Phoebe Mumbi Ndungu (as Legal Representative of the Estate Of Zachary Ndungu Runo v Kamau & another (Civil Case 321 of 2012) [2022] KEHC 11878 (KLR) (Civ) (23 March 2022) (Ruling)

Neutral citation: [2022] KEHC 11878 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 321 OF 2012

SJ CHITEMBWE, J

MARCH 23, 2022

BETWEEN

PHOEBE MUMBI NDUNGU (AS LEGAL REPRESENTATIVE OF THE ESTATE OF ZACHARY NDUNGU RUNO ..... PLAINTIFF

AND

MICHAEL MANJARI KAMAU ..... 1ST RESPONDENT

MAK FAM INVESTMENT LIMITED ..... 2ND RESPONDENT

RULING

1. The application dated March 20, 2020 seeks the following orders: -

    1. Thatthe orders made on April 13, 2018 dismissing this suit for want of prosecution be set aside and the suit be reinstated.

    2. Thatthe plaintiff, Zachary Ndungu Runo, (deceased) be substituted with Mrs Phoebe Mumbi Ndungu the legal representative of the deceased plaintiff.

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

2. The affidavit of Phoebe Mumbi Ndungu sworn on March 11, 2020 supports the application sworn on October 1, 2021. The respondent filed grounds of opposition dated June 14, 2021. The application was determined by way of written submissions.

3. Counsel for the applicant submitted that the plaintiff passed on April 29, 2012. The applicant who is the deceased's wife was advised to obtain letters of administration which she managed to get on October 9, 2018. Attempts to substitute the applicant with the deceased failed since the court file could not be traced. Several letters were written to the court to secure the court file but there was no positive

response. On November 12, 2019, counsel for the applicant learnt that the case was dismissed on April 13, 2018 for want of prosecution. According to counsel no notice to show cause was served on them prior to the dismissal of the suit.

4. It was further submitted that reinstatement of the suit and substitution of the deceased with his personal representative would meet the overriding objective of doing justice to the parties. No prejudice will be suffered by the defendant. Counsel relies on the case of *Belinda Murai& others v Amoi Wainaina*(1978) where Madan J stated as follows:-

> "The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule."

5. Counsel for the applicant also referred to the case of *Philip Chemwolo & another v Augustine Kubede* (1982-88) KAR 103 where Apollo J A stated:-

> "Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

6. The applicant contends that the notice to show cause why the suit should not have been dismissed was not served. Counsel relies on the case of*In the matter ofKenya Power & Lighitng Company Ltd v Kenya Cold Storage (1964) Ltd*, HCCC No 387 of 2002 where the court stated: -

> "Nevertheless dismissal of a suit under order xvi rule 2 (1) of the Civil Procedure Rules requires that notice be given to the parties to appear before the court to show cause why the suit should not be dismissed before any order of dismissal is made. In this present case, a notice to show cause was not issued but the matter was dismissed any way. The plaintiff was therefore denied a chance to show cause why the matter should not be dismissed."

7. It was further submitted that soon after realizing that the suit had been dismissed for want of prosecution, the current application was filed.

8. The application is strongly opposed. It is stated that the applicant is guilty of unreasonably excessive delay. The suit abated on April 30, 2014 and therefore there was no suit to be dismissed for want of prosecution as of April 30, 2018. It took over five (5) years for the applicant to obtain letters of administration.

9. It is further submitted that the applicant lacks *locus standi* to bring the application as she ought to have first applied to be joined as a party first after the suit abated on April 30, 2014. Counsel relies on the case of *Rebecca Mijide Mungole & another v Kenya Power & Lighting Co Ltd & 2 others* (2017) eKLR where the court of appeal stated:-

> "It is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of

the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party.

10. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted."

11. It was further submitted that timelines provided by statute are not technicalities. Counsel referred to the case of *Charles Wanjohi Wathuku v Githinji Ngure& Another*, Civil Application No 9 of 2016 (cited in the Rebecca Mijinde case (supra) where the court held: -

> "The court in Charles Wanjohi Wathuku v Githinji Ngure & Another Civil Application No 9 of 2016 stressed the importance of strict application of timelines set by the law stating that; timelines are not technicalities of the procedure which may be accommodated under article 159 of the *Constitution* or section 3A and 3B of the *Appellate Jurisdiction Act*".

12. This was reiterated in *John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 others*, Civil Appl No 126 of 2014, cited by learned counsel for the respondent, where it was held, in relation to rule 82 of the *Court of Appeal Rules* that; "That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the court processes dispense justice in a timely, just, efficient and cost-effective manner".

13. According to the respondents, the plaintiff died on April 29, 2013. It took over five (5) years to obtain the limited grant. The applicant has exercised a great deal of indolence in handling her matter and does not deserve any remedy from the court. No sufficient reason has been provided for the delay. The two letters dated 14th June and September 18, 2019 cannot be the excuse for the delay.

14. Further reference was made to the case of *Rebecca Mijide Mungole & another* (supra) where the Court of Appeal went on to state the following:-

> "The 1st and 2nd respondents were aggrieved by that conclusion and filed two separate appeals in the High Court which were subsequently consolidated into HCCA No 42 of 2013. Sergon, J who heard that first appeal observed that the application for revival of the suit ought to have been preceded by an application for extension of time within which to apply for revival and substitution under order 24 rule 3(2) of the Civil Procedure Rules. In overturning the decision of the magistrate and allowing the appeal, the learned judge said;
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> "... I'm persuaded that the appeal should succeed on the ground that the respondents proceeded to file an application for revival of the suit and substitution without making an application for extension of time under order 24 rule 3(2) of the Civil Procedure Rules. In the case of Gachuhi Muthanji v Mary Wambui the Court of Appeal stated *inter alia* as follows:
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> "That the learned judge of the High Court had misdirected himself in this case by allowing the application for substitution. The respondent in the said Court of Appeal case also

conceded that an application for extension of time to revive the abated suit had never in fact been made."

It is clear in my mind that the respondents missed a very important step before making the application for revival of the suit. The learned senior principal magistrate therefore misdirected himself when he made the application reviving the suit yet the respondent had not sought for leave to do so prior to lodging the application".

The appellants now bring this second appeal on the grounds that the learned judge erred in insisting that the application for extension of time was a condition precedent to an application for revival of an abated suit; that he failed to address his mind to the relevant question, namely whether the appellants had shown sufficient cause to justify revival of the suit; that the learned judge ought to have considered whether the learned magistrate properly exercised his discretion in granting the application for revival of the suit."

15. According to counsel for the respondents, the defendants will be prejudiced if the suit is revived as their witnesses cannot be traced after the period of nine (9) years.

Analysis And Determination

16. The relevant statute relating to the issue of revival of abated suits is order 24. Order 24 r 1 states as follows:

"The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues."

order 24 rule 3(2) further provides:

"Where within one year no application is made under sub rule (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.

Further, order 24 rule 7 (1) and (2) states:-

1. 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 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.

17. The application is erroneously brought under order 21 rules 4(1) and (5) of the *Civil Procedure Act*. The main contention by the applicant is that the plaintiff died on April 29, 2013. The applicant obtained a limited grant on October 9, 2018 and sought to be substituted for the deceased plaintiff but the court file could not be traced. The file was ultimately traced by November 12, 2019 and it was discovered that the suit had been dismissed way back on April 13, 2018. Two letters dated June 14, 2019 and September 18, 2019 were produced with the aim of establishing that the applicant's counsel was trying to get the court file so as to substitute the deceased plaintiff.

18. On his part, counsel for the respondent maintain that the suit had already abated by the time it was dismissed since the deceased died way back on April 29, 2013. Further, it is submitted that the applicant has not pursued the correct procedure by first seeking extension of time under order 24 rule 3(2) before being enjoined in the case.

19. There is no dispute that the suit was dismissed for want of prosecution on April 13, 2018. The dismissal was made under order 17 rule 2(1) whereby a notice to show cause why the suit was not to be dismissed was served and there being no appearance of the parties, it was dismissed.

order 17 rule 2 (1) states:-

> "In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit."

20. It is evident that the plaintiff could not have shown any cause as to why the suit should not have been dismissed for want of prosecution as he was since deceased. The deceased was involved in a road traffic accident on May 10, 2002 along Muindi Mbingu Street. He filed civil suit number 5070 of 2005 before the Milimani Chief Magistrate's Court. The Chief Magistrate's Court file could not be traced and an application dated January 5, 2012 was filed seeking reconstitution of the file.

21. On September 7, 2010 an application was filed in the High Court seeking to have the Chief Magistrate's case transferred to the High Court. That application was allowed by Justice Mugo and there is an order issued on November 11, 2010 transferring the file to this court. The deceased applied to amend the plaint so as to include incurred special damages and on September 30, 2013 the court allowed the amendment.

22. The record shows that between September 30, 2013 to April 13, 2018 there was no action on the case. This led to the dismissal of the case for want of prosecution. The deceased died on April 29, 2013 and by the time the application for amendment of the plaint was granted on September 30, 2013, the plaintiff had already died. The application was dated February 13, 2013 and was supported by the deceased's affidavit. By then the plaintiff was still alive.

23. Counsel for the respondent maintain that the applicant lacks *locus standi* as the applicant has not sought for the extension of time under order 24 rule 3(2). The proviso to order 24 rule 3(2) simply states:-

> "provided the court may, for good reason on application extend time."

24. Taken on its own, the above proviso allows the court to extend the time of an abated suit and allow such a suit to be revived one year after the death of the plaintiff or defendant. The Court of Appeal in the *Rebecca Mijide* case held that one must first apply for extension of time before seeking to be enjoined. The opposite can equally be argued as the person applying for extension of time may lack the *locus standi* to seek such an order since he/she would not have been enjoined as a party to the case what would be the rational of seeking extension of time if one is not a party to the suit. In my view, such an applicant would be relying on the letters of administration to seek enlargement of time as well as be enjoined and ultimately substitute the deceased plaintiff or defendant. It is the letters of administration which clothes the applicant with the locus of making such an application.

25. In the *Rebecca Mijide* case, the Court of Appeal stated as follows:-

> "After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of *bona fides*, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.

26. Apart from the provisions of order 24 rule 3(2), there is order 24 rule 7 which deals with both an abated suit as well as a suit which has been dismissed. The said provision does not specifically indicate that such a dismissal could be due to want of prosecution. Order 24 rule 7 specifically provides for the effect of abatement or dismissal of a suit. It allows the legal representative of deceased plaintiff to apply for an order to revive a suit which has abated or set side an order of dismissal. Such an applicant is equally expected to explain the circumstances which prevented him/her from continuing the suit. What can be inferred from order 24 rule 7 is that one year would have lapsed before the application to revive the suit is made just as is the case with order 24 rule 3(2). What will happen if a party simply comes to court through order 24 rule 7 and seeks to revive an abated suit.

27. The *Black's Law Dictionary*, 10th edition explains the term "abatement in equity" as follows:-

> "The suspension of a suit for lack of the proper parties necessary for it to proceed.
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> Abatement in equity differed from abatement at law in that the action was entirely defeated in the latter case, whereas in the former the action was merely sus pended and could be revived later (usu. when appropriate parties were substituted for the originals within a specified time). "

28. The plaintiff's suit both abated and was equally dismissed. The dismissal was for want of prosecution as opposed to dismissal due to death or bankruptcy of party under order 24. The applicant is seeking to set aside the order dismissing the suit for want of prosecution. She is not a party to the suit and can only obtain *locus standi* if she is enjoined as the legal representative of the deceased. The applicant is armed with a limited grant of letters of administration ad litem issued by the Chief Magistrate's Court in Nyeri on October 9, 2018. She is simply seeking an order to revive an abated suit. The application is being made nine years after the suit abated. The applicant under order 24 rule 7 is expected to establish sufficient cause why she did not continue with the suit. There is no explanation given by the applicant as to why there was no action from the time of death in April, 2013 to 2018. The limited grant was applied for in 2018 (a*d litem* 77 of 2018) and was issued in the same year. Counsel for the applicant seems to be indirectly taking the blame through their reference to authorities which refers to blunders and mistakes. There is no specific explanation as to who made the blunder or mistake. The further affidavit states that the delay in obtaining the grant of letters of administration on time is regretted and is the cause of the delay in filing for substitution.

29. In the *Rebecca Mijide* case, the Court of Appeal stated:-

> "It took six years between the date the deceased died and time when the application was presented. Except for the general averment that the local chief of the location where the deceased came from refused to issue the 1st appellant with a letter confirming her relationship with the deceased, no other justifiable reason was advanced by the appellants. Although there is no law that requires that the relationship of any party with a deceased person be proved by the local chief, under section 46 *Law of Succession Act*, the chief, in whose location free property of a deceased person is found is required to take all necessary steps to protect that property. He is also expected to ascertain if other free properties of the deceased exists in the area and all persons appearing to have any legitimate interest in the succession to or administration of his estate. This duty is limited only to situations where the property of a deceased person is situated in the location of the chief. It was not claimed that there was such property in the location concerned. In any case the 1st appellant was able nonetheless to obtain the letter from a chief in Nairobi. It is inconceivable that it would take six years to get a grant of probate on such a ground as advanced by the appellants.

30. In the *Rebecca Mijide* case, the Court of Appeal further observed as follows:-

> "A prayer for the revival of the suit cannot be allowed as a matter of course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7 (2) 'sufficient cause has been broadly and liberally defined, in order to advance substantial justice Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant."

31. The Court of Appeal in the case of *Said Swailem Gheithan Saanum v Commissioner of Lands (Being sued through the Attorney General) & 5 others* (Malindi C A 16 of 2015 stated as follows:-

> "There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for "good reason" determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The "good reason" therefore relates to application for extension of time to join the plaintiff's legal representative to the suit.
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> Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
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> Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by "sufficient cause" from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which

> flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M'mboroki M'arangacha v Land Adjudication Officer, Nyambene and 2 others,Meru HCC Application No 45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (deceased) NBI HCCC No 1671 of 1994. From the language of order 24 rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit."

32. In the case of *James Mwaniki Kinuthia v Hemed Idd Mukui & another* (2019) eKLR, Justice Kemei observed as follows:-

> "I have seen a number of decisions of courts in this country where suits have been revived outside the one-year period depending on the circumstances of the case. In all these cases the decisions were informed by the court's cardinal duty to meet the ends of justice. In the case of Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR , Koome, JA invoked those principles when dealing with an application for revival of an appeal "made two years and eight months" after the death of a party. After setting out the principles that guide the court in the exercise of judicial discretion, the judge, in allowing the application for revival in that matter stated:
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> "..... I am also guided by the provisions of section 3A and 3B of the *Appellate Jurisdiction Act* otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the *Constitution* of Kenya, 2010 in particular article 159."

33. Given the circumstances of the case, it is evident that the period between April 2013 when the deceased died and the year 2018 when the grant *ad litem* was obtained has not been explained. It is not for this court to think of what could have prevented the applicant from seeking to be enjoined or substituted in this matter. I do note that the second defendant is a limited liability company with perpetual succession. However, the specific people who might have information on the accident may or may not be available. The accident occurred in 2002 almost twenty (20) years now. I do find that the applicant has not provided sufficient cause for this court to exercise its discretion in her favour.

34. The upshot is that the application dated March 24, 2020 lacks merit and is hereby dismissed. Parties shall meet their respective costs.

DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF MARCH, 2022.

S.J. CHITEMBWE

JUDGE