



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO.545 OF 2013**

**NICHOLAS MAKUYU LUMBI.....PLAINTIFF/APPLICANT**

**VERSUS**

**HENRY MUSYOKI KILONZI.....DEFENDANT/RESPONDENT**

**RULING**

1. This ruling is in respect to the application dated 13<sup>th</sup> November 2018. The application is brought under Order 24 Rules 3(1) and (2) of the Civil Procedure Rules (CPR). The plaintiff/applicant seeks orders for; extension of time to apply to substitute the defendant, the revival of the suit, leave to amend the plaint, and the setting aside of the order dismissing the suit.

2. The application is supported by the applicant's affidavit sworn on 13<sup>th</sup> November 2018 and is premised on the grounds that:-

- a) That the defendant herein died on 3<sup>rd</sup> July 2016 and therefore the suit abated on or about 2<sup>nd</sup> July 2017.*
- b) That the applicant had taken all necessary steps to substitute the defendant but he was caught by time due to factors beyond his control.*
- c) That the proposed new defendants are the administrators of the estate of the defendant.*
- d) That the claim survives as against the defendants herein.*
- e) That the proposed amendments go to the core of the suit and are therefore necessary.*
- f) That the defendants will not be prejudiced in any way if this application is allowed.*

3. The respondent opposed the application through the replying affidavit of one **Meshack Kilonzi**, the administrator of the estate of **Henry Kilonzi Musyoki** (deceased). He avers that the application is misconceived and hence an abuse of the court's process for the following reasons:-

- a) That the plaintiff filed this suit against my father (deceased) on 4<sup>th</sup> December 2013.*
- b) That the plaintiff had already executed the judgment of the court against my father in Civil Suit 905 of 2009, where the claim was already settled.*
- c) That the plaintiff failed to fix this matter for hearing before its dismissal on 5<sup>th</sup> July 2018.*
- d) That on 26<sup>th</sup> April 2018, we received a notice to appear in court on 2<sup>nd</sup> May 2018 before Honourable D. Majanja to show cause why the suit should not be dismissed ( attached herein is a copy marked MMK1).*
- e) That on the said date of 2<sup>nd</sup> May 2018, we appeared in court in response to the Notice to Show Cause, but the plaintiffs were not present in court.*
- f) That the plaintiff should raise the issue with the advocates for failing to follow up the matter and attending court summons.*

*g) That the plaintiff has not explained why he failed to attend court on 2<sup>nd</sup> May 2018 when the same was listed.*

*h) That it is true that all of us were served with a notice to show cause as evidenced by our copy attached in exhibit MMK1.*

*i) That the suit contains allegations which have not survived the death of my father.*

4. The respondent avers that the applicant is taking advantage of the deceased's death so as to punish members of his family who are not aware of the facts surrounding the case.

5. Parties filed written submissions to the application which I have carefully considered. I note that the main issue for determination is whether the applicant has made out a case for the granting of the orders sought in the application.

6. It is worth noting that the following facts are not in dispute.

*a) That the defendant herein died on 3<sup>rd</sup> July 2016 when the instant suit was still pending.*

*b) That the applicant had to wait for the appointment of the administrator of the defendant's estate before he could apply to substitute of the defendant.*

*c) That following the defendant's death, the suit automatically abated 2<sup>nd</sup> July 2017.*

*d) That the dismissal of the suit for want of prosecution therefore happened after the abatement of the suit.*

*e) That the administrators of the estate of the defendant estate were issued with the grant of letters of administration on 7<sup>th</sup> June 2018 long after the abatement of the suit on 2<sup>nd</sup> July 2017.*

7. Considering the above undisputed facts of this case, I find that the applicant cannot be faulted for failing to list the case for hearing or to prosecute the case following the death of the defendant as he had to await the appointment of the administrators before substituting the deceased defendant. I have in this regard perused a copy of grant of letters of administration attached to the applicant's affidavit in support of the application as annexure "NM4" and note that it was issued on 7<sup>th</sup> June 2018.

8. I have also perused the notice to show cause dated 18<sup>th</sup> April 2018 that was attached to the respondent's replying affidavit as annexure "MMK1". I note that the said notice indicates that the parties were to appear in court on 2<sup>nd</sup> May 2018. I also note that the notice was neither served upon the applicant nor his advocates on record.

9. Clearly therefore, the dismissal of the suit for want of prosecution on 5<sup>th</sup> July 2018, on a date when the matter was not even scheduled for hearing and without proof of service upon the applicant's counsel, was not regular.

10. For the reasons that I have stated in this ruling. I am satisfied that the applicant has made out a case for the granting of the orders sought in this application.

11. Consequently, I allow all the prayers sought in the instant application with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered in open court at Nairobi this 31<sup>st</sup> day of October 2019.**

**W. A. OKWANY**

**JUDGE**

**In the presence of**

Mr Musyoki for plaintiff/applicant

No appearance for respondent

Court Assistant – Sylvia