



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

ELC CASE NO. 284 OF 2017

LUCY NYOKABI KIARIE.....PLAINTIFF (DECEASED)

-V E R S U S-

DAVID WAHOME GITONGA.....1ST DEFENDANT/RESPONDENT

MARY NYAKIO KANINI.....2ND DEFENDANT/RESPONDENT

SETTLEMENT FUND TRUSTEES.....3RD DEFENDANT/RESPONDENT

KENYA COMMERCIAL BANK LTD.....4THDEFENDANT/RESPONDENT

AND

DAVID GITAU KIARIE.....APPLICANT

RULING

1. Before me for determination is the Applicant's Application by way of a Notice of Motion dated the 10th November 2015 wherein he seeks inter alia to revive this suit which abated as well as to amend his plaint in terms of draft amended plaint so as to enable the court to determine the real issues in controversy between the parties.

2. The Application is brought under Order 8 Rules 3(1), 5 and 7, Order 24 Rule 3(1) Rule 7(2) and order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all other enabling Provisions of the law.

3. The Application is supported on the grounds on the face of it as well as a sworn affidavit of David Gitau Kiarie the Applicant herein dated the 10th November 2015.

4. Wherein Service was effected upon the Respondents herein as is evidenced in the affidavit of service filed on the 31st May 2016. On the 8th June 2016, the 2nd Respondent filed her replying affidavit to the application opposing the same.

5. Subsequently directions were taken on the 11th October 2017 that this application be disposed of by way of written submissions and thereafter parties to high light on their submissions. That as is evidenced by the affidavit of service filed on the 10th November 2017, the Defendants were served but did not file their responses nor file their written submissions.

The Applicant's Submissions

6. The application was canvassed by way of written submissions. The Applicant's counsel filed submissions dated 26th February 2018 on the 27th February 2018 wherein he submitted that the Applicant herein is the son of the Plaintiff who had filed the present case on 22nd December 2009 but who died on the 3rd August 2014 during the pendency of the same.

7. That following the death of the Plaintiff, he had applied and was issued with limited grant ad litem vide Nakuru High Court Probate and Administration Cause No. 47 of 2015 for the purpose of substituting the Plaintiff in this suit. That by the time he was issued with limited grant ad litem, the case had abated. He therefore sought to revive the suit and substitute the Plaintiff so that the suit can be prosecuted to its logical conclusion.

8. The applicant relied on Order 24(7)(2) of the Civil Procedure Rules which allows the Court to revive a suit which has abated provided

sufficient cause is shown the said provision provides as follows:

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.

9. The Applicant's further submission was to the effect that following the death of his mother he obtained the letters of administration on 10th March 2015 within one year of the deceased's death but was precluded from filing an application for substitution within the prescribed time due to inaction on the part of the Counsel who had been handling this case on behalf of the Plaintiff. He relied on the case of Leonard **Mutua Mutevu vs Benson Katela ole Kantai & Another (2014) eKLR**

10. The applicant in pursuant to his application on why the same should be allowed and in pursuant to Order 24 Rule 3(1) and Rule 5, relied on the decided cases of;

i. Peter Mbiri Michuki vs amuel Mugo Michuki [2014]eKLR

ii. Penina Auma Otieno (Suing as a Legal Representative of Ezra Otieno Ongong'a (Deceased) V Charles Otieno Ayoo & 2 Others [2013] eKLR to submit that the Applicant could substitute the deceased Plaintiff.

11. The plaintiff further submitted that the amendments to the plaint were fair and would not cause any grievous effect on the Defendants and that the court could grant leave to amend the plaint under Order 8 Rule 3(3)he relied on the case of **Barclays Bank D.C.O vs Shamsudin [1973] E.A. 451** where the court held that;

' in special circumstances the amendment of a plaint will be allowed, notwithstanding that then effect will be to defeat a defence of limitation '.

12. The Applicant thus asked the court to exercise its discretion and grant the prayers sought in his application.

Determination

13. I have considered the pleadings and submissions made by the applicant herein. The issue is whether the suit by the deceased Plaintiff should be revived, and if so, whether the deceased Plaintiff should be substituted. Order 24 Rule 3 of the Civil Procedure Rules provides for the effect of death of one of several plaintiffs or of sole plaintiff. It states as follows:

(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.

14. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Plaintiff. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit. The Court of Appeal in the case of **The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011** observed as follows as to the meaning of sufficient cause:

“Sufficient cause or good cause in law means:-

**‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’
See Black’s Law Dictionary, 9th Edition, page 251.**

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

15. In the instant application, the intended Plaintiff averred that following the death of his mother he obtained the letters of administration on 10th March 2015 within one year of the deceased's death but was precluded from filing an application for substitution within the prescribed time due to inaction on the part of the Counsel who had been handling this case on behalf of the Plaintiff.

16. This, in my view, is good reason to revive the Plaintiff's suit and also to substitute the Plaintiff with the Applicant herein. To this effect thereof:

17. The Applicant's application is accordingly allowed for the foregoing reasons, and it is hereby ordered as follows:

i. The suit by the Plaintiff be and is hereby revived.

ii. That the deceased Plaintiff be and is hereby substituted by David Gitau Kiarie herein as plaintiff.

iii. The Applicant /Plaintiff is granted leave to amend his Plaint accordingly and to file and serve the Amended Plaint within 14 days from today.

iv. The costs of the Plaintiff's Notice of Motion dated 10th November 2015 be in the cause.

Dated and delivered at Nyahururu this 26th day of April 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE