



**Omoyi v Miyawa (Environment and Land Appeal E047 of 2024)
[2025] KEELC 2930 (KLR) (27 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 2930 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E047 OF 2024
SO OKONG'O, J
MARCH 27, 2025
(FORMERLY HIGH COURT CIVIL APPEAL NO. 16 OF 1992)**

BETWEEN

ALEX CHUMBE OMOYI APPELLANT

AND

ENOS KARANI MIYAWA RESPONDENT

RULING

1. The appellant and the respondent were involved in a civil suit brought by the respondent in the District Magistrate's Court at Tamu, through Misc. Application No. 4 of 1989 (hereinafter referred to as "the lower court suit"). On 8th March 1990, the lower court ordered that the dispute be referred to the Objection Board or the Panel of Elders presided over by the District Commissioner. Pending the determination of the dispute as aforesaid, the lower court issued an injunction restraining the appellant from putting up any new structures or houses on the parcel of land that was in dispute or carrying out any development thereon.
2. The appellant was dissatisfied with the decision of the lower court and filed an appeal against the same in the High Court at Kisumu in 1992. On 15th November 1994, the High Court stayed the execution of the said orders by the lower court and directed that the appeal be fixed for hearing within 3 months, failure of which the stay order would be vacated unless good reason was shown to justify the extension of the same.
3. There is no information as to what transpired in the appeal after the stay order was made on 15th November 1994. Due to the time lapse, the original court file for the appeal cannot be traced. The appellant and the respondent are both deceased. This file was opened when the administrator of the appellant's estate, John Agwenge Chumbe (hereinafter referred to as "the applicant"), moved the court



through an application dated 22nd February 2024 for the court file to be reconstructed. The order was issued on 11th April 2024.

4. What is now before the court is the applicant's application brought by way of a Notice of Motion dated 1st October 2024. In the application, the applicant has sought the following orders;
 1. That the court be pleased to revive ELCA No. E047 of 2024 (formerly High Court Civil Appeal No. 16 of 1992) for hearing.
 2. That the court be pleased to substitute the deceased appellant, John Chumbe Omoyi, with the administrator of his estate, John Chumbe and the deceased respondent, Enos Karani Miyawa, with the administrator of his estate, Andrew Matoka Okoko.
 3. That the costs of the application be provided for.
5. The application was brought on the grounds set out on the face thereof and on the affidavit of the applicant, John Agwenge Chumbe sworn on 1st October 2024. The applicant averred that the dispute between the appellant and the respondent who were both deceased concerned land parcel No. 2429 which the appellant occupied. The applicant averred that the respondent used the lower court orders the subject of this appeal to evict the appellant from his home. The applicant averred that the appellant died before prosecuting the appeal. The applicant averred that the family of the appellant commenced the process of succession in respect of the appellant's estate and was issued with a rectified grant of letters of administration on 12th May 2022.
6. The applicant averred that as the administrator of the estate of the appellant, he requested to peruse the court file for High Court Civil Appeal No. 16 of 1992 through a letter dated 25th August 2022 to prosecute the appeal, but the file could not be traced, necessitating the reconstruction of the file. The applicant averred that it was in the interest of justice that the appeal be revived so that it may be prosecuted.
7. The applicant averred that Andrew Matoka Okoko was issued with a limited Grant of Letters of Administration in respect of the estate of the deceased respondent, Enos Karani Miyawa, on 17th June 2009. The applicant averred that Andrew Matoka Okoko fraudulently caused the property in dispute to be registered in his name on 23rd August 2017.
8. The application was opposed by Andrew Matoka Okoko (hereinafter referred to as "the respondent") through a replying affidavit sworn by his advocate Agnes Akinyi on 4th November 2024. The respondent averred that the appeal had abated the appellant having died more than 1 year ago. The respondent averred that the applicant had not provided sufficient reason to warrant the revival of the appeal several years having passed since the appeal abated.

Analysis and Determination

9. The application was heard through written submissions. The applicant filed submissions dated 6th January 2025, while the respondent filed submissions dated 14th January 2025. I have considered the application together with the affidavit in support thereof. I have also considered the replying affidavit filed by the respondent in opposition to the application. The following is my view on the matter:
10. Order 24 Rule 3 of the Civil Procedure Rules provides 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, 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:

Provided the court may, for good reason on application, extend the time.”

11. Order 24 Rule 7(2) of the Civil Procedure Rules provides as follows:

“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.”

12. Order 24 Rule 9 of the Civil Procedure Rules provides as follows:

9. In the application of this Order to appeals, so far as may be, the word plaintiff shall be held to include an appellant, the word “defendant” a respondent, and the word “suit” an appeal.”

13. For reasons only known to the applicant, the applicant did not disclose the date when the appellant, Alex Chumbe Omoyi, died. In his submissions, the applicant intimated that the appellant died almost immediately after the ruling on the stay application on 15th November 1994. That means that the appellant died in the 1990s. It is not disputed that the appellant was not substituted with his legal representative within 1 year, as a result of which this appeal abated in the 1990s by operation of law. I agree with the respondent that the applicant’s application was not properly framed. After the abatement of an appeal, the deceased appellant can only be substituted with his legal representative after time has been extended for such legal representative to apply for substitution under the proviso to Order 24 Rule 3(2) of the Civil Procedure Rules. It is after that substitution that an abated appeal can be revived. In the application before me, the applicant has not sought the extension of time within which to apply for substitution of the deceased appellant. Without such an extension, the court cannot grant an order for the substitution of the deceased appellant with his legal representative. These findings are sufficient to dispose of the application before me. I will, however proceed to consider the application on merit in case I am wrong on the procedure for reviving an abated appeal.

14. The court has the power under the proviso to Order 24 Rule 3(2) of the Civil Procedure Rules to extend time for the substitution of a deceased appellant with his legal representative. The court also has the power under Order 24 Rule 7(2) of the Civil Procedure Rules to revive an abated appeal. The powers granted to the court under the proviso to Order 24 Rule (3)(2) and Order 24 Rule 7(2) of the Civil Procedure Rules are discretionary. The said powers can only be exercised for good reason or sufficient cause. Sufficient cause was defined in Attorney General v. Law Society of Kenya & another [2017]eKLR 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, 9th Edition, page 251.

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

15. I am not satisfied that the applicant has shown sufficient cause to warrant the extension of time within which to file an application for the substitution of the deceased appellant with his legal representative and the revival of the appeal. I am not satisfied with the explanation that has been given by the applicant for the failure on the part of the estate of the deceased to file an application for the substitution of the deceased appellant within the prescribed period. The application for the substitution of the deceased appellant has been brought over 20 years from the death of the appellant and abatement of the suit. If the administrators of the estate of the deceased were keen on prosecuting the appeal, all they required was a Grant of Letters of Administration Ad Litem in respect of the estate of the deceased. They did not need to wait for a full Grant of Letters of Administration. The fact that the administration of the estate of the deceased was protracted, in my view, would not justify the revival of an appeal that abated over 20 years ago. In any event, the applicant has not placed any evidence before the court showing any difficulties that arose in the succession proceedings. I doubt if justice can still be done in the matter if the appeal were to be revived. The original appeal file cannot be traced, and the applicant seems not to have the proceedings and documents that were contained in the said file. There is also no evidence that the lower court file is still in existence 36 years after that court's ruling the subject of this appeal. Even if the appeal was reinstated, the court would find it very difficult to hear it. I have also noted that so much has happened since the judgment of the lower court the subject of the appeal was delivered. The adjudication process was completed and the property which was in dispute between the appellant and the respondent was registered in the name of a third party as the first registered owner. There are chances that the appeal has been overtaken by events.

Conclusion

16. Due to the foregoing, I find no merit in the Notice of Motion application dated October 1, 2024. The application is dismissed. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 27TH DAY OF MARCH 2025

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Tonge Yoya for the Appellant/Applicant

Ms. Akinyi for the Respondent

Ms. J.Omondi-Court Assistant

