



**REPUBLIC OF KENYA**

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

**HCCC NO.19 OF 2000**

**DAVID K. CHERUIYOT.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOSHUA KIMUTAI CHERUIYOT.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**HON. KIPKALYA KONES.....DEFENDANT/RESPONDENT**

**RULING**

1. By an Amended Notice of Motion which is undated but was filed in court on 23<sup>rd</sup> September 2016, the plaintiffs/applicants seek the following orders.

***1. That Pauline Cherono Kones and Lily Chepkemai Kones be substituted for Kipkalya Kones (deceased) as defendants herein.***

***1. (a) That the Plaintiff's suit herein be revived.***

***2. That costs of this application be provided for.***

2. The application is based on the following grounds:

***1. That the defendant herein died on or about 10<sup>th</sup> June 2008.***

***2. That it had taken long for the plaintiffs to establish the administrators of the deceased defendant but have now succeeded.***

***3. That a consent judgment on liability was recorded on 9<sup>th</sup> November 2006 and the matter shall only proceed for quantum of damages.***

***4. That the defendant will not be prejudiced if the deceased defendant is substituted as the defendant had a valid insurance cover and the company is still in operation.***

***5. That the plaintiffs herein be granted leave to substitute the deceased defendant with his administrators.***

***6. That unless the defendant is substituted as prayed, this suit may not be concluded expediently.***

3. The application was supported by an affidavit sworn by counsel for the applicants, Mr. Kennedy Araka Nyachoti. In the said affidavit, Mr. Nyachoti avers that it is within his knowledge that the defendant died

on or about 10<sup>th</sup> June 2008 in a plane crash in Narok. He has now known that Pauline Cherono Kones and Lily Chepkemoi Kones are the defendant's legal representatives.

4. It is his deposition further that it has taken a long time for the plaintiffs to establish the administrators of the estate. They had filed an application for substitution of the defendant on 18<sup>th</sup> August 2016. However, his office had inadvertently omitted a prayer for revival of the suit as it had abated for not substituting the deceased within the time prescribed. They had filed the application for substitution when the matter was coming up on 18<sup>th</sup> August 2016 for dismissal for want of prosecution.

5. According to the applicant, the defendant would not suffer any prejudice as there is a judgment on liability on record. It was his averment that the plaintiffs had suffered serious injuries in a road accident, and should not be prejudiced on a legal technicality.

6. The matter came up before me on 19<sup>th</sup> April 2017 in the presence of Mr. Nyachoti for the applicants but in the absence of the respondents. An affidavit of service by one Maurice Onyango Ogol indicated that a hearing notice had been served by registered post on the administrators.

7. In his submissions, Mr. Nyachoti stated that judgment on liability had been entered in the matter in 2006, and what was remaining was assessment of damages. The plaintiffs had not known the administrators of the deceased's estate and took time to find the administrators. He urged the court to allow the application and revive the suit, arguing that the matter should not be allowed to lapse on a technicality. No authorities were placed before the court to support the application.

8. From the grant of letters of administration intestate placed before the court, Kipkalya Kiprono Kones died on 10<sup>th</sup> June 2008. In accordance with the provisions of Order 24 of the Civil Procedure Rules, the suit against him abated on or about 10<sup>th</sup> June 2009. Order 24 provides as follows:

***1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.***

***2. 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.***

***3. (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.***

9. Is there "good reason" for reviving this suit, 8 years after it abated? More importantly, what has been placed before the court to justify such revival? It would appear that the application for revival of the suit and substitution of the defendant was precipitated by a notice from this court dated 4<sup>th</sup> August 2016 issued under Order 17, Rule 2 of the Civil Procedure Rules 2010 for the parties to show cause why the suit should not be dismissed for want of prosecution. The application for substitution was filed when the notice to show cause was coming up on 18<sup>th</sup> August 2016.

10. Is the explanation offered by the applicants, that it had taken them long to establish who the administrators of the estate of the defendant were, a sufficient reason? I note that the letters of administration intestate to the estate of the deceased were issued on 25<sup>th</sup> September 2009. The application before me was filed on 18<sup>th</sup> August 2017, almost eight years after the issuance of the grant and after the suit had abated. It is evident that both the applicants and their Counsel had slept on the matter, despite having judgment in their favour on liability against the defendant prior to his demise.

11. The plaintiffs/applicants are alleged to have suffered serious injuries in a road traffic accident, and the parties had entered judgment on liability, leaving only the question of quantum for determination. Order 24 talks of “good reason”. The only good reason placed before the court is that there was on record a judgment on liability entered by consent between the parties. In the circumstances, while decrying the length of time that the applicants have taken to substitute the defendant and seek revival of their suit, I am satisfied that in this case, the interests of justice are best served by allowing the application and permitting the plaintiff/applicants to pursue their claim for personal injuries suffered.

12. Accordingly, I will allow the application. The applicants are directed to substitute the defendant and pursue their claim against the defendant within the next 90 days from today.

**Dated Delivered and Signed at Kericho this 24<sup>th</sup> day of July 2017.**

**MUMBI NGUGI**

**JUDGE**