notice of Motion dated **27th March, 2014** by **Leah Gichohi** and **Leah Wambui Gichohi**, the 1st and 2nd respondents herein. In the main, the respondents sought the following orders that:

> ***"(2) The Honourable court be pleased to substitute the applicants herein in place of the deceased appellant Peterson Gichohi Hiuhu,***
>
> ***(3) The Honourable court be pleased to set aside and or vacate the order issued on 21st July, 2009, marking the appeal herein as abated,***
>
> ***(4) The Honourable court be pleased to revive the appeal herein to enable the same be heard and determined to its final conclusion,***
>
> ***(5) Pending the hearing and determination of the application herein, the Honourable court be pleased to order the stay of execution of the orders, judgments and/or decree of the lower court issued in the District Magistrate's Court at Kerugoya in Civil Appeal No. 2 of 1972,***
>
> ***(6) Upon granting the orders sought in this application and pending the hearing and determination of the appeal herein, the Honourable court be pleased to order stay of execution of the orders, judgment and/or decree of the lower court issued in the***

District Magistrate's Court at Kerugoya in Civil Appeal No. 2 of 1972".

The motion was heard by **Waithaka, J** who in a ruling dated **1st March, 2016** rendered herself thus:

> **"The upshot of the foregoing is that the application dated 27th March, 2015 is allowed in terms of prayers 2, 3 and 4. In lieu of the order of stay sought in prayer 5 and 6, an order of maintenance of status quo shall issue pending the hearing and determination of the appeal".**

The appellant was dissatisfied with the said outcome, hence this appeal. In a Memorandum of Appeal dated **24th August, 2016**, the appellant faulted the learned judge for grounds that:

(i) There was no competent appeal to warrant substitution as the same had abated by operation of the law

(ii) The learned judge failed to exercise her judicial discretion properly in reviving the abated appeal

(iii) That though the delay was long and inordinate the learned judge proceeded to allow the application to revive the appeal.

(iv) The circumstances of the case were not proper for allowing the application.

(v) The learned judge granted orders of maintenance of status quo despite finding that the application for stay of execution was *res judicata.*

(vi) There was no application for extension of time to substitute the deceased under Order 50 Rule 5 of the Civil Procedure Rules.

(vii) The learned judge failed to consider the appellant's replying affidavit and submissions.

(viii) The learned judge failed to consider that the effect of her decision was to annul the ruling of **Sergon J.**

On **26th March, 2019,** the appeal came before us for plenary hearing. The appellant wholly relied on his written submissions filed on his behalf on **5th February, 2018** by his counsel, **Kiguru Kahigah** who inspite of service of a hearing notice did not attend the hearing of the appeal. It was submitted that the learned judge failed to consider that the application for revival and substitution was made after an inordinate delay of fifteen (15) years; that the delay was not only inordinate but that the respondents had failed to sufficiently explain it. The appellant was of the view that the respondents' alleged illness, old age and lack of guidance by their advocates were not valid reasons to satisfactorily explain the inordinate delay and that no medical records were produced before court to prove that the respondents were indisposed for fifteen (15) years. It was further contended that the respondents had the option of instructing another legal counsel if they were dissatisfied with their then counsel, noting that the appeal was filed in 1973 and by the time of the deceased's death in 1998 the matter had not been concluded and that this long delay was proof of indolence on the part of the respondents. In addition, the learned judge was faulted for granting an order of status quo yet the same had not been sought by the respondents; that the decision of the learned judge to allow the substitution in absence of an application for extension of time under Order 50 Rule 5 of the Civil Procedure Rules was not in keeping with the law; that the appellant's submissions were never considered despite containing sufficient reasons and various legal issues in opposition to the motion, and that the learned judge failed to realise the effect of her decision on the ruling of **Sergon, J** which had revoked the letters of administration issued to the respondents in respect of the suit property. The appellant urged this court to allow the appeal, set aside the judgment of **Waithaka, J.** and substitute it with an order dismissing the respondents' application dated **27th March 2015** with costs.

On behalf of the respondents, learned counsel **Mr. P.K Njuguna** opposed the appeal. Firstly, on the exercise of judicial discretion, counsel submitted that the learned judge considered the pros and cons of reviving the abated appeal and that it was in the interest of justice for the appeal to be heard on merit. Further, that Article 159(2) (d) of the Constitution, Sections 1A, 1B, 3A and 3B of the Civil Procedure Act enjoins a judicial officer to ensure the attainment of the overriding objectives of fairness and justice which was the case herein. Secondly, counsel asserted that the delay was adequately explained and the learned judge gave reasons why she was so convinced.

Finally, counsel submitted that the appellant's submissions were properly analysed by the judge. Counsel urged the court to find that the appeal had no merit and should therefore be dismissed with costs.

We have considered the oral rival submissions of counsel, the appellant's written submissions filed on **5th February, 2018,** the record and the law.

The dispute between the parties which is centred on land, commenced over four decades ago. The land in dispute was originally owned by one **Johana Miano Warungu** (hereinafter '**Warungu')** and measured approximately 8.5 acres. In 1950, the deceased (**Peterson Gichohi Hiuhu**) entered into an arrangement with **Warungu** for purchase of the land. As per customary laws, the land was supposed to have been inherited by **Warungu's** son **Karimi Johana**, who unfortunately passed away on **24th December 1958,** but **Warungu** chose to sell the land to the deceased instead. In anticipation of the sale, the deceased was allowed possession of the land before payment was finalised in the year 1964. An application was made for the transmission of that piece of land under African Customary Law to the deceased and in **Succession Cause No. 29 of 1970**, the deceased was found to be the legal heir of the land. The deceased proceeded with the transfer and eventually, in 1972, he was able to procure title to the suit land in his name, the land now identified as **MWERUA/MUKURE/235.** One **Jotham Ngii**, however, contested this determination. Declaring that he was acting on behalf of Karimi Johana's younger brother, **Maina**, he filed **Civil Appeal No. 2 of 1972**. The judgment therein declared **Maina** to be the rightful heir of the

land. The deceased eventually appealed against that decision in the High Court at Nairobi, **Civil Appeal No. 4 of 1973.** The same was later transferred to Nyeri where it was renumbered as **Civil Appeal No. 8 of 1973.** Again, the same was later transferred to the Environment & Land Court and became **E.L.C Civil Appeal No. 14 of 2015**.

The appeal went unheard for many years. The matter was even referred to arbitration for settlement though nothing came out of it. As the matter dragged in court, the deceased's health took a turn for the worse. The respondents explained that the deceased's ill-health was one of the factors that led to the delay in the hearing of the appeal; that other factors included multiple proceedings surrounding the suit property which had to be heard and dealt with before the appeal, as well as lack of proper and sound legal advice, the misplacement of the court file which necessitated reconstruction of the entire file when it could not be traced. Further that matters got worse afterthe death of the deceased on **23rd September 1998** when the family entered into a state of disarray and it was only in 2002 that the respondents applied for a grant of letters of administration of the deceased's estate. The letters of administration were issued to the respondents who were widows of the deceased. In the meantime, **Maina applied** to have the grant of letters of administration, in respect of the suit property, revoked. The application for revocation was contested and was finally resolved about ten years later when **Sergon, J.** allowed the application and revoked the letters of administration issued to the respondents in respect of the suit property. In addition to revocation of the letters of administration in respect of the suit property, the respondents submitted that matters were further complicated when **Sergon, J.** allowed the application for the cancellation of title numbers derived from the parent title **MWERUA/MUKURE/235.** The suit property had been subdivided to give portions thereof to the beneficiaries of the estate. Unfortunately, as per the respondents, the learned judge also ordered the cancellation of property identified as **MWERUA/MUKURE/1565**, which had not been derived from the parent title of the suit land. The respondent filed an appeal against this decision to the Court of Appeal, which on the advice of their advocate, was eventually withdrawn. The respondents were instead advised to file a fresh application for grant of letters of administration in respect of the suit property

This application was struck out at the instance of **Maina**, the appellant, as an abuse of the court process. The respondents contended that in their confusion, the respondents, as administrators of the deceased's estate, had neglected to file for substitution of the deceased in the appeal as required in law. **Maina,** acting in person, consequently filed an application on **8th July 2009**, seeking to have the appeal marked as abated. This application was served upon the respondents' advocates who had at that time closed shop. According to the respondents, the application was therefore never received by the respondents and that the application for abatement was granted in the respondents' absence and without their knowledge. Apprehensive that there was nothing to bar the appellant from having the title transferred to himself, the respondents filed an application dated **27th March 2015** for: substitution of the deceased with the respondents; the abated appeal to be revived; and an order for stay of execution. The respondents had also filed an application dated **26th March, 2015** seeking leave for the firm of **P.K Njuguna & Company Advocates** (incoming advocates) to come on record in place of **Munene Muriuki & Company Advocates** (outgoing advocates).

The application dated **27th March 2015** was opposed by the appellants through a replying affidavit sworn on **4th June 2015**. In summary the appellant deposed that the delay was inordinate; that the issues relating to the suit property had already been dealt with by courts of competent jurisdiction; that the respondents' conduct reveals abuse of the court process; and that the application for revival of the abated appeal is an afterthought. The appellant urged the court to dismiss the application with costs.

Waithaka, J. heard the applications. The learned judge found that since there was a consent between the incoming and outgoing firm of advocates, as per Order 9 Rule 9, the application was not necessary but nevertheless allowed it since there was no prejudice occasioned to the parties. On the second contested application, the learned judge considered the delay and the explanations put forward by the respondents to explain the delay as well as case law, in particular, in **Issa Masudi Mwabumba v Alice Kavenya Mutunga & 4 others [2012] eKLR,** the judge was of the view that the delay had been adequately explained. In addition to the special circumstances of the case and in view of the fact that the respondents had been in possession of the suit property for over four decades, the judge was of the opinion that the appeal ought to be heard and determined on merit. Substitution was allowed after the judge extended time *suo motu* for the same in view of the overriding objectives of the case. The judge also felt that the situation commended itself for maintenance of the status quo. The respondents were however condemned to pay the costs of both applications.

It is not in dispute that the dispute herein has been long outstanding.

The deceased filed an appeal in the year **1973.** On **23rd September, 1998**, the appeal was marked as abated. It was not until **27th March, 2014** that the respondents filed the application that was determined by **Waithaka, J** in the ruling, the subject of this appeal. In her ruling, the judge took into consideration the fact that the respondents had been in occupation of the suit land for over 40 years (since 1959). She also considered that the reasons advanced for the delay were plausible and sufficiently explained. She cited the decision of **Issa Masudi Mwabumba vs. Alice Kavenya Mutunga & 4 others [2012] eKLR** where **Koome, JA** stated:

> ***"…The principles to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a long line of authorities. See the case of Leo Sila Mutiso vs. Rose, CA NAI 255 of 1997 (unreported) … Besides the principles set out in the case of Leo (supra), I am also guided by the provisions of Section 3A and 3B of the Appellate jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal at the end of the day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in Article 159 …. Bearing in mind those overarching objectives, this appeal deserves to be revived for the following reasons: firstly, the appellant was acting in person when he filed the appeal. Secondly, an advocate was instructed but he did not take the necessary steps to revive the appeal; although no reasons have been given for the advocate's failure, his failure or mistakes cannot be attributed to the applicant. Thirdly, the applicant has a limited grant of letters of administration in respect of the deceased's estate. Although the limited grant gives the applicant power to file a suit, that power can also be construed to include prosecuting an appeal. The fourth reason for allowing the revival of the suit is for reasons that the dispute involves ownership of land and a durable solution to that addresses the substantive issues is always better option.***

The respondents' complaint that this matter has taken several decades and in particular, this application was made after two (2) years and eight (8) months had passed are valid concerns. It is also obvious the respondents will continue to be inconvenienced by the prolonged litigation, but in my humble view, that is the price one has to pay while defending their rights and the prejudice can be compensated by costs. …"

In her ruling, it is clear that the judge in exercise of her discretion, gave weighty consideration to substantive justice. She was conscious of the need not to lock out a party on the basis of a technicality, more so given the fact that the respondents have been in occupation of the suit land for over 40 decades. We too are in agreement that the appeal at the High Court took an unduly long period of time. But the facts as narrated above clearly show that the appeal was riddled by many ills – the deceased's ill-health and his subsequent death; the respondents' advanced ages and lack of proper legal counsel, multiple applications touching on the suit land as well as disappearance of the court file that necessitated reconstruction. It is on the basis of the above multiple factors that the judge exercised her discretion in favour of the appellants.

The judge in considering the application for substitution and revival of the abated appeal was exercising discretionary powers. The principles to be considered in the exercise of such a discretion are set out in the case of **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where this Court held *inter alia:*

"2. The Court of Appeal may only interfere with the exercise of the court's judicial discretion if satisfied:

(a) the judge misdirected himself on law; or

(b) that he misapprehended the facts; or

(c) that he took into account of considerations of which he should not have taken account; or

(d) that he failed to take into account of considerations of which he should have taken account; or

(e) that his decision, albeit a discretionary one, was plainly wrong."

As this Court has often stated, it is hesitant to upset a ruling arrived at in the exercise of discretion. It is also important to point out that Rule 99 (3) of the Court of Appeal rules provide:

"3. The person claiming to be the legal representative of a deceased party to an appeal may apply for an order to revive an appeal which has abated; and, if it is proved that the legal representative prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit".

Additionally, in **Leo Sila Mutiso vs. Rose Hellen Wangari Mwangi [CA NAI. 255 of 1997]**, this Court stated:

"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this Court takes into account in deciding whether to grant an extension of time are, first, the length of delay; secondly, the reason for the delay; thirdly, (possibly), the chances of the appeal succeeding if the application is granted and fourthly; the degree of prejudice to the respondent if the application is granted".

And in **Joseph Gachuhi Muthanji vs. Mary Wambui Njuguna Nyeri CA No. 34 of 2014:**

"In this case, it is not in dispute that the 2nd plaintiff died on 8th October, 1998 while the defendant died on 16th December, 2009. No application was made within a year of their death to substitute them with their legal representatives. Consequently, the 2nd plaintiff's suit had abated by the time the respondent filed the application dated 28th February, 2011. However, the proviso to Order 24 rule 3 allows the court on reasonable grounds to extend the time within which to seek substitution.

"Sufficient cause or good cause in law means:

'the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused'. See Black's Law Dictionary, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful, should not be an explanation that leaves doubt in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events"."

The learned judge considered the legal principles enunciated above and rendered herself as follows:

"I hold the view that the delay, though inordinate, has been adequately explained in that the applicants who were all along represented by advocates were misadvised on how to approach the dispute between them and the respondent. Bearing in mind the special circumstances of this case, the applicants are in occupation of the suit property and have been in occupation for over four decades. I hold the view that it is in the interest of justice to have the issues raised concerning the suit property, and which issues I find to be arguable, heard and determined on their merit".

We too are in agreement. The special circumstances in this matter dictated that the respondents be substituted in order to have the appeal heard on merit. It is also important to point out that the orders sought before **Waithaka,** J centred principally on revival of the appeal which had been marked as abated by **Makhandia, J.** We find that contrary to the appellant's submissions, **Sergon, J** did not deal with issues of abatement.

It is in view of the foregoing that we find that this appeal is bereft of merit. It is hereby dismissed with costs.

Dated and Delivered at Nairobi this 8th day of November, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR