



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

CIVIL APPEAL NO. 3 OF 2018

TIMOTHY LIMO.....1ST APPELLANT

JOHN KIPTOO BARSEMOI.....2ND APPELLANT

CHRIS KIPRONO KEMBOI.....3RD APPELLANT

=VERSUS=

JOEL KINYANJUI MUCHIRI (Suing as the legal representative of the late

JACOB MUCHIRI KINYANJUI.....RESPONDENT

[Being an appeal from the Ruling of the Principal Magistrate's Court at Eldama Ravine Civil suit. No. 40 of 2015 delivered on the 10th day of April, 2018 by Hon.J. Nthuku, SRM/]

RULING

Issue for determination

1. This appeal is on a matter of law whether the court has, after the refusal of an application for the extension of time for the joinder of a personal representative of a deceased plaintiff under Order 24 Rule 3 (2) of the Civil Procedure Rules, the jurisdiction under order 24 rule 7 (2) of the Civil Procedure Rules to consider an application for revival of suit which has abated, or whether such subsequent application is barred by *res judicata*, the court becoming *functus officio* on the refusal of the first application for extension of time to join the personal representative under Order 24 rule 3 (2) of the Civil Procedure Rules, **and whether the grant of revival of suit is valid after such refusal of extension of time.**

The Facts of the Case

2. The facts of the case are set out in the ruling of the trial court subject of this appeal as follows:

“RULING

This suit was filed on **12th August, 2015** soon thereafter on **11th September 2015** the plaintiff passed and the suit automatically abated. The applicant moved to Court on 17th March, 2016 and filed for substitution of the plaintiff name (deceased) with the name of the legal representative but the court found that substitution would not breathe life to an abated suit so the application was dismissed. The appellant has come back seeking revival of the suit then substitution of the plaintiff with the administrator. He explains the delay by stating that he took long to discover existence of this suit after his son passed on.

The respondent filed an undated affidavit stating that the suit was dismissed on 11th July, 2017, no reason has been given to sufficiently prove there's need to reinstate the suit and that the court in entertaining this application will be sitting on appeal in its earlier ruling. It's further deponed that the applicant should have sought extension of time but they haven't done so and that the plaintiff never availed himself for 2nd medical examination so revival of the suit will be an exercise of futility.

First of all I would like to point out that this suit was never dismissed by the court at any point. What was dismissed was an application dated 17th March, 2016. Secondly, the issues of failure by the plaintiff to undergo second medical examination have no bearing on the application before me. **The Civil Procedure Rules Order 24 Rule 7(2) gives the court powers to make orders**

reviving a suit that has abated if it is proved that the applicant was prevented from continuing with the suit by sufficient cause. The applicant has provided evidence that the plaintiff is deceased and he had obtained letters of Administration for his Estate.

Those letters were issued in November, 2016 more than a year after the death of the plaintiff so the suit had already abated by the time the letters of Administration were issued.

The deceased was an adult I find it possible that he didn't disclose the existence of this suit to his parents. **The delay is not inordinate and it has been explained. I am aware that the courts are supposed to deal with matters/dispense Justice expeditiously but I am also alive to the fact that doing substantive justice is more important than sticking to Rules of procedure. The cause of action herein arose on 1st April, 2015 i.e three years ago in the interest of justice I allow the application dated 19th February, 2018 on condition that the substitution be done within seven days from today.**

Ruling signed dated delivered in open court;

Keboga holding brief for Mboga for applicant.

No appearance for the defendant.

Hon. J. Nthuku

Senior Resident Magistrate

10.4.2018"

[emphasis added]

The appeal

3. By a Memorandum of Appeal dated 25th April 2018, the appellants challenged the decision of the trial court on grounds set out therein as follows:

"MEMORANDUM OF APPEAL

TIMOTHY LIMO, JOHN KIPTOO BARSEMOI AND CHRIS KIPRONO KEMBOI *the above named Appellant appeals to the High Court of Kenya against the whole of the above mentioned decision on the following grounds;*

1. That the Learned Magistrate erred in law and fact in allowing an application for revival of an abated suit **when a similar application had been dismissed in the same Court.**
2. The Learned Magistrate erred in law and fact in misinterpreting and failing to apply the law specifically the proviso in **Order 24 Rule 3(2) of the Civil Procedure Rules that provides that a suit cannot be revived unless time has first been extended.**
3. The Learned Magistrate erred in law and fact in holding that Section 3 (e) of the Insurance (Motor vehicle Third Party risks). (Amendment) Act 2013 that makes re-examination of a plaintiff mandatory had no bearing in the application and in effect the suit before her.
4. The Learned Magistrate erred in law and fact when she failed to find that the respondent ought to pay costs for the application previously dismissed before bringing another application in court.
5. The Learned Magistrate erred in law and fact when she failed to appreciate the Appellant's submissions and the law.

We therefore pray for **ORDERS THAT;**

- a. This appeal be allowed with costs.
- b. The ruling of the Hon. Nthuku, Senior Resident Magistrate, Eldama Ravine, delivered on 10th April, 2018, in Eldama Ravine SRMCC No. 40 of 2015 be set aside or varied accordingly.
- c. Any other order that the Honourable Court may deem fit to grant considering the circumstances of the case and for the interest of justice.

DATED at NAKURU this 25TH Day of APRIL 2018."

Submissions

4. Counsel for the parties filed written submissions, with the appellant principally setting up a claim on *functus officio* and *res judicata* as follows:

“APPELLANT’S WRITTEN SUBMISSIONS

10. The Appellants submit that the trial court erred in allowing the Application dated 19/02/2018 for the foregoing reasons and pray that the appeal be allowed as prayed with costs.

11. Firstly, the Application dated **19/02/2018** (except for the prayer of revival of the suit) was similar with the Application dated **17/03/2017** that was heard and determined in merits by Hon. Yator on 11/07/2017. The common ground raised in both applications was that there was a delay in obtaining the Death Certificate of the late Jacob Kinyanjui to apply for substitution of the Plaintiff within one year as provided in the law. The issue was analysed and considered by Hon. Yator who found the explanation not plausible enough and thus dismissed the Application dated 17/03/2017. The natural remedies that were available to the aggrieved party was to Appeal or apply for Review of the Ruling.

12. The Respondent never Appealed or sought Review of the said Ruling but opted to seek the substitution again in the same court though differently constituted about seven months later. We humbly submit that the subsequent decision to entertain the Application dated 19/02/2018 amounted to the trial Court sitting on appeal in its own decision because the Court was already *functus officio*.

13. Secondly, the court having become *functus officio*, it is safe to submit that the issue of substitution of the Plaintiff was *res judicata* having been heard and determined on merit.

14. Thirdly, the provision of Order 24 Rule 3 sub-rule 2 and Rule 7 Civil Procedure Rules 2010 is to the effect that;

“(2) 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 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.

7. (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”

15. The procedure above is clear that the court, may extend time for an application for substitution to be made beyond the one year period. The wording of the proviso implies that the said extension is **not mandatory** but a decision that squarely falls on the court’s discretion. The Respondent applied for substitution of the Plaintiff out of time and the court rendered its Ruling. The Respondent cannot purport to seek the same prayer again because there is no procedure for such second attempts in the reading of Order 24 of the Civil Procedure Rules.

16. Order 24 Rule 7 is coached in mandatory terms. There is no exception provided thereto. The conduct of the Respondent through his counsel is tantamount to the overriding duty of an advocate to this court as an officer of the court who should aid the court in the dispensation of justice. We call upon this Honourable court to frown upon this conduct and allow this appeal in its entirety.

17. Notably my Lord the time lapse since when the death certificate was allegedly obtained to filing the initial Application dated 17/03/2017 and the second Application dated 19/02/2018 is a clear indication of lack of seriousness in prosecuting the suit. The Application dated 19/02/2018 was an abuse of the court and bad in law in light of the prayers sought in one go.

18. Our courts have 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”.

19. This position reiterated in **John Mutai Mwangi & 26 Others v. Mwenja Ngure & Others, Civil Appl. No. 126 of 2014**, 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”.

20. We humbly submit that the trial court misdirected itself in holding that ‘doing substantive justice is more important than sticking to rules of procedure’ when the same Rules of procedure are coached in mandatory terms.

21. The Court of Appeal has held that an Application for revival of an abated suit has to be preceded by an application seeking extension of time to revive the said suit. The Respondent did not seek any extension of time but opted to file an Application seeking

revival of the suit and at the same time substitution of the Plaintiff. For this reason alone the Appellants have demonstrated that the trial court erred in law and in fact by entertaining the Application dated 19/02/2018 to call for this Honourable Court's intervention.

22. The essence of seeking enlargement of time is because the suit abated by effluxion of time. 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. This is the recent decision of the Court of Appeal in **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** whereby the Appellants challenged the decision of the appellate court that overturned the trial court Ruling, similar to the impugned Ruling herein-that allowed an Application for substitution of the Plaintiff way out of time and without sufficient thereof. In dismissing the appeal, the learned Judges 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...”

(See page 4 of the Bundle of authorities [Emphasis ours])

23. Moreover in the case of **Charles Mugunda Gacheru vs Attorney General & another [2015] eKLR** the High Court dismissed a similar application for revival and substitution of The Plaintiff and we urge your Lordship to consider the same.

24. From the above submissions, the Appellants have demonstrated that the learned trial Magistrate based the disputed Ruling on wrong principles of law and in doing so at on its own appeal. Accordingly, we urge this Honourable Court to set aside the Ruling dated 10/04/2018 and affirm the Ruling delivered on **11/07/2017.**”

5. For the respondent, it was contended that the applications for extension of joinder of the deceased plaintiff under Order 24 rule 3 (2) of the Civil Procedure Rules and the one for revival of the suit under Order 24 rule 7 (2) were independent, and the issue of *res judicata* and *functus officio* did not arise, and substantial justice was urged as follows:

“SUBMISSIONS

The respondent's application dated 19/2/2018 was made pursuant to the provisions of Order 7 rule 2 which says:

“The plaintiff or the person claiming to be the legal representative of 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 cost or otherwise as it thinks fit”

The learned trial Magistrate listened to the respondent's case and found merit in it hence allowed his application giving terms she found to be appropriate.

The main prayer in the application dated 19/2/2018 is for revival of the abated suit. Which the court granted and allowed substitution of the legal representative. The application dated 17/3/2017 sought for substitution only and since there was no suit due to abatement, it could not be allowed.

The argument by the appellant that the two applications are similar is inaccurate. They are quite distinct in what is being sought.

The provision in order 24 rule 3 (2) of Civil Procedure Rules does not provide that a suit cannot be revived unless time has first been extended.

It simply say;

“Provided the court may for good reason on application extend the time”

The provision in our humble view envisages a situation where a party seeks for more time before the one year period provided therein ends. That is to say before the suit abates, for example a suit is to abate on March 10th, a Party may seek that the one year period be extended beyond that date for some reasons.

However, when that date passes the suit automatically abates and can only be revived following an application under rule 7 (2).

Under section 1A the overriding objective of the Civil Procedure Act and rules made therein is to facilitate the just, expedition proportionate and affordable resolution of the civil disputes. **Substantive justice is the Hallmark of its application.**

It is our submission that the prayers the respondent sought for revival and substitution did not cause any prejudice to the appellant. When the suit is eventually heard and determination made, the appellant will be at liberty to appeal if dissatisfied.”

Determination

6. At the outset, I respectfully consider that the contention that the examination of the deceased plaintiff is impossible following his death and therefore, as urged by the appellant, compliance with “*Section 3 (e) of the Insurance (Motor vehicle Third Party Risks) (Amendment) Act 2013 that makes re-examination of a plaintiff mandatory*”, is a matter for defence at the trial and therefore no bar for an order for revival in a proper case.

7. The principle for consideration of the exercise of discretion by a trial court is settled by the Court of Appeal for East Africa decision in *Mbogo v. Shah* (1968) EA 93, as follows:

““[A] court of appeal should not interfere with the exercise of the discretion of a single judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that a result there has been misjustice....”

8. The Supreme Court has settled the issue of *functus officio* in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others* [2013] eKLR (cited by the Court of Appeal in *Peterson Ndung’u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd* [2018] eKLR) as follows:

“[18] ... Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law,*” (2005) 122 SALJ 832, has thus explicated this concept:

“The *functus officio doctrine* is one of the mechanisms by means of which the law gives expression to the principle of finality.

According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter....The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

(emphasis added)

9. The **joinder of the personal representative** is not the *same matter* as the revival of the abated suit. The rules of court contemplate an application for revival even after a suit has abated and consequently, even after the court has rejected an application for joinder of a personal representative, and therefore the suit is held to have abated, the residual jurisdiction to revive an abated suit keeps the matter alive until an order refusing abatement is made.

10. The first application for substitution of the personal representative for the deceased plaintiff which was refused did not deal with the question of revival of the suit and the issue of revival is therefore *res judicata* and the court is not *functus officio*.

11. Indeed, I respectfully consider that the provision for revival of abated suits which was inserted by amendment to the Civil Procedure Rules in 1996 by LN. No. 5 of 1996 introducing the subrule 8 (2) to the Order XXIII (now rule 7 (2) of Order 24) was clearly calculated to ameliorate the injustice of the situations where a deceased person dies and his personal representative has a good cause for not being able to seek joinder by substitution within the period of 12 months allowed by the rules before abatement after which no fresh suit may be brought on the same cause of action. It is for the same object of securing justice that the **Proviso** under Order 24 Rule 3 (2) of the Civil Procedure Rules for **extension** of the period of 12 months for substitution of a personal representative before abatement was introduced by the new Civil Procedure Rules 2010.

12. The reason given for the default in seeking to substitute the deceased plaintiff as explained by his father on account of being unaware of the fact of filing of the suit by his adult son is reasonable and I do not see that the trial court misdirected itself in finding therein “**that he was prevented by any sufficient cause from continuing the suit**”, in terms of the requirements of Order 24 Rule 7 (2) of the Civil Procedure Rules.

Matter governed by authority

13. However, the matter is governed by authority. In its decision, which is binding on this court, the Court of Appeal in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, held:

“The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to **rule 3(2)** the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in **Said Sweilam** (supra) 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.

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.

14. The Court of Appeal has in *William Muinde Kilundo v. Peter K. Wambua & 3 others* [2018] eKLR subsequently approved the decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others*, supra, and held that the provisions of Order 24 are not mere technicalities as follows:

“25. Having found that the cause of action in the two suits were similar, we cannot help but note that the High Court suit which was filed first in time abated following the deceased’s death on 13th August, 1994. This much is admitted by the appellant. As a result, the provisions of **Order 24 (7) of the Civil Procedure Rules** which we have set out in the opening paragraph of this judgment come into play. This Court while expressing itself on the said provision in *Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Company Ltd & 2 Others* [2017] eKLR 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.” [Emphasis added]

26. We decline to accede to the appellant’s invitation to find that the provision in question is a mere technicality and should not defeat substantive determination of the suit. In doing so, we take guidance from the case of

Said Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR wherein this Court succinctly stated:

“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.”

27. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs.”

[emphasis added]

15. On the principle of *stare decisis*, this court is bound to follow the decision in *Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others* [2017] eKLR, and I am compelled to find that the trial court in this matter erred in allowing the revival of the suit subject of this appeal.

Orders

16. Accordingly, for the reasons set out above, the court allows the appeal as prayed.

17. However, as this is an interlocutory appeal and the suit has not been heard and determined on the merits, there shall be no order as to costs.

Order accordingly.

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2020.

EDWARD M. MURIITHI

JUDGE

Appearances:

M/S Kairu & McCourt & Co. Advocates for the Appellants.

M/S Mboga G.G. & Co. Advocates for the Respondent.