REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL NO. 4 OF 2019

FRED BARASA WANYAMA.....APPELLANT

VERSUS

HARRISON OULO.....1ST RESPONDENT

JOSEPHINE KHASENYA.....2ND RESPONDENT

ESTHER MALKIA OULO.....3RD RESPONDENT

(Being an appeal from the ruling in original Bungoma CMCC 818of 2011delivered on 21/12/2018 by C.A Mutai S.P.M)

JUDGMENT

This is an appeal from the ruling of HON C.A. S MUTAI SPM in Bungoma CMCC No. 818 of 2011 delivered on 21/12/2018.The appellant was dissatisfied with the Honorable Magistrate's decision finding that the suit had abated under the provisions of Order 24 Rule 4 (1) of the Civil Procedure Rules**.**

The Chief Magistrates Civil case No. 818/2011 was commenced by way of a plaint dated 8th November 2011where the plaintiff had sued the defendant for negligence and averred that on or about 8th July 2010 at Webuye -Kitale road near Lugulu while the appellant was lawfully cycling off the left side of the road the respondent by himself his servant, agent and or authorized driver did negligently, recklessly and or carelessly lost control veered off the road and knocked down the plaintiff thereby causing him serious bodily injuries.

The 1st respondent denied all these allegations tin his Statement of Defence filed on 1st March, 2012 and attributed neglince on the part of the appellant.

Pre-trial directions were taken and the matter was set down for hearing of the plaintiff case.PW1 the plaintiff and PW2 a police officer testified in support of the appellant's case and the case was closed. Before Respondents' case was heard the 1st respondent passed on. According to affidavits filed in court, he died on 12th December, 2013 hence the need to substitute him in order for the suit to proceed to its logical conclusion.

Citation was filed in the High Court being Bungoma P & A Succession Cause No. 167 of 2014 where one Josephine Oulo the wife to the deceased was the Citee.She never appeared in court in this cause despite being duly served. The matter was heard and judgement on the same delivered on 20th September,2015 to the effect that the Citation was premature. However, the honourable judge reasoned that the applicant should not be left helpless when those who qualify to be representatives of the estate of the deceased are evading justice or for any other reasons fail to take out grant of letters of administration. He therefore invoked section 66 of the Laws of Succession Act and through the chief summoned the Citee to appear in court.

The appellant later learned that the citee had filed Succession Cause No. 248 of 2018 and the grant was issued in her favour on 24th October,2018.

Upon receipt of the grant, the appellant filed an application dated 29th October,18 seeking leave of court to extend time for substitution and reinstate the suit.

The application was opposed by the firm of Onyinkwa & Company Advocates on behalf of the 1st Respondent (deceased). The application was canvassed by way of written submissions.

Both parties filed and exchanged submissions. The learned Magistrate having evaluated rival submissions on record vis a vis the applicable

law held that the suit had abated and directed that the file be closed.

The appellant was aggrieved and filed this appeal. The appeal is pegged on 14 grounds of appeal;

1. That the learned trial Magistrate erred in law and in fact when he failed to consider that there were good grounds adduced by the appellant why the substitution of the deceased respondent was not done within time.

2. That the learned trial Magistrate erred in law and in fact when he disallowed the Appellant's application dated 29/10/2018 when the same had not been opposed.

3. That the learned trial Magistrate erred in law and in fact when he failed to resolve pertinent issues that arose in the proceedings as to whether the plaintiff had filed Citation proceedings after the death of the defendant in 2013 when there was sufficient evidence to that effect.

4. That the learned trail Magistrate erred in law and fact when he totally disregarded the crucial evidence adduced by the appellant that could have dislodged the respondent's claim and had the appelant's application allowed.

5. That the learned trial Magistrate erred in law and fact when he ruled that the appellant's application was filed 5 years after the death of the defendant and totally disregarded the efforts made by the appellant to have the defendant substituted by his next of kin.

6. That the learned trial Magistrate erred in law and fact when he disregarded deliberate delays caused by the respondents in procuring letters of administration in the defendant's estate to be made administrators having taken over 5 years.

7. The learned trial Magistrate erred in law and fact by misconstruing the provisions of Order 24 Rule 4 Sub rule 1 of the Civil procedure Rules therefore arriving at a wrong conclusion.

8. The learned trial Magistrate wrongly applied the provisions of section 66(1) of the Law of Succession Act which led to miscarriage of justice.

9. The learned trial Magistrate erred in law and fact when he failed to appreciate that the process of having the respondents to be the legal representatives of the estate of the defendant was ne of the factors that frustrated the efforts of the plaintiff to substitute the defendant with the respondents within the prescribed period.

10. The learned trial Magistrate erred in law and fact when he appreciated the fact that the appellant demonstrated that he did all that was commonly possible to get the defendant's next of kin to obtain letters of administration to the estate of the defendant but disregarded the same reaching at a wrong conclusion.

11. The trial Magistrate erred in law and fact when he failed to appreciate the fact that the delay in obtaining Letters of Administration to the estate of the defendant was occasioned by the respondents' refusal to get one.

12. The learned trial Magistrate erred in law and fact when he dismissed the appellant's application against the weight of the evidence on record.

13. That the trial Magistrate erred in law and fact when he took into consideration irrelevant matters and failed to take into consideration relevant matters thereby arriving at a wrong conclusion.

14. The learned trial Magistrate was generally biased against the Appellant.

When the appeal came up for hearing on 10th February,2020 both parties agreed to canvass the appeal by way of written submissions. Subsequently they filed and exchanged their respective submissions which l have carefully read and considered alongside cited authorities.

From the appeal and submissions, the issues for determination before this court are:

i. Whether the suit abated on the death of the 1st respondent and if so; when.

ii. Whether the appellant has made sufficient case for extension of time and substitution of the 1st respondent by the administrator of the estate.

iii. Whether the suit should be reinstated.

Determination

The Civil Procedure Rules provides for the issue of abatement under **Order 2**4;

Order 24, rule 4 of the **Civil Procedure Rules** provides;

(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 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 subrule (1), the suit shall abate as against the deceased defendant.

The provisions of **Order 24 rule 4(1) of the Civil Procedure Rules** allows the substitution of a deceased Defendant respectively, upon application being made by the legal representative of the party. **Rule 4(3)** thereof provides that where such a substitution application is not made **within one year of the party's death**, the suit **"shall abate"** so far as the deceased, Defendant, is concerned respectively.

The 1st respondent died on 12th December,2013, the period which he ought to have been substituted lapsed on 12th December, 2014.That the record confirms that there was no application filed to replace the 1st respondent within the period of one year of his death. That by operation of the law, the appellant suit against the 1st respondent abated on or about 12th December,2014.

The second issue to be answered is whether the court has jurisdiction to extend time, whether the appellant has made reasonable case for extension of time and substitution of the 1st respondent.

Order 24 Rule 3 Subrule 1 provides that: ***Provided the court may, for good reason on application, extend the time.***

In the case of **Rebecca Mijide Mungole & another Vs Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** the Court of Appeal held;

"***Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, 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. 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. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did."***

Indeed, the Court can extend time and f**or the court to exercise the said discretion vested in it in favour of a person seeking to revive a suit that has abated, the Court must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In the case of Rukwaro Wawer V Kinyutho Ritho & another (2015) eKLR the Court held;**

"… it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd – versus- Kassam [1982] K.L.R. 458.

This Court indeed is vested with the discretionary powers to extend the time within which substitution can be made.

As to whether the appellant has made reasonable case to warrant extension of time and substitution of the 1st respondent, the appellant's Advocate submitted that they learnt of the 1st Respondent's death in April 2014, approximately 5 months after he passed on. The appellant immediately filed a citation against the widow of the deceased. The citation was filed on 2nd May, 2014.The Citee was duly served. She did not only refuse to respond to the citation, she never appeared in court and also failed to file succession in respect to her late husband's estate.

On 20thSeptember,2015, judgement to the citation was delivered and the court invoked **Section 66 of the Law of Succession Act** and summoned the citee through her chief to attend court. She never appeared and warrants of arrest were issued against her. She only filed the succession cause after the warrants of arrest had been issued. The appellant's advocate submitted she failed to disclose the cause number hence they were unable to tell the progress of the matter.

The appellant's advocate followed up and after gazettement moved the court for grant as the citee was indolent in prosecuting the cause. Grant was issued on 24th October ,2018. Upon receipt of the grant is when they were able to file the application dated 29th October, 2018 seeking leave to extend time for substitution and reinstatement of the abated suit.

From the above steps taken; the appellant has demonstrated that he did all that was within his powers to get the 1st respondent's next of kin to obtain grant of letters of administration in order for him to be substituted. I find that sufficient reasons have been given to warrant extension of time.

Since the second issue has succeeded, automatically the third issue succeeds as it was pegged on the success of the preceding issue.

In conclusion the appeal is allowed. The trial magistrates order given on the **21/12/2018** is set aside and substituted with an order allowing the application dated 29th October,2018. The cost of this appeal will be borne by the respondents.

DATED at BUNGOMA this 11th day of February, 2021

S. N. RIECHI

JUDGE