



Kiswii & another (Suing as the Legal Representatives of the Estate of Kiswii Kwithonga - Deceased) v Konza Ranching & Farming Co-operative Society Limited & another (Civil Appeal 236 of 2018) [2024] KEHC 1699 (KLR) (Civ) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1699 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 236 OF 2018

DAS MAJANJA, J

FEBRUARY 22, 2024

BETWEEN

JOYCE KAMENE KISWII ALIAS KAMENE KISWII 1ST APPELLANT

MUSYOKI KISWII 2ND APPELLANT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF KISWII
KWITHONGA - DECEASED**

AND

**KONZA RANCHING & FARMING CO-OPERATIVE SOCIETY
LIMITED 1ST RESPONDENT**

ALICE KAMENE NZOMO 2ND RESPONDENT

*(Being an appeal against the ruling and order of the Co-operative Tribunal
at Nairobi dated 17th April 2018 in Tribunal Case No. 577 of 2014)*

JUDGMENT

Introduction & Background

1. On 17.04.2018, the Co-operative Tribunal (“the Tribunal”) dismissed the Appellants’ suit on the ground it was statute barred (“the Ruling”). The Appellants are dissatisfied with the Ruling and have lodged the present appeal through their memorandum of appeal dated 16.05.2018. The appeal has been canvassed by way of written submissions which I have considered in my analysis and determination below.



2. The Ruling was in respect of an application dated 19.10.2017 filed by the Appellants. The Appellants sought to extend the time for substitution of the 2nd Appellant, who was deceased, with one Bibiana Katumbi Musyoki (“Bibiana”). The Appellants averred that the 2nd Appellant (“the Deceased”) died sometime in 26.04.2015 and that Bibiana is his daughter and legal representative of his estate for purposes of prosecuting the suit before the Tribunal. Bibiana deponed they could not substitute the Deceased within the required time as she had to apply for a limited grant after their mother failed to do so.
3. In response to the application, the 2nd Respondent averred that neither the Deceased nor Bibiana had the *locus standi* to bring the suit against the Respondents since none of them obtained the mandatory leave of the court to file the suit out of time as the cause of action arose in 1985. That the Deceased’s suit against the Respondents abated on 26.04.2016 and there were no sufficient reasons as to why the application was not made within the period of one year as required under Order 24 Rule 3 of the *Civil Procedure Rules*. Further, that the mere reason that the person to substitute the Deceased did not have an ad litem grant was insufficient.
4. In its Ruling, the Tribunal stated that on the issue of extension of time alone, the Appellants had given sufficient cause for the delay. On the issue of whether the suit was statute barred, the Tribunal noted that the cause of action arose in 1985 as the Appellants claimed fraudulent dealings in the parcels of land subject of the claim in this year. That they only learnt of these alleged fraudulent dealings in 2011, that is 16 years later and that this being related to recovery of title in land, the Appellants ought to have sought leave under section 27 of the *Limitation of Actions Act* or other relevant sections explaining the reasons for not filing the suit in time.
5. The Tribunal relied on the court’s decisions in *Kennedy Mureithi & another v Peterson Karimi Gacewa* [2016]eKLR and *Bosire Ogero v Royal Media Services* [2015]eKLR to hold that limitation goes to the jurisdiction of a court to entertain a matter and that if a matter is statute barred, the court lacks jurisdiction to entertain it. The Tribunal noted that the suit before it was filed over 12 years since the cause of action arose, no leave was sought when the suit was filed and that there was no application to deem the claim as properly filed. Since the claim was statute barred, the Tribunal dismissed the application as it lacked jurisdiction.

Analysis and Determination

6. In resolving this appeal, I am cognizant that the court derives its appellate jurisdiction from section 81 of the *Co-operative Societies Act* which empowers the High Court to, inter alia, exercise any of the powers which could have been exercised by the Tribunal in the proceedings in connection with which the appeal is brought or make such other order as it may deem just, including an order as to costs of the appeal or of earlier proceedings in the matter before the Tribunal.
7. The Appellants aver that the Tribunal erred in dismissing their suit without giving them an opportunity to be heard and on the basis of a preliminary objection which was never argued by the parties. That the Tribunal breached the rules of natural justice, erred in dismissing their application for substitution and failed to take into account the fact that the Appellants’ suit was based on fraudulent transfer of membership of a deceased person where the Appellants were the legal representatives of his estate. The Appellants urge the court to allow the appeal, set aside the Ruling and allow its application for substitution of the Deceased with Bibiana and remit the matter back to the Tribunal for further action.
8. As submitted by the Appellants, it is correct that the Tribunal stated in the Ruling that it had earlier on given directions that the Appellants’ application be dealt with first and thereafter, a preliminary



objection on the issue of jurisdiction be determined later. The Tribunal however noted that the said application might as well deal with the said objection wholly and substantially.

9. While it is also correct that the Appellants had not responded to the preliminary objection, it is common ground that the 2nd Respondent, in her opposition to the Appellants' application, raised the same issue as that in the preliminary objection that the suit was filed out of time as the cause of action arose in 1985 and that the Appellants had failed to obtain leave to file the suit out of time. Once this issue was raised in response to the application, the Appellants had an opportunity to respond to the issue but they failed to do so. They cannot state that they were denied the opportunity to ventilate the objection when it was at the centre of the 2nd Respondent's response. It would be a waste of judicial time to deal with the preliminary objection separately when the issue raised therein was the subject of the objection. Once the issue of the suit being statute barred was raised in the response to the application, the Tribunal had an obligation to deal with it. In this case, the Appellants can only blame themselves for not responding to the issue. I do not fault the Tribunal for dealing with the objection on jurisdiction as it was live issue before it when determining the application.
10. On the substance of the application, I hold that the Appellants did not deny that the suit had abated on 26.04.2016, that is a year after the Deceased's death since there was no application filed for substitution within this period. In the late application for substitution, the Appellants did not make a prayer for reinstatement of the suit. For a suit to be revived, an appropriate application must be presented to court and the court has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement (See *Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd* 2018] eKLR). Since an abated suit requires revival, the Appellants could not file their application for substitution and proceed as if the suit before the Tribunal was still alive. They ought to have sought to revive the suit first and once this was allowed, then pray for the substitution of the Deceased.

Disposition

11. The Appellants' appeal lacks merit. It is dismissed with costs to the 2nd Respondent assessed at Kshs 20,000.00.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

