



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 471 OF 2015

SAMUEL OTIENO NYAMORI (suing as administrator of the estate of the late

ROSE AKOTH).....PLAINTIFF

VERSUS

FRANCIS RICHARD ABUYA.....DEFENDANT

AND

JONES OLUOCH.....APPLICANT

RULING

The Applicant filed a Notice of Motion on 16th October 2019 seeking orders to extend the time for the Applicant to substitute the deceased Plaintiff and, upon that prayer being granted, orders granting the Applicant Jones Oluoch to be granted leave to substitute Samuel Otiemo Nyamori as the Plaintiff representing the estate of the late Rose Akoth in this suit.

The application is based on the grounds that the Plaintiff passed away on 2nd April 2015 and that the Kisumu HC Succession Cause No. 925 of 2007 re: Estate of the late Rose Akoth has issued a new grant to the Applicant for purposes of concluding this land case. That the delay bringing this action was occasioned by the many beneficiaries of the deceased who took time to agree on the administrators. That the substitution is necessary to enable the suit to progress.

In his supporting affidavit the Applicant stated that the delay in bringing the action was also because there were difficulties in communicating with the advocate on record and because the file was misplaced for some time when the succession court wanted to peruse it before making its orders on 24th June 2019. He attached the current Plaintiff's death certificate and the limited grant of letter of administration ad litem granted to him.

Defendant's Response

The Defendant filed a replying affidavit on 21st January 2019 stating that the matter came up for hearing on 24th September 2014 and that was the last time it was heard. That the suit had abated following the death of the original Plaintiff without any legal steps being taken. That the substitution of the Plaintiff has not been effected within a reasonable time frame. Despite the foregoing averments, the Defendant stated that it was in the interest of justice that the application be allowed.

Issues for Determination

1. *Whether orders sought are merited*

Order 24 Rule 3 of the Civil Procedure Rules provides:

“(1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff 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 plaintiff to be made a party and shall proceed with the suit.

(2) Where within one year no application is made under subrule (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.”

On substitution of parties, **Order 1 Rule 10 (2) of the Civil Procedure Rules** provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that ... that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Analysis

It is on record that the court file had been missing for an undisclosed period but had been found recently in 2019. Therefore, the Applicant’s explanation of the delay having been caused by the missing court file being needed for perusal before the limited grant was issued is plausible. A good reason for reviving the suit has been put forward.

Therefore, as has also been conceded by the Defendant, in the interest of justice the prayers sought for revival of the suit and substitution of the Plaintiff ought to be granted and are hereby granted precisely thus that the time for the Applicant to substitute the deceased Plaintiff is hereby extended and, the Applicant Jones Oluoch is hereby granted leave to substitute Samuel Otieno Nyamori as the Plaintiff representing the estate of the late Rose Akoth in this suit. Costs in the cause.

DATED AND DELIVERED THIS 21ST DAY OF FEBRUARY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

Omondi T for respondent

N/A for applicant

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE