



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 115 OF 2011

ELIZABETH WAMBUI RURIGA.....1ST APPLICANT

BERNARD KARIUKI RURIGA.....2ND APPLICANT

VERSUS

ARTHUR MURIGI.....DEFENDANT

R U L I N G

1. The applicants in their capacities as the widow and son of the deceased plaintiff in this case brings this application dated 26/01/2017 seeking the following prayers:-

(a) That time within which to apply for substitution and revival of the suit be extended.

(b) That this suit be revived on such terms as may bejust.

(c) That the applicants being the legal representatives “ad litem” of the estate of the deceased plaintiff be substituted as the plaintiffs so as to proceed with the suit.

2. The motion is supported by the affidavit of the 1st applicant Elizabeth Wambui Ruriga. She deposes that the deceased passed away on 21/05/2016 and she is aware that the suit abates if substitution is not done within one (1) year from the date of death of the deceased. The applicants applied a limited grant on 24/10/2016 which were issued on 14/11/2016. This was a suit for claim of damages for personal injuries the deceased had obtained in a road traffic accident.

3. The applicants state that the delay to apply for substitution was not deliberate and that it is in the interests of justice that the time for filing the necessary application be extended.

4. In his grounds of opposition dated 25/08/2017 and filed on 28/08/2017 opposed the application. Firstly, it stated that the reason for substitution is not explained considering that the limited letters of administration *ad litem* were applied for and issued on time on the 14/11/2016. Secondly, that the deceased plaintiff had himself lost interest of prosecuting the suit long before he died.

5. Thirdly, the respondent states that the cause of action does not survive the death of the plaintiff. Finally, that this application dated 26/01/2017 was prepared and signed four months before the suit abated and no explanation has been given for the delay in filing.

6. The parties argued this application by way of written submissions filed by their counsels on record. The applicants were represented by Messrs Nelson Kaburu & Co. while Kinyua Kiama & Co. represented the respondent.

7. The applicants rely on order 24 Rule 7(2) which provides that the court has power to give orders for revival of a suit which has abated upon sufficient cause being shown. It is further argued that the limit of time of one year for applying for revival of an abated suit provided for under Rule 8(3) was repealed. As such there is no time limit for filing the application for revival of the suit.

8. The applicants relied in the case of **SONI VS MOHAN DIARY [1968] EA 58** to support his argument that the cause of action may be revived provided three years have not expired since the abatement. This decision was based on the provisions of Civil Procedure Rules Order 23 Rule 4 K and on the Indian Limitation Act 1877.

9. The second case cited is that of **PIM VS MORTON [1978] KLR 196** where Harris, J. allowed an application to revive an abated suit made two years after abatement. The applicants conclude that they have shown sufficient cause and that the application should be allowed.

10. In their submissions, the respondent argued that the application is defective in that the deceased still appears as the applicant in this case and that the advocate on record for the applicants has no instructions to act for them. The applicant failed to explain the delay in filing the application even after obtaining letters of administration *ad litem*. It was not explained why the application was prepared (as per its date) long before the suit abated.

11. In the analysis of the material before this court, I begin with the issues of the alleged incompetence of the application. The respondent observes rightly that the application was drafted by the counsel for the applicants indicates the deceased as the plaintiff/applicant. This was an anomaly that the counsel would have rectified before filing the application. However, Article 159(2)(d) of the Constitution provides that courts shall not have due regard to technicalities. The contents of the application are in order and it would be inappropriate to strike out this application based on a technicality. The respondent did not raise this issue in his grounds of opposition to give the applicant a chance to respond. I therefore disregard the said technicality and declare the application competent.

12. This court is empowered by the provisions of Order 24 Rule 8 of the Civil Procedure Rules 2010 to grant orders for revival of an abated suit.

13. Order 24 Rule 7(2) provides:-

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.

14. It is clear in the provisions of Order 24 that Rule 8 (3) which gave time limit of one (1) year no longer exists. It was repealed by Legal Notice No. 5 of 1996 long before the current rules of 2010 were drafted. There is therefore no time limit within which such an application must be filed.

15. In determining an application of this nature, the period of limitation for the suit ought to be considered.

16. Section 4(1) of the Limitations of Actions Act provides:-

4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued—

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

17. The applicant submits that six years had not lapsed at the time this application was brought. This suit was filed on 20/09/2011 and this application filed on 26/06/2017 though it is dated 26/01/2017. The material date is not that of preparing the application but that of filing. The correct position is that this application was filed only three (3) months before the expiry of the six (6) year limitation period. It was therefore within the limitation period of the suit.

18. I have perused the affidavit of the 1st applicant in support of this application. It is not in dispute that this suit has abated. Under Order 24 Rule 3(2) the suit abates at the expiry of one year after the death of the deceased. The deceased died on 21/05/2016. The suit therefore abated on 20/05/2017. The applicant applied limited grant on 24/10/2016 which were granted on 14/11/2016.

19. This application was filed on 26/06/2017 which was about seven (7) months after the limited grant was issued. The purpose of the limited grant was to appoint the applicants as the personal representatives of the deceased. In this capacity, the applicants were expected to move and apply for substitution. The applicants did not explain this delay of seven (7) months. However, in the light of the fact there is no limitation in filing the application for abatement, this court will spare the applicants from insisting that explanation ought to have been given.

20. The applicant relied on the case of *PIM (supra)* where the court held that obtaining grant of representation *ad litem* was sufficient cause. Although this case was decided before Rule 8(3) was repealed, I find it relevant in this case.

21. The act of applying and obtaining grant of representation by the applicants was evidence that the parties were on course in getting substituted in this case in place of the deceased. It is my considered opinion that this act is sufficient cause on part of the applicants.

22. It is within the discretion of the court to revive an abated suit provided the applicant has shown a sufficient cause for this court to exercise its discretion in the applicant's favour.

23. I find the application merited and allow it accordingly. The suit shall be fixed for hearing within 30 days from the date of this ruling in default of which the orders in this ruling for revival will abate.

24. The applicant's advocates Messrs Nelson Kaburu are hereby directed to regularize his representation for the applicants within the same period.

25. The applicants will meet the costs of this application.

26. It is hereby so ordered.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF MAY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Ngige for K. Kiama for Respondent/Defendant

Mr. Andande for Kaburu for Applicant/Plaintiff