



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 233 OF 2004

ESTON NDUNGU WANYOIKE & OTHERS.....PLAINTIFFS

VERSUS

BERNARD THUITA & OTHERS.....DEFENDANTS

RULING

[1] The application that is the subject of this ruling is the Chamber Summons dated **4 April 2011** that was filed by the law firm of **Macharia Gakaria & Associates** on behalf of the estate of **Eston Ndung'u Wanyoike**, the 1st Plaintiff herein, for orders that the Applicants, **Joice Maregi Ndung'u**, **Robert Mugambi Ndung'u** and **Ann Nduta Karioki**, as the legal representatives of the estate of the late **Eston Ndung'u Wanyoike**, be granted leave to be enjoined to the suit in place of the **Eston Ndung'u Wanyoike**, now deceased.

[2] The application was brought under **Order 24 rule 2 of the Civil Procedure Rules, 2010**, and is hinged on the Supporting Affidavit annexed thereto, sworn by **Robert Mugambi Ndung'u** on **4 April 2011**, in which it was averred that **Eston Ndung'u Wanyoike** died on **13 June 2010** during the pendency of this case; and that Grant of Letters of Administration to his estate was made on **15 March 2011** to the Applicants vide **Nairobi High Court Succession Cause No. 2071 of 2010**. It was further averred that the Applicants are eager to pursue this case and are therefore seeking that the name of **Eston Ndung'u Wanyoike** as the 1st Plaintiff be substituted with those of the Applicants. Annexed to the Supporting Affidavit are copies of the Certificate of Death in respect of **Eston Ndung'u Wanyoike** and the Grant of Letters of Administration Intestate, both of which confirm the death of the 1st Plaintiff, and that the Applicants have been appointed as the deceased's legal representatives.

[3] The application was opposed by the Defendants who had the Grounds of Opposition dated **15 July 2016** filed on their behalf by the law firm of **Amolo & Gachoka**. They contend that the suit in respect of the 1st Plaintiff abated on **14 June 2011** and therefore that the application is not only incompetent but is also an abuse of the court process. The Defendants accordingly urged for the dismissal of the application with costs.

[4] The application was canvassed by way of written submissions pursuant to the directions issued herein on **20 July 2016**; and thereafter an opportunity for highlighting those submissions was given on **22 March 2017**. I have carefully perused the pleadings, the application and the affidavits in respect thereof in the light of the proceedings to date; and the brief background to the application is that two of the

Plaintiffs herein came together and formed a partnership in **1970** together with one **Nduati Wa Mukuru**, (the deceased father of the 3rd Plaintiff). They were at all times material to the suit trading as **Maturo Hardware Tools and Paints** (hereinafter "**Maturo Hardware**"), and, as they were pre-occupied with other endeavours of life, they agreed to hire and did hire one **James Thuita Chege** (now deceased), the father of the Defendants, to run the business for them.

[5] It was further pleaded that the said **James Thuita Chege** was never a partner in **Maturo Hardware**; but that in abuse of the trust bestowed on him by the partners of **Maturo Hardware**, and without any colour of right, he converted the partnership business, operations and finances to himself and even opened new business outlets and bank accounts in his own name, thereby making secret profits without the knowledge or authority of the Plaintiffs. It was further pleaded that after the demise of **James Thuita Chege** on or about **10 September 1999**, the Defendants immediately grabbed and took over the entire partnership property and forcibly resisted the efforts of the Plaintiffs to take over their business, claiming that the business and the properties connected therewith belonged to their deceased father. It was thus in the foregoing circumstances that the Plaintiffs filed this suit in **2004** for redress.

[6] Since then, the 1st and 2nd Plaintiff have also passed away. In effect therefore all the three partners have died; and whereas the 3rd Plaintiff was brought on board at the outset to champion the interests of the estate of his deceased father, **James Thuita Chege**, the 2nd Plaintiff is said to have withdrawn his component of this suit against the Defendants shortly before his demise. The record shows that by that time, the 2nd Plaintiff had already given his evidence herein. Accordingly, the twin issues for determination herein, as I see them, are:

[a] Whether the application is competently before this court, granted the Defence contention that the suit by the 1st Plaintiff abated on 14 June 2011; and if so,

[b] Whether the Applicants have made a good case for their joinder herein;

[7] Regarding the first issue, Learned Counsel for the Defendants submitted that **Order 24 Rule 2, Civil Procedure Rules**, does not contemplate the filing of an application, such as the one before the Court; and therefore, by dint of **Section 58 of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya**, the substitution ought to have been done without unreasonable delay. It was accordingly urged that since the instant application has been pending prosecution for 5 years, it ought to be dismissed with costs for being an abuse of the court process; granted that no explanation was proffered to explain this inordinate delay.

[8] The Applicants countered the foregoing argument by citing **Order 24 Rule 3 of the Civil Procedure Rules**, and contending that the application was timeously filed, though it has been pending hearing for a long time, due to no fault on the part of the Applicants. Intervening orders for hearing *de novo* and a follow up application for review are some of the reasons that were given for the delay. They relied on **Sections 37(1) and 46 of the Partnership Act, Chapter 29 of the Laws of Kenya** as well as the cases of **Rotich Cherutich & 3 Others vs. Director of Surveys & Another, Eldoret ELC Case No. 93 of 2012** and **Sultanali P. Molu & Another vs. Railways Corporation & Another [2002] eKLR** in support of their submissions and urged the Court to overlook any procedural technicalities and ensure justice is accorded to the Applicants in line with the Overriding Objectives of the Civil Procedure Act.

[9] **Order 24 Rule 2 of the Civil Procedure Rules** under which the instant application was filed provides as follows:

"Where there are more Plaintiffs or Defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving Plaintiff or Plaintiffs alone or against the surviving Defendant or Defendants alone, the Court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving Plaintiff or Plaintiffs, or against the surviving Defendant or Defendants."

[10] It is not in doubt that the 1st Plaintiff herein, **Eston Ndung'u Wanyoike**, died on **13 June 2010** as is indeed confirmed by the Certificate of Death exhibited herein as **Annexure RM1** to the Supporting Affidavit. Thus, the question to pose is whether the 1st Plaintiff's cause of action survived or continued to the surviving Plaintiffs, in this case the 3rd Plaintiff. In this regard, **Section 37** of the **Partnership Act, Chapter 29** of the **Laws of Kenya** provides that:

"...every partnership is dissolved as regards all the partners by the death or bankruptcy of any partner..."

[11] Accordingly, by the time this suit was filed, the partnership stood dissolved in the eyes of the law. As matters stand now, all the partners have died. Thus, what remains is for the legal representatives of the partners to see to the distribution of the assets of the partnership, if any for the benefit of the respective estates of the deceased partners in terms of **Section 48** of the **Partnership Act**. In the premises, it cannot be said that the interests of the 1st Plaintiff, or his cause of action would continue to the 3rd Plaintiff. Thus, the correct provision for the Applicants to have come under is **Rule 3** of **Order 24, the Civil Procedure Rules**. It reads as follows:

"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."

[12] Bearing in mind the rule that no application shall be defeated on a technicality, including failure to cite the correct provision of the law relied on (see **Order 51 Rule 10** of the **Civil Procedure Rules**), I would eschew the procedural technicalities raised herein by Counsel for the Defendants and proceed to consider the application from the perspective of **Order 24 Rule 3** aforesaid; in respect of which **Rule 3(2)** stipulates that:

"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..."

[13] Since the application was filed on **5 April 2011**, within the one year window, it is my considered finding that the 1st Plaintiff's suit is still valid and subsisting. As was rightly submitted by Counsel for the Applicants, the lapse of time thereafter would not count for purposes of reckoning the timeline set out in **Rule 3(2)**. Accordingly, I would resolve the first issue in favour of the Applicants and find that the application is competently before this Court and that the 1st Plaintiff's case is alive and subsisting.

[14] As to whether a good case has been made by the Applicants for their joinder, it has been shown hereinabove that the 1st Plaintiff's cause of action does survive in its own right. The Applicants have demonstrated that they are the legal representatives of the 1st Plaintiff by dint of the Grant of Letters of Administration exhibited herein as an annexure to the Supporting Affidavit. I note too that the application was supported by the 3rd Plaintiff, who is herein representing the estate of his deceased father. The Defendants are equally sued as representatives of the estate of their deceased father. It would only be fair and just that the Applicants be similarly accorded the opportunity to represent the interests of their deceased father's estate.

[15] In the result, I would allow the application dated **4 April 2011** and direct that the 1st Plaintiff be and is hereby substituted by **Joice Maregi Ndung'u, Robert Mugambi Ndung'u** and **Ann Nduta Kariuki**; and that the costs of the application be in the cause.

Orders accordingly.

DATED AND SIGNED AT NAIROBI THIS 12TH DAY OF APRIL, 2017

OLGA SEWE

JUDGE

**DATED, COUNTERSIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL,
2017**

RACHEL NG'ETICH

JUDGE