



REPUBLIC OF KENYA



KENYA LAW
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**Rono v Rono & 2 others (Environment & Land Case 18 of 2022)
[2023] KEELC 20 (KLR) (16 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 20 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 18 OF 2022
MN MWANYALE, J
JANUARY 16, 2023**

BETWEEN

OBADIAH KIPRUTO RONO APPLICANT

AND

JONATHAN KIPKEMOI RONO 1ST DEFENDANT

REJOIN INVESTMENT LIMITED 2ND DEFENDANT

ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Before me are the two applications, brought by way of notices of motion dated November 19, 2018 and September 16, 2022 both filed by applicants namely Sarah Jepkemboi Kurui and Victor Kemei as legal representatives of the estate of Obadiah Kirui (deceased).
2. The first application dated November 19, 2018 seeks the following orders that;
 - i. Spent
 - ii. Spent
 - iii. The court be pleased to make the applicants parties to this cause in place of the deceased plaintiff
 - iv. The court be pleased to issue an order reviving this suit and reinstating the interim orders of injunction preserving the suit premises pending the disposal of the suit.
 - v. Costs of the application be in the cause.
3. The application relies on the nine grounds set therein and supported by affidavits of Victor Kemei and Sarah Jepkemboi Kurui.



4. The applicants averred that they are administrators of the estate of the deceased plaintiff, who died on August 26, 2017, pursuant to grant of letters of administration issued on August 9, 2018. That delay in filing an application for substitution was occasioned by late access of funds in deceased account to enable them instruct their advocates further. Also that after the 1st and 2nd defendants moved the court to have the suit marked as abated, they delivered building materials on suit land for development and announced that the property is up for sale. Therefore that it is in the interest of justice that the orders sought are granted.
5. The application was opposed *vide* replying affidavit sworn by Jonathan Kipkemei Rono, the 1st defendant/respondent. He contended that no suit existed after August 27, 2018 upon death of the plaintiff. That the applicants sought to have sought for revival of suit after being enjoined as parties.
6. In the second notice of motion dated September 16, 2022, the applicants seek the following orders;
 - i. Spent
 - ii. That this court be pleased to enlarge time to file an application to join the applicants herein Sarah Jepkemboi Kurui and Victor Kemei the legal representatives of the estate of the plaintiff herein Obadiah Kirui.
 - iii. Costs of the application be in the cause.
7. The grounds upon which the application is premised are listed on the face of it as well as supporting affidavit of Sarah Jepkemboi Kurui. The applicants averred that they omitted inadvertently to advise their advocates to seek enlargement of time to substitute when they filed the application dated November 19, 2018.
8. This application was also opposed by the 1st defendant/respondent *vide* replying affidavit dated October 25, 2022. The 1st respondent contended that the application was not served upon his advocates as ordered by court. That the reliefs sought herein were a duplicate of reliefs sought in application dated November 19, 2018 hence an abuse of the court process. Further that the applicants are guilty of inordinate delay in filing the instant application, as a result the same ought to be struck out.
9. This court directed parties to file written submissions in respect to both applications. I have taken note of submissions dated January 8, 2019 and filed on January 19, 2019 as well as submissions dated November 4, 2022 and filed on November 11, 2022 by applicants advocates together with rival submissions filed by respondents advocate filed on November 28, 2018.

Analysis and Determination: -

10. This court has considered all the foregoing and finds it prudent to consolidate both applications for just disposal of the issues herein. The sole issue emerging for consideration is whether the applicants are entitled to the reliefs sought.
11. One of the reliefs sought by the applicants is revival of the suit after it was marked as abated on August 5, 2018.
12. In Kenya, the law that governs abatement of suits is provided under Order 24 rule 3 of the [*Civil Procedure Rules*](#). It provides as follows;

“Procedure in case of death of one of several plaintiffs’ or of sole plaintiff.



- i. 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.
 - ii. Where within one year no application is made under sub rule (i), 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.
 - iii. Provided the court may, for good reason on application, extend the time.”
13. Similarly, Order 24 rule 7 (2) of the *Civil Procedure Rules* grants the court discretionary power to revive a suit that has abated upon application by a representative of the estate of the deceased party. Order 24 rule 7 (2) of the *Civil Procedure Rules* provides;

“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.”
14. In view of the provisions cited herein above, the applicants ought to have done the following;
 - i. Have the applicants sought for enlargement of time, if yes
 - ii. Have they proved they were prevented by sufficient cause from continuing the suit?
15. In this case, the chronology of events is that the plaintiff died on August 26, 2017, suit was marked as abated on November 5, 2018 while grant of letters of administration issued on August 9, 2018. It is clear that grant was issued just before the suit abated automatically on August 26, 2018. However an application for substitution was not made within one year after death of plaintiff hence the present application for enlargement of time to revive suit and substitute deceased plaintiff.
16. Therefore the answer to the first question is in the affirmative, the applicants have sought for enlargement of time.
17. Have they proved sufficient cause from continuing suit? The applicants averred that the bank’s procedures in accessing funds in deceased account, led to delay in continuing with the suit. That due to lack of funds they were unable to instruct their advocates accordingly. The application for revival of suit and substitution was filed on November 19, 2018, 50 days after suit automatically abated and the application for enlargement of time to revive and substitute filed on September 18, 2022, which is approximately 4 years after suit abated atomically. The reason for delay as advanced, by the applicant’s advocate is inadvertent mistake on their part which ought not to be visited on their client.
18. Bearing in mind the reason and period for delay as advanced by the applicants, I wish to cite the Court of Appeal decision in the case of *Joseph Kirui v Said K Keitany* (2021) eKLR where the Court invoked the provision for Article 159 of the *Constitution* of Kenya and proceeded to allow an application to revive an abated suit filed after 6 1/2/ years from date of death of deceased.
19. In the circumstances, I will exercise discretion in favour of the applicants and allow for revival of the suit and subsequent substitution of deceased plaintiff with the applicants herein, who are undoubtedly



representatives of deceased estate. This will allow the applicants an opportunity in having their day in court and in the long run substantive justice and fairness will prevail.

20. The other relief being sought by the applicants is for reinstatement of injunctive orders preserving the suit properties.
21. Upon perusal of the court's record, this court has established that on December 14, 2018, my brother Hon Justice Ombwayo issued orders that;
 - “2. In the interest of justice, the subject matter being property parcel No NANDI/CHEPTERIT/855 and NANDI/CHEPTERIT/856 are hereby preserved. This should not be sold and or transferred.”
22. Once the suit was marked, as abated on November 5, 2018, the defendants moved the court on February 12, 2019 to have these orders vacated. However, the court dismissed that application on December 2, 2022 on grounds that it would defeat the interest of justice to let the defendants interfere with the subject matter.
23. I find no reason why this court should not reinstate the orders previously issued in order to preserve the suit properties.
24. Consequently, I take a similarly position as my brother and order that the suit properties being property parcel No Nandi/Chepterit/855 and Nandi/Chepterit/856 be preserved to the extent that they should not be sold and/or transferred until determination of this suit.
25. In essence, both applications are allowed as prayed. The plaintiff is given 14 days to amend, file and serve the plaint while the defendants are equally granted 14 days after service to amend their defence.
26. I make no orders as to costs.
27. It is so ordered.

DATED AT KAPSABET THIS 16TH DAY OF JANUARY, 2023.

HON. M. N. MWANYALE,

JUDGE.

In the presence of;

Mr. Karanja Mbugua for Defendants/Respondents

Ms. Masika holding brief for Mr. Mwetich for Plaintiff/Applicant

