



Case Number:	Environment and Land Case 136 of 2017
Date Delivered:	13 Dec 2018
Case Class:	Civil
Court:	Environment and Land Court at Makueni
Case Action:	Ruling
Judge:	Charles Gitonga Mbogo
Citation:	Fedalis Mang'uu Mwikya & another v Marshall Kivesi [2018] eKLR
Advocates:	Ms Mbuvi holding brief for Mrs. Nzau for the Defendant Mr. B.M Mungata for the Plaintiff/Applicant
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	-
County:	Makueni
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Dismissed with costs to the Respondents.
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. 136 OF 2017

MWIKYA MANG'UU(DECEASED).....PLAINTIFF

VERSUS

MARSHALL KIVESI.....DEFENDANT/RESPONDENT

FEDALIS MANG'UU MWIKYA.....1ST APPLICANT

QUEEN NDEE MUENDO (being the legal

representatives of MWIKYA MANG'UU

KISEU *alias* MWIKYA MANG'UU-DECEASED).....2ND APPLICANT

RULING

1) What is before court for ruling is the notice of motion application dated 19th February, 2018 and filed in court on even date. It is expressed to be brought under order 24 Rules 1,2 and 3, order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law for orders that:-

1. That this suit be revived.

2. That, leave do issue to the Applicants to substitute Mwikya Mang'uu Kiseu alias Mwikya Mang'uu –Deceased with his legal representatives Fedalis Mang'uu Mwikya and Queen Ndee Muendo.

3. That costs of this application be in the cause.

2) It is predicated on the grounds on its face and is supported by the affidavit of Fedalis Mang'uu Mwikya, the first Applicant herein, sworn on his own behalf as well as with the authority of Queen Ndee Muendo, the second Applicant.

3) Marshal Kivesi, the Defendant/Respondent herein, has opposed the application vide his replying affidavit sworn at Machakos on the 28th June, 2018 and filed in June, 2018 and filed in court on the 29th June, 2018.

4) The court directed that the application be disposed off by way of written submission which direction the parties have since complied with.

5) In their grounds upon which the application is predicated on the Applicants' have stated:-

i. That the Plaintiff, Mwikya Mang'uu Kiseu alias Mwikya Mang'uu died on 6/6/2015 and as such this suit abated by operation of law on 7/6/2016.

ii. That the Applicants have since obtained a limited grant of letter of administration *ad litem* limited to the purpose of

prosecution this suit, Mkaueni Principal Magistrate's Succession Cause No. 27 of 2012 and Machakos Succession Cause no. 56 of 2012.

iii. That, failure to substitute on time was not intentional but caused by factors beyond the Applicants' control.

iv. That, there is need for substitution to enable the Applicants prosecute the current suit.

v. That it is in the interest of justice to grant the orders sought.

vi. That the Respondent shall suffer no prejudice if the orders sought are granted.

6) In paragraphs 2 and 3 of their supporting affidavit, the first Applicant has deposed that Mwikya Mang'uu Kiseu alias Mwikya Mang'uu died on 6th June, 2015. That the two Applicants subsequently filed Machakos Succession Cause no. 61 of 2016 to petition for a limited grant of letters of administration ad litem for purposes of prosecuting this suit among others. The first Applicant further deposed in paragraphs 4 and 6 of the affidavit that the limited grant that was subsequently issued by the Chief Magistrate's court had errors which required amendment and that this process was lengthy. He went on to depose that the delay to procure the amendment was not due to their fault.

7) The Respondent in paragraphs 3,4,5,6 and 7 of his replying affidavit, deposed that the application is baseless, frivolous and an abuse of the court process, that Mwikya Mang'uu died on 6th June, 2015 that it is over 2 years and 11 months since the latter died, that he has been informed by his advocates on record which information he believes to be true that a suit abates after one year on the death of either party if no application for substitution is made and that the suit herein abated on 7th June, 2018 and that there is no suit upon which the Applicants can be substituted as parties.

8) In his submissions, the Applicants' counsel cited order 24 rule 1 of the Civil Procedure Rules as the applicable law in this application. The aforementioned rule provides as follows:-

“Order 24(1). The – death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.

2. where there are more Plaintiffs or Defendant than one of them dies, and where the cause of action survives or continues to the surviving Plaintiff alone or against the surviving Defendant or Defendants alone, the court shall cause an entry to that effect to be made on the record and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs, or against the surviving defendant or Defendants.

4(i) where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendant alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, in an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased Defendant.

3) Where within one year no application is made under sub rule (1) the suit shall abate as against the deceased Defendant.

7(i) where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.

2) The Plaintiff or the person claiming to be the legal representative of the deceased Plaintiff or the trustees or official receiver in the case of a bankrupt Plaintiff may apply for an order to revive the 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 the such dismissal upon such terms as to costs or otherwise as it thinks fit.”

9) The counsel relied on the case of Kisor Kumar Dhanji Varsani V. Amolak Singh and 4 others [2016] eKLR which adopted

with approval the definition of “sufficient cause” that was given in the case of *Honourable Attorney General V the Law Society of Kenya & Another in Civil Applicant no. 133 of 2011*. In the latter case, the court stated;

“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 Blacks Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the judges mind. The explanation should not leave unexplained gaps in the sequence of events.”

10) The Applicants’ counsel went on to submit that the Applicants filed for letters of administration ad litem on the 15th July, 2016 after the Plaintiff who is their father passed on. The counsel added that the delay in filing the succession cause was not deliberate but was caused by the Applicants’ financial constraints. That the Applicants were also not aware of this suit and that immediately after they became aware, they sought for letters of administration. In my view, the submissions by the counsel amount to evidence from the bar as nowhere in their supporting affidavit have the Applicants deposed to the issues that their counsel has submitted on.

11) The counsel submitted that the Applicants have demonstrated sufficient cause that prevented them from being enjoined in this suit as parties and urged the court to exercise its discretion and order for the revival of the suit.

12) The Respondent’s counsel in her submissions stated that the Applicants have not demonstrated sufficient case to warrant the revival of the suit.

13) Having read the application, the supporting affidavit, the replying affidavit as well as the submissions filed, my finding is as follows: - Firstly, it is common ground that the Plaintiff herein died on the 6th June, 2015. The Applicants herein are silent on why they did not file the succession cause for letters of administration before the 7th June, 2016 when the Plaintiff’s suit abated. Nowhere in their supporting affidavit have they indicated that they were not aware of the existence of this suit or that they had financial constraints which prevented them from filing for letters of administration ad litem. They did not annex the grant of letters which they alleged had errors for this court to see. In my view, the Applicants cannot be seen to shift blame to others when it is clear that the delay to obtain the letters of administration ad litem squarely lies in their court.

14) The upshot of the foregoing is that I am in agreement with the Respondents counsel that the Applicants have not shown sufficient cause to warrant this court to exercise its discretion in their favour. The application lacks merits and same is dismissed with costs to the Respondent.

Signed Dated and Delivered at Makeni this 13th day of December, 2018.

Mbogo C.G,

Judge

IN THE PRESENCE OF:

Ms Mbuvi holding brief for Mrs. Nzau for the Defendant present

Mr. B.M Mungata for the Plaintiff/Applicant absent

Mr Kwemboi Court Assistant

MBOGO C.G, JUDGE

13/12/2018



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