REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL SUIT NO. 19 OF 2005 (O.S.)

CLEMENT CHIURI KARIUNGI……..……PLAINTIFF

VERSUS

JOHN KABUKU GACHARI…….....……1ST RESPONDENT

MICHAEL KAGUAMBA GACHARI….……...……..2ND RESPONDENT

AND

PAULINAH NYOKABI KARIUNGI……...……..…APPLICANT

RULING

On 5th of June 2015, this honourable court issued a notice to the plaintiff to show cause why his suit should not be dismissed for want of prosecution; the notice was, no doubt, issued under **Order 17 rule 2** of the **Civil Procedure Rules** although **rule 4** was erroneously cited as the applicable rule. The substance of the notice was, however, obvious as to its intendment and when parties responded and appeared before court on 24th June, 2015 they were not in any doubt why the notice had been issued.

The issuance of the notice was informed by the fact that the last action taken by the plaintiff towards progression of his case was when he filed an amended originating summons on 8th July, 2008; no further action was taken 7 years down the line. In these circumstances, the court invoked **Order 17 rule 2** of the **Civil Procedure Rules** which authorises it to dismiss a suit for want of prosecution where no cause is shown, to its satisfaction, why no step towards hearing and conclusion of the case has been taken within a period of one year. That rule says: -

> ***2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.***

As of 24th June, 2015, when parties appeared before court, the plaintiff had not filed any affidavit to show cause why the suit should not be dismissed; however, his counsel informed the court from the bar that the plaintiff was deceased. It was not clear when the plaintiff died but the court took counsel at his word and marked the matter as abated since no application had been made for substitution of the plaintiff.

More than a year later, and in particular on 9th February, 2017, the applicant herein filed a motion dated 27th January, 2017 and prayed for the following orders:

1. That the honourable court be pleased revive(sic) this suit which has abated.

2. That once the suit is revived, the honourable court be pleased to substitute PAULINAH NYOKABI KARIUNGI the applicant herein for the plaintiff CLEMENT CHIURI KARIUNGI (deceased).

3. That the costs of this application be provided for.

The motion was made under **Order 24 rule 1, 3(1), 7(2)** and **Order 51 Rule 1** of the **Civil Procedure Rules** and supported by the affidavit of Paulinah Nyokabi Kariungi. In the affidavit, the applicant disclosed that the plaintiff died on 30th September, 2008 and that she was now his personal representative. She deposed that she could not file the application for substitution within one year after the plaintiff's death because she had been unwell, having undergone a major operation that involved the amputation of one of her limbs in the year 2008.

Counsel for the defendants opposed the application and filed grounds of objection dated 24th of March, 2017 together with a replying affidavit sworn by the 1st defendant on 24th March, 2017. He urged that there has been inordinate and inexplicable delay in institution of the application and that the same was in any event misconceived, frivolous, vexatious and an abuse of the due process of this court. He also urged that since the application is bad in law it ought to be struck out.

The law applicable to the applicant's motion is found in **Order 24** of the **Civil Procedure Rules**. **Sub rule (1)** thereof states:

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

For this reason, **sub rule 3(1)** of **order 24** clothes the court with the power to substitute the deceased party with his personal or legal representative whenever it is moved in an appropriate application for such an order; it states:

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.

The dispute between the plaintiff and the defendants was about ownership of land known as **Title No. Ruguru/Kiamariga/1291**; if the suit was to be resolved in the plaintiff's favour, this parcel of land would form part of his estate. It follows that his cause of action against the defendants survived him and therefore his legal representative, who in this case is the applicant, can be made a party to the suit and proceed with it for purposes of collecting or claiming on behalf of the plaintiff's estate or otherwise preserving the estate.

But this is on the assumption that there exists a suit in which the applicant can be made a party in place of the deceased plaintiff. The status of the suit at the moment is that it is abated and therefore the appropriate question to consider at the very outset is whether there is any merit in the application of revival of the suit.

Counsel for the defendants argued that the suit cannot be revived and therefore it was not open to the applicant to seek for its revival; rather she ought to have filed a fresh suit in her own right. If this is the reason why the learned counsel thought the applicant's motion to be misconceived, vexatious, frivolous and an abuse of the due process of this court, then he must have misapprehended the law.

Contrary to the learned counsel's submission's that the applicant ought to file her own suit in her own right, **rule 7** of **Order 24** is clear that when a suit has been dismissed under this particular order, no fresh

suit can be filed by any other person. The only alternative available is to seek the revival of the dismissed or abated suit. This rule states as follows: -

> ***7. 1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***
>
> ***(2) 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.***

To the extent that the applicant has applied for the revival of the suit, her application is properly before the court and therefore the primary question remains whether there is any merit in the application.

According to the applicant, she was unwell since the plaintiff died in 2008 until the year 2015 when the court marked the suit as abated. Her case is that because of her illness she could not file the application for substitution within one year of the plaintiff's death as is the requirement under **Order 24 rule 3(2)** of the **Civil Procedure Rules** which states:

> ***(2) Where within one year no application is made under sub rule (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***.

The application referred to in **sub rule (1)** is the application for substitution.

The applicant exhibited to her affidavit in support of her motion a copy of a letter dated 18th January,2017 allegedly from the Director, Karatina hospital saying that she had been a patient in that hospital between 2009 and 2015. She also attached on the same affidavit a copy a bill from Consolata Hospital suggesting that she had been treated and billed in that hospital sometimes in October, 2008. These two documents were, intended to prove that she was unwell at the time should have filed the application for substitution.

I found this evidence wanting in several respects. First, I couldn't figure out the connection between Karatina Hospital and Consolata Hospital. If the applicant was a patient at Karatina Hospital between 2008 and 2015 no explanation was given as to why she was billed by Consolata Hospital in 2008.

Secondly, no formal medical report was provided to demonstrate that the applicant was indisposed to the extent that she could not, at the very least, instruct counsel and swear a simple affidavit in support of an application for substitution. Besides the letter from Karatina Hospital, there is no evidence of any medical records showing that the applicant was an inpatient or outpatient in that hospital or any other hospital for that matter between the period 2008 and 2015.

Thirdly, when this matter came up for dismissal for want of prosecution in June 2015, the issue of the applicant's sickness never came up. If the applicant was sick as alleged, there is no reason why an affidavit to explain her state of health and hence the delay in prosecution of the suit was not filed by the material date.

My assessment of the applicant's conduct is that she was only nudged into action when this court moved suo motu to dismiss her case for want of prosecution. And even when the suit was marked as abated, seven years after the last action by the plaintiff, the applicant took another one and half years to file the current motion. While she has attempted to explain the failure to file the application for substitution before the suit was eventually marked as abated, no explanation whatsoever has been given for the delay of one year before she filed the application for revival of the suit.

For the foregoing reasons, I am not satisfied that the applicant provided any sufficient cause that can be said to have prevented her from continuing the suit before it abated. For the same reasons, I am not convinced that the applicant has provided sufficient reasons for reviving the suit. Accordingly, I find and hold that her motion dated 27th January, 2017 is not merited and it is hereby dismissed. There shall be no orders as to costs.

Signed, dated and delivered in open court this 18th August, 2017

Ngaah Jairus

JUDGE