Mageka v Good News Mission Kenya; Ibongia (Applicant) (Environment & Land Case 18 of 2019) [2024] KEELC 6116 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6116 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT & LAND CASE 18 OF 2019

M SILA, J

SEPTEMBER 26, 2024

BETWEEN

JOHN THOMAS IBONGIA MAGEKA ..... PLAINTIFF

AND

GOOD NEWS MISSION KENYA ..... DEFENDANT

AND

TABITHA GESARE IBONGIA ..... APPLICANT

RULING

1. The application before me is that dated 8 March 2024 filed by one Tabitha Gesare Ibongia who is administrator of the estate of the deceased plaintiff. In it the applicant seeks the following orders:

    i. That the orders dismissing the suit herein issued on 14 February 2024 be reviewed and/or set aside, varied or vacated.

    ii. That further and/or in the alternative to (i) above, this Honourable Court be pleased to order that the plaintiff's abated suit herein be and is hereby reviewed (sic).

    iii. That upon grant of prayer (ii) above the applicant herein, Tabitha Gesare Ibongia be appointed and/or substituted as the plaintiff herein.

    iv. That consequent upon the foregoing, the court be pleased to give further directions respecting further steps to be taken towards hearing and determination of the plaintiff's suit.

2. The application is opposed.

3. To put matters into context, this suit was commenced through a plaint filed on 20 May 2019 by one John Thomas Ibongia Mageka (now deceased). In the plaint he pleaded that prior to 15 March 2011, he was the registered proprietor of the land parcel Central Kitutu/Daraja Mbili/3250 measuring 0.11

ha. He alleged that the defendant fraudulently excised a portion of it and registered this portion as Central Kitutu/Daraja Mbili/3896. In the suit he asked for an order of cancellation of the titles No. 3896 and 3897 which resulted from a subdivision of the parcel No. 3250 so that the title reverts back to the parcel No. 3250 in his name.

4. The position of the respondent, a church organization, was that the plaintiff had gifted part of his land to her after the respondent had organized a medical camp that successfully dealt with a medical condition that the plaintiff had. She averred that the plaintiff subdivided his land into two portions, gifted one to the church, and sold the other to a third party who in turn sold that portion to another person. Before the suit could be heard the plaintiff died on 3 July 2022.

5. On 25 September 2023, the applicant filed an application of even date, seeking to substitute the deceased plaintiff. That application was opposed by the respondent inter alia on the ground that the application was coming too late in the day as the suit had already abated pursuant to Order 24 Rule 3 and there was no prayer to have the suit revived. The application was argued and I delivered ruling on 14 February 2024. I found that the application had been filed outside the one year allowed for substitution under Order 24 Rule 3 (2) and it had abated. I was not persuaded that this was a fit case to exercise my discretion to revive the abated suit or allow the application for substitution out of time. I interrogated the provisions of Order 24 particularly Order 24 Rule 7 (2) which permits the revival of an abated suit. I found that the court is at liberty to revive an abated suit if the applicant proves that "he was prevented by any sufficient cause from continuing the suit." It was my view that where no sufficient cause is shown then the court ordinarily ought to decline an application to revive an abated suit and the burden of demonstrating sufficient cause rested on the applicant. I inter alia expressed myself as follows:

> 14. An applicant who files an application for substitution after one year of death needs to exercise caution and needs to demonstrate the sufficient cause or the good reason for not filing his application within the specified time otherwise, he risks dismissal of his application. Such applicant ought never to approach court casually and ought never to imagine that the application for substitution will be allowed as a matter of course. In other words, you cannot casually walk into court with an application for substitution which has been filed more than one year of death and expect to be automatically granted the order without giving good reason or demonstrating sufficient cause why you did not file your application within the prescribed period of one year.

6. I did not find a single word, sentence, or paragraph, within that application, which attempted to give an explanation as to why the application was filed beyond one year of death. Given that position, I was not persuaded to allow the application and I dismissed it.

7. This application was then filed. I see that it has been brought pursuant to the provisions of Order 24 Rule 7, Order 50 Rule 1, and Section 1A, 1B, and 63 (e) of the *Civil Procedure Act*. I have already spelt out the prayers at the beginning of this ruling. The application is based on the grounds that in the ruling of 14 February 2024 this court held that the application had been filed out of time; that the court found that the application had been filed out of time without any explanation tendered for the late filing; that the applicant had made considerable attempts to defeat the one year time frame as disclosed herein; that the delay was not inordinate or inexcusable; that the applicant's late filing of the application was occasioned by honest and/or inadvertent delays and circumstances beyond her control and should not be detrimentally visited on her; that the estate of the deceased plaintiff will suffer loss of the suit property if the dismissal order is not set aside; that the court has jurisdiction to reinstate and/or revive the abated suit; that unless the prayers are issued the applicant will be condemned unheard

and shut out of justice despite having an arguable case which ought to be ventilated in court at a full hearing; that there will be no prejudice to the respondent that is not curable by costs.

8. The application is supported by the affidavit of the applicant. She has more or less given a chronology of events after the death of the plaintiff which led to her filing the application for substitution after one year.

9. The application is opposed vide a replying affidavit sworn by Paul Oseko Osoro, a church elder of the respondent. He has deposed inter alia that it was the duty of the applicant to fast-track issuance of grant of letters of administration and the suit.

10. The application was argued through written submissions and I have taken note of the submissions filed by counsel for the applicant and respondent.

11. My view of the application is that it is res judicata in so far as the issue of substitution is concerned. When I considered the first application dated 20 September 2024, I also considered it as an application brought under Order 24 Rule 7 i.e. an application for revival of an abated suit, for reason that the application for substitution was being filed after the suit had already abated. In my opinion, where an application for substitution is being filed after one year then the court must be invited to look into whether to revive the abated suit for there would be no point in substituting if the suit will not be revived. In my ruling of 14 February 2024, I addressed myself fully on whether I should allow the revival of the abated suit and whether I should allow the application for substitution. What the applicant is doing is now trying is to have the application heard afresh but I am afraid I do not have jurisdiction to hear for a second time a similar application. Neither can I sit on appeal against my own decision.

12. I observe that the subject application is brought inter alia pursuant to the provisions of Section 63 (e) of the *Civil Procedure Act* but I do not see the applicability of Section 63 (e) of the said *Act* which is drawn as follows:

> 63. Supplemental proceedings
>
> In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed –
>
> (a) - (d) .....
>
> (e) make such other interlocutory orders as may appear to the court to be just and convenient.
>
> What is before me is not an application for interlocutory orders and I therefore see no place for Section 63 (e) of the *Civil Procedure Act*.

13. In his submissions, counsel for the applicant did submit that the legal basis for the application is Order 12 Rule 7, Article 50 (1) of the *Constitution* and Sections 1A, 1B and 3A of the *Civil Procedure Act*. I see no applicability of Order 12 Rule 7 of the *Civil Procedure Act*. Order 12 addresses itself to hearings and consequences of non-attendance at a hearing. Inter alia it provides for a dismissal of a suit for non-attendance at the hearing and under Rule 7 provides for the avenue to set aside or vary judgment where a suit is either dismissed or allowed under Order 12. There is nothing before court that touches on dismissal of this suit for failure to attend at any hearing. What we have is a suit that abated pursuant to the provisions of Order 24 for failure to file an application within one year of death, not a suit that was dismissed for non-attendance. Indeed, my ruling of 14 February 2024 had nothing to do with Order 12 so as to invite an application under Order 12 Rule 7.

14. Article 50 (1) of the *Constitution* which has been cited provides as follows:

> Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

Again, I see no applicability of Article 50 (1) of the *Constitution* to this application. In the dismissed application, the applicant was accorded a fair hearing in accordance with Order 24 but simply failed the test.

15. I also see no applicability of Section 1A which provides for the overriding objectives (i.e facilitation of a just, expeditious, proportionate and affordable resolution of civil disputes governed by the *Civil Procedure Act*), nor Section 1B which addresses the duty of court in furthering the overriding objectives; nor Section 3A which provides for the inherent powers of the court.

16. The issues herein squarely fall under Order 24 of the *Civil Procedure Rules* which addresses itself on death of a party, substitution, and abatement. Order 24 Rule 3 provides that where a party dies then an application for substitution needs to be filed within one year unless sufficient reason is given for not filing the application within time. An application for substitution was already filed and I did find, in my ruling of 14 February 2024, that the suit has already abated as no application for substitution was filed within one year, and I was not persuaded to revive it, as no sufficient reason was given for not filing the application within one year of death.

17. Prayers (1) and (2) of the application seem to suggest that the application is also for review though neither Section 80 of the *Civil Procedure Act*, nor Order 45 of the *Civil Procedure Rules*, which relate to review, have been cited in both application or in the submissions of counsel for the applicant. There was indeed no mention of an order for review in the said submissions. Be that as it may, even if I am to consider this as an application for review, I would still dismiss it. The parameters for review are set out in Order 45 Rule (1) which provides as follows:

> [Order 45, rule 1.] Application for review of decree or order.
>
> 1. (1) Any person considering himself aggrieved—
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

18. From the above, it will be discerned that in a review application, the applicant needs to demonstrate the following:

i. Discovery of new and important matter or evidence which could not be availed at the time the order was made despite due diligence;

ii. A mistake or error apparent on the face of record; or

iii. Any other sufficient cause.

19. It has not been suggested by the applicant that she is furnishing new evidence which she could not avail when the first application for substitution was heard. Neither have I been pointed to any mistake or error apparent on the face of record; and I am not persuaded that there is any sufficient cause demonstrated to entitle the applicant to an order of review of the ruling of 14 February 2024. I heard the application on merit following the material that the applicant supplied and in my view the material fell short of the test to permit a substitution or revival of suit after lapse of the one year.

20. If the applicant was aggrieved by my ruling, the right path, in my humble opinion, was to file an appeal, not come back to court a second time seeking similar orders or seeking review when the test for review is not met.

21. It is for the above reasons that I find no merit in this application and it is hereby dismissed with costs.

DATED AND DELIVERED THIS 26 DAY OF SEPTEMBER 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

At Kisii

Delivered in presence of:

Mr. Nyanchoga for the applicant

Ms. Kebungo for the respondent

Court Assistant – David Ochieng'