



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & ODEK, JJ.A)**

**CIVIL APPEAL NO. 34 OF 2014**

**BETWEEN**

**JOSEPH GACHUHI MUTHANJI ..... APPELLANT**

**AND**

**MARY WAMBUI NJUNGUNA ..... RESPONDENT**

*(An appeal from the ruling of the High Court at Nyeri (Sergon, J.) dated 16<sup>th</sup> December, 2013*

**in**

**H.C.C.C No. 150 of 1974)**

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**JUDGMENT OF THE COURT**

1. Mbugua Wangige and David Njuguna Nyoro (plaintiffs) filed suit in the High Court against Muthanji Wangige (defendant). The parties were related; Mbugua Wangige and Muthanji Wangige were brothers while David Njuguna Nyoro was their nephew. It was the plaintiffs' case that the defendant was registered as a trustee in respect of L.R No. 208 Kabete/Kibichiku (suit property); he held the suit property for their benefit. The plaintiffs claimed that the suit property had been bequeathed by Nyoro Wangige (deceased) to his sons namely the 1<sup>st</sup> plaintiff, the defendant and the 2<sup>nd</sup> plaintiff's father. The 1<sup>st</sup> Plaintiff sued both in his personal capacity and as an administrator of the estate of Nyoro Wangige. While the 2<sup>nd</sup> Plaintiff also sued both in his personal capacity and as an administrator of the estate of his late father.

2. In the alternative, the plaintiffs claimed that they had occupied and developed identifiable portions of the suit property since the year 1965 without the consent of the defendant; the defendant was aware of their occupation at all material time. Consequently, they averred that they were entitled to the identified portions by way of adverse possession. The plaintiffs sought transfer and registration of the identified portions in their favour.

3. The Defendant in his statement of Defence denied the existence of a trust or that the plaintiffs were entitled to the suit property through adverse possession. He maintained he was the registered proprietor of the suit property and his title was indefeasible. Following consent by the parties, the matter was referred for arbitration before clan elders. The clan elders resolved that the plaintiffs

were entitled to the identified portions of the suit property and directed transfer of the same. Aggrieved with the decision of the elders, the defendant filed an application before the High Court seeking an order setting aside the said arbitral award. On 3<sup>rd</sup> June, 1982, the arbitral award was set aside by consent and the matter was set down for hearing.

4. Subsequently, while the matter was still pending in the High Court, the 2<sup>nd</sup> plaintiff died on 5<sup>th</sup> October, 1998 while the defendant died on 16<sup>th</sup> December, 2009. Thereafter, the respondent herein filed an application dated 28<sup>th</sup> February, 2011 seeking to be substituted with the 2<sup>nd</sup> plaintiff and the substitution of the defendant with the appellant and one James Mbugua Muthanji. The respondent is the 2<sup>nd</sup> plaintiff's widow while the appellant is the defendant's son. The respondent deposed that she obtained letters of administration over her husband's estate on 7<sup>th</sup> July, 2004 while the appellant and James Mbugua Muthanji had obtained letters of administration of their father's estate on 30<sup>th</sup> July, 2010. She further deposed that it was just and mete for the substitution to be allowed so that the suit could proceed. The respondent also sought an order to revive the suit on behalf of the 2<sup>nd</sup> plaintiff.

5. In opposing the application, the appellant deposed that the same was incompetent and bad in law having been filed out of time. The application had been brought after over 13 years since the death of the 2<sup>nd</sup> plaintiff.

6. After considering the application on merit, the learned Judge (Sergon, J.) vide a ruling dated 16<sup>th</sup> December, 2013 allowed the application as prayed. It is that decision that has provoked this appeal based on the following grounds:-

- ***The advocate of the respondent filed the Notice of Motion dated 28<sup>th</sup> February, 2011 in contravention of Order 9 Rule 7 and the application was fatally defective.***
- ***The application nevertheless was statute barred under Order 4(3) and ought to have been disallowed, as the suit had abated.***
- ***The learned Judge erred in law in finding that Order 24(7)(2) was applicable in this Motion, and the court had no discretion in the matter as learned Judge assumed as 'wide discretion' as no sufficient cause was shown for such substitution. Sic.***
- ***The respondent failed to satisfy the court that she was prevented from (sic) sufficient cause in her affidavit and her erstwhile counsel only stated that the application is under Order 24 rule 7(2).***

7. Mr. Mahan, learned counsel for the appellant, submitted that the respondent's application was incompetent under **Order 9 rule 7** of the **Civil Procedure Rules**; the respondent had no authority to prosecute the application. According to him, the main issue was whether the application for substitution was made within one year. Mr. Mahan faulted the learned Judge for holding that he had discretion to issue the order sought under **Order 24 rule 7** of the **Civil Procedure Rules** yet the respondent had not made any application for extension of time to file the application for substitution. He argued that the learned Judge erroneously moved himself to extend time. Mr. Mahan further submitted that the respondent had not demonstrated any sufficient cause to warrant the learned Judge to exercise his discretion in her favour. He maintained that the learned Judge misdirected himself and urged us to allow the appeal.

8. Mr. Muhoho, learned counsel for the respondent, conceded that the application was not filed within one year of the 2<sup>nd</sup> plaintiff's death. He submitted that the respondent had sought in the said application revival of the 2<sup>nd</sup> plaintiff's suit. He argued that it was in the interest of justice for the High Court's decision to be upheld.

9. We have considered the grounds of appeal, submissions by counsel and the law. On the issue of whether the applicant's advocate was properly on record, we take note that after the death of the 2<sup>nd</sup> plaintiff and the plaintiffs' former advocate, Mr. Gatimu, the High Court adjourned the suit on 28<sup>th</sup> July, 2004 to enable the 1<sup>st</sup> plaintiff appoint another advocate. From the record before us, we note that the respondent's advocate, Mr. Muhoho began appearing for the plaintiffs' on 4<sup>th</sup> October, 2010. As to whether he was properly on record we cannot see any Notice of Change of advocates or Notice of his appointment on the record. We also note that the appellant never raised the issue of Mr. Muhoho's appearance until the application for substitution was filed. Without more evidence, we are unable to determine if the applicant's advocate was properly on record.

10. The learned Judge in considering the application for substitution and revival of the suit was exercising his discretionary power. That being the case, we can only interfere with his exercise of such discretionary powers under certain well defined principles. These principles are succinctly spelt 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.”***

11. ***Order 24 rule 3*** of the ***Civil Procedure Rules*** provide in part as follows:-

***“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....”***

In this case, it is not in dispute that the 2<sup>nd</sup> plaintiff died on 8<sup>th</sup> October, 1998 while the defendant died on 16<sup>th</sup> December, 2009. No application was made within a year of their death to substitute them with their legal representatives. Consequently, the 2<sup>nd</sup> Plaintiff's suit had abated by the time the respondent filed the application dated 28<sup>th</sup> 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. Further ***Order 24 rule 7*** provides:-

***“7(1) where the suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***

***(2) the plaintiff or person claiming to be the legal representative of a deceased plaintiff or the trustee or the 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.” Emphasis added.**

12. Based on the foregoing, the High Court was required to consider whether the respondent had demonstrated sufficient cause for not seeking substitution within the required time frame. Musinga, J.A while considering the meaning of sufficient cause in ***The Hon. Attorney General – vs- The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011*** observed as follows:

***“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, 9<sup>th</sup> Edition, page 251.***

***Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It 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.”***

13. We take note that the 2<sup>nd</sup> plaintiff died on 5<sup>th</sup> October, 1998; the respondent obtained the letters of administration over the 2<sup>nd</sup> plaintiff’s estate on 7<sup>th</sup> July, 2004; the application for substitution and revival of the suit dated 28<sup>th</sup> February, 2011 was filed on 1<sup>st</sup> March, 2011. Perhaps, the delay of filing the application for substitution from the date of the 2<sup>nd</sup> plaintiff’s death to 7<sup>th</sup> July, 2004 could be attributed to the delay in obtaining letters of administration. However, we note that the respondent did not give any explanation as to the delay from 7<sup>th</sup> July, 2004 to 28<sup>th</sup> February, 2011, a period of almost 7 years. That being the case we find that there was no reasonable cause upon which the learned Judge (Sergon, J.) exercised his discretion in favour of the respondent. We find that the learned Judge misdirected himself in this case by allowing the application for substitution. Further, the respondent conceded that an application for extension of time to revive the abated suit had never in fact been made.

14. The upshot of the foregoing is that the appeal herein has merit and is hereby allowed. Consequently, we set aside the High Court’s ruling dated 16<sup>th</sup> December, 2013 allowing the respondent’s application and dismiss the same with costs to the appellant. The appellant shall also have costs of this appeal.

***Dated and delivered at Nyeri this 25<sup>th</sup> day of November, 2014.***

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***J. OTIENO-ODEK***

.....

***JUDGE OF APPEAL***

I certify that this is a  
true copy of the original.

***DEPUTY REGISTRAR***