



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 189 OF 2011

CHRISTOPHER MWANIKIPLAINTIFF

VERSUS

DR. JYOTEE TRIVEDY1ST DEFENDANT

LION SIGHTFIRST EYE HOSPITAL.....2ND DEFENDANT

RULING

1. The application dated 5th December, 2017 seeks orders that the suit herein be revived as it has since abated.

2. The Application is premised on the grounds stated therein and is supported by the affidavit of Mary Nyakio Mwaniki, the widow of the deceased Plaintiff and a further supplementary affidavit by Dr. Christopher O. Kenyariri. The delay in substituting the deceased is attributed to the time taken to trace the deceased's Advocate and the time taken to obtain the Grant of Letters of Administration which was issued on 6th September, 2017. It is further stated that a Notice to Show Cause why the suit should not be dismissed for want of prosecution was issued by the court and the same had to be dealt with first.

3. The application is opposed. the 1st Respondent filed the grounds of opposition dated 18th December, 2017 which state as follows:

“(1) This Honourable Court is *functus officio* having issued its final orders confirming the abatement of the suit on 10th November, 2017.

(2) This Court has no jurisdiction to hear any application in the suit after abatement of the suit.

(3) The application is incompetent, incurably defective and an abuse of the court process and should be dismissed with costs.”

4. The 2nd Respondent filed the grounds of opposition dated 11th January, 2018. The said grounds are as follows:

1. The Application is incompetent, misconceived and devoid of any merit in view of its own contents together with the Supporting Affidavit.

2. The orders sought under the application are untenable and the orders sought there under are based on a grave misconception of the law and fact.

3. The orders sought herein are unsustainable and are therefore unavailable to the Applicant.

4. The application is tantamount to trifling with the court and is an abuse of the process of this Honourable court.”

5. I have considered the application, the grounds of opposition, the submissions made by the respective counsels for the parties herein and the authorities cited.

6. Under Order 24 rule 7 (2) Civil Procedure Rules, the Plaintiff’s legal representative can apply for an order to revive a suit which has abated upon sufficient cause being shown for failure to continue with the suit.

7. The above position was encapsulated by the Court of Appeal in **Rebecca Mijide Mungole & another v Kenya Power & Lighting Co. Ltd & 2 others [2017] eKLR** as follows;

“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 manner he did.”

8. In the case at hand, there is no application for the extension of time. The substantive prayer is for the revival of the abated suit. The revival cannot be carried out in a suit that has abated without the time being enlarged first.

9. With the foregoing, I dismiss the application with costs.

Date, signed and delivered at Nairobi this 15th day of March, 2018

B. THURANIRA JADEN

JUDGE