Case Number:	Civil Suit 32 of 2010
Date Delivered:	24 Mar 2022
Case Class:	Civil
Court:	High Court at Nakuru
Case Action:	Ruling
Judge:	Joel Mwaura Ngugi
Citation:	Timoi Farms & Estate Limited v Kipngeno Arap Ngeny & another [2022] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	Nakuru
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application dismissed with costs
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 32 OF 2010

TIMOI FARMS & ESTATE LIMITED.....PLAINTIFF/ APPLICANT

-VERSUS-

KIPNGENO ARAP NGENY.....1ST DEFENDANT/ RESPONDENT

FLORENCE CHALANGAT LANGAT.....2ND DEFENDANT/ RESPONDENT

RULING

1. The Applicant brought the present suit *vide* a Plaint dated 10/02/2010. It then amended its Plaint on 17/02/2019 and introduced the 2nd Defendant. The 1st Respondent is said to have died on or about 01/07/2014 during the pendency of the suit. The Applicant has now brought the Application dated 20/04/2020 seeking the following orders:

1. Spent

2. THAT this honourable court be pleased to allow the Plaintiff to proceed with the suit against the 1st Defendant

3. THAT this honourable court be pleased to allow the deceased 1st Defendant to be substituted with Alexander Kipngetich Sitieney alias Brigadier Alexander Sitienei and John C. Koech being the executors of the defendant's estate

2. The Application is supported by the grounds on the face of it and the affidavit of Isaya Kiptonui Kimeiywo, a director of the Applicant. He depones that the Applicant had all along been represented by Mr. Kimatta- Advocate who passed on in November 2020 and that prior to Mr. Kimatta's demise, he thought the matter was proceeding well and was legally compliant.

3. He deposes that that sometime early in 2019, he discovered that the 1st Respondent had passed on. The Applicant filed an application for substitution dated 16/08/2019 but when he sought to know the position of the matter after Mr. Kimatta's demise, he learnt that the matter had been listed for dismissal on 16/08/2019. It is only after perusing the 16/08/2018 application that he realised the application named the wrong person as the administrator of the estate.

4. He says that it is after changing advocates that the Applicant discovered a case reported on Kenya Law Reports as Nairobi Succession Cause No, 2633/ 2014 as well as a Certificate of Confirmation of Grant naming Alexander Sitieney alias Brigadier Alexander Sitieney and John C. Koech as the executors of the estate of the 1st Respondent. This prompted the Applicant to withdraw the earlier application and file this application.

5. He contends that having invested more than Kshs.100,000,000 in the suit property, it would be great prejudice if the suit is terminated on technicalities.

6. In response, the 1st Respondent filed a Notice of Preliminary Objection dated 28/01/2020. The same is based on the following grounds:

1. Order 24 rule 4(3) of the Civil Procedure Rules is couched in mandatory terms. It states herein quote:-

"3**.** Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

2. The Application has been overtaken by events. See notice dated 20.06.2018 that was filed in Court on 21.06.2018 attached herein. The suit as against the Defendant has long abated.

3. The application is bad in law, vexatious, scandalous, frivolous and that it amounts to an abuse of the process of the Court. The same is headed for dismissal.

7. The 1st Respondent also filed Grounds of Opposition, dated 28/01/2020 as follows:

1. The application that is before the Court is aimed at scuttling the hearing of the environment and land civil suit NAIROBI ELC No. 606 of 2015 (Formerly NAKURU ELC NO. 231 OF 2012) wherein the Applicant is the Defendant and that Florence Chelangat Langat whom the Applicant has mischievously introduced as the 2nd Defendant in his application is the Plaintiff. The subject matter is the two matters is the same…

2. The Application is superfluous, a waste of valuable yet limited judicial time and that of the parties.

3. That NAIROBI ELC NO. 606 OF 2015 which is part heard has been listed for further hearing on 25.02.2020

4. The Applicant has not laid out any basis at all to justify its application to have Miss. Chepkirui Ngeny in the subject matter

5. The subject parcels of land i.e. OLENGURUONE/AMALO/314, 315, 316 &321 are not part of the estate of the late Kipngeno Arap Ng'eny. That all the four parcels belong to FLORENCE CHELANGAT LANGAT….

8. Both the Application and the Preliminary Objection were canvassed by way of written submissions. The Applicant's submissions are dated 10/07/2021. The Applicant has rehashed the facts as in the Supporting Affidavit and submits that it is still in occupation of the suit property which is sufficient reason for it to be allowed to proceed with the suit against the 1st Respondent.

9. The Applicant also submits that that under the provisions of Order 24 Rule 7(2) a party can apply for leave to revive a suit which has abated and upon proof that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit upon such terms as to costs or otherwise as it thinks fit.

10. It argues that this suit is completely different from ***ELC 606/2015*** and contends that the Defendant passed away on 01/2014 while its advocates were preoccupied with ***Civil Case No. 231/2012 and ELC No. 606/2015*** and only discovered his death in 2019.

11. On whether the 1st Respondent should be substituted with the executors of his estate, the Applicant agrees that under Order 24 Rule 4(3) of the Civil Procedure Rules the application for substitution ought to have been made within one year of the death of the Defendant. However, the Applicant argues that Order 24 Rule 7(2) allows the Court to discretion to revive an abated suit. The Applicant relies on the case of ***Titus Kiragu Mugo Mathai [2015] eKLR*** to the effect that a suit abates by operation of law. The applicant has cited various authorities to support its argument that the Court has the discretion to revive an abated suit, among them ***Rukwaro Waweru v Kinyutho Ritho & Another [2015] eKLR, Charles Mugunda v Attorney General & Another [2015] eKLR*** and given the definition of 'sufficient cause' in ***Attorney General v Law Society of Kenya & another [2013] eKLR.***

12. The Applicant also submits that the 1st Respondent's advocates did not inform the Applicant of the death of their client, thus the Applicant cannot be blamed for not acting within one year. It cites the cases of ***Fatuma Mohamed & 2 Others v Wananchi Estate limited & 4 Others [2014] eKLR*** and ***Mary Gathambi Kibe v Daniel Kibe & Another [2013] eKLR.***

13. In response to the Preliminary Objection, the Applicant submits that it is not clear on whose instructions the 1st Respondent's advocates is acting for, since there is no notice of appointment from the executors and the said executors have not filed any affidavits to shed light on the issue.

14. It contends that counsel has also filed documents and evidence with his grounds of opposition and submissions, a procedure the Applicant says is unknown in law. It relies on the case of ***Mukhisa Biscuits Manufacturing Co. Ltd v West end Distributors Ltd [1969] EA. 696.***

15. Counsel for the 1st Respondent filed two sets of submissions both dated 21/10/2021. He submits that the Applicant filed the present application after the lapse of one year required for the substitution of a Defendant under Order 24 Rule 4(3), which he contends is couched in mandatory terms. He refers to a Notice dated 21/06/2018 when counsel for the Respondent filed a notice stating that the suit had abated.

16. In any event, he submits, the application has been brought to Court 7 years after the death of the 1st Respondent and that the 1st Respondent having been a public figure, the Applicant must have had knowledge of his demise.

17. It is also argued for the 1st Respondent that the Applicant is prosecuting his Defence in ***Nairobi ELC No. 606 of 2015*** where it has filed a counterclaim. Counsel contends that the present application offends the *sub judice* rule under Section 6 of the Civil Procedure Act. He faults Applicant's Counsel for failure to disclose that ***ELC 606/2015*** is pending Defence hearing and the same was scheduled to be heard on 22/09/2021.

18. It is also submitted for the 1st Respondent that the Applicant has not shown any sufficient cause to invoke the Court's discretion. He proceeds to give five reasons thereof. First the cause of action did not survive the Deceased since the subject parcels do not belong to the estate of the Deceased and the Applicant is guilty of laches. Second, the existence of ***ELC 606/2015*** which relates to the same properties and offends the *sub judice* rule. Third, he says if the application is allowed, it will waste the Court's time and is likely to cause embarrassment to the Court in view of the existence of ***ELC 606/2015***. Fourth, that the application if granted is not capable of implementation since the matter is before the Land and Environment Court and fifth, there is no prayer seeking extension of time in the Application and the extension of time envisaged under Order 50 Rule 6 is not available under Order 24 Rule 3. He asks that the Court dismisses the application and allows the Preliminary Objection

19. The two issues for determination from both the application and the Notice of Preliminary Objection are first, whether the suit against the 1st Defendant is capable of reinstatement and secondly, whether the 1st Respondent should be substituted with the two executors. The second issue will be dependent on the determination of the first issue.

20. The procedure for what is to happen upon the death of a Defendant is found under Order 24 Rule 4 of the Civil Procedure Rules. The procedure is that where the Cause of Action survives the Defendant, then an application for substitution of that Defendant with his personal representatives is to be made within one year and where the application is not made within one year, the suit against the deceased Defendant abates.

21. Evidently, the suit against the 1st Respondent abated when the Applicant did not file the requisite application on or about 1st July 2015 i.e a year after the 1st Respondent's death. The Applicant is acutely aware of this provision and its implications but introduces the provision of Order 24 Rule 7, which it contends allows the revival of an abated suit if it is proved that there was sufficient cause preventing the Applicant from continuing with the suit.

22. Order 24 Rule 7(2) reads as follows:

(2) 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.

23. In **Kishor Kumar Dhanji Varsani v Amolak Singh & 4 others [2016] eKLR** the Court of Appeal was of the view that it was appropriate to revive a suit where an Applicant sufficiently explained the reasons for failing to pursue the suit before it abated, and the explanation is accepted as candid and plausible.

24. Is the Applicant's explanation candid and plausible" The Applicant says that it was under the belief that the suit was proceeding well and only learnt of the 1st Respondent's death early in 2019 when it first sought to substitute the 1st Respondent with the

administrator of his estate. The record shows that the Applicant was granted leave to amend its Plaint in the ruling of 01/02/2013 by *Waithaka J.* After that ruling, the proceedings seem to have stalled. No explanation has been given why the Applicant did not move the Court until 16/08/2019.

25. The Court of Appeal dealt with a similar application in ***Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR.*** In this case, the Applicant's reasons for the delay in filing an application for revival was that there was confusion in her advocate's law firm and that there had been initial disagreement about who would file for letters of administration. The Court held that this was not sufficient or excusable justification for the delay. The Court went on to state:

"Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

26. The Applicant's explanation in this case ignores that there was already a delay of more than six years between the last time it moved the Court and the first application to revive the suit. Perhaps if the Applicant had pursued its case in the intervening period, it would have become aware of the 1st Defendant's death. This is so, even more because the Applicant had counsel on record. There is really no other way to describe a delay of six years other than "inordinate." And, inordinate delay disentitles a party from the Court's discretion. While the Applicant laments that it is unfair to drive it away from the seat of justice on account of a technicality, the failure to take a necessary action to keep a suit alive for six years cannot, even with the widest possible extension of the term, be termed a technicality. It is a substantive failure which has implications on the rights of the other party. A party has a right to have his case determined expeditiously. That right is seriously injured when his adversary fails to take action for more than six years and then springs to action and enlists the Court's discretion to recover from the effects of such *laches*.

27. Consequently, it follows that the prayer for substitution must also fail.

28. In the Notice of Preliminary Objection, Counsel for the 1st Respondent raised the issue of issue of ***ELC No. 606 of 2015***. He claims that this suit is *sub judice* ***ELC No. 606 of 2015***. I am unable to come to that conclusion on the basis of the material placed before me. If Counsel is serious about that claim, it behoves him to make an appropriate application for consideration by the Court.

29. The outcome, then, is that the Application dated 20/04/2020 is hereby dismissed with costs.

30. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF MARCH, 2022

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JOEL NGUGI

JUDGE

NOTE: This ruling was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments and rulings.