



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NUMBER 143 OF 2015

GIDEON MURIUKI MWORIA.....1ST PLAINTIFF

KIJANA MURIUKI MWORIA.....2ND PLAINTIFF

VERSUS

MPURI MAIZE MILLERS LTD.....1ST DEFENDANT

MARGARET KANYUA GITUMA.....2ND DEFENDANT

SILAS GITUMA.....3RD DEFENDANT

JOHN W. MUREITHI GITUMA.....4TH DEFENDANT

R U L I N G

By plaint dated 31st July, 2014, the Plaintiff Gideon Mugambi Mworja (1st Plaintiff) and Kijana Muriuki Mworja (2nd Plaintiff) sued the Defendant/Respondent, Mpuri Maize Millers (1st Defendant), Margaret Kinyua Gitura (2nd Defendant), Silas Gituma (3rd Defendant) and John Muriithi (4th Defendant) seeking judgment against the Defendant for: -

- a) Judgment be entered against the Defendants jointly and severally for the sum of Kenya Shillings Two Million, Five Hundred and Three Thousand Ten (Kshs.2,503,000/-).*
- b) Judgment be entered against the Defendants jointly and severally for the sum of Kenya Shillings Two Million, Six Hundred and Twenty Four Thousand, Three Hundred and Ten (2,624,310/-).*
- c) Interest in the sums in (a) and (b) herein above at court rates from the date of filing suit.*
- d) Loss of bargain amounting to the sum of Kshs. Sixty Million (Kshs.60,000,000/-).*
- e) Damages.*
- f) Costs of the suit.*

On 3rd September, 2014 the firm of Gikunda Miriti & Co. Advocates entered a Memorandum of

appearance for all the defendants. They did not file statement of defence. On 15th December, 2014 the Plaintiff applied for judgment in default of filing defence. Judgment was entered on 8th January, 2015. The 3rd Defendant Silas Gituma had died on 16th October, 2014 and by operation of the Law Order the suit against him abated. The Applicant then filed this application brought under Section 1A, 1B, 3A, Civil Procedure Act Order 24 Rule 1, 7 Civil Procedure Rules seeking orders: -

a) This Honourable court be pleased to substitute Silas Gituma (deceased) the 3rd Defendant herein with Margaret Kanyua Gituma and John Wycliffe Mureithi, the Administrators and Legal Representatives of his Estate.

The application is based on the grounds that: -

- 1. The 3rd Defendant herein passed away on 16th October, 2014 pursuant to which the Plaintiff filed a citation to take or accept letters of Administration in the 3rd Defendant's Estate against the known beneficiaries of his Estate.***
- 2. After the beneficiaries were served they later on filed for letters of administration with the 2nd and 4th Defendants herein being named as the administrators for the estate of the 3rd Defendant.***
- 3. That by the time that the letters of administration was acquired over 1 year had lapsed meaning that the suit against the 3rd Defendant had elapsed by effluxion of time.***
- 4. In the interest of justice and fairness, the Plaintiff prays that Margaret Gituma and John Mureithi are substituted for the 3rd Defendant and that the suit against the 3rd Defendant is revived.***
- 5. Despite the death of the 3rd Defendants herein, the cause of action survives against the Estate of the deceased.***

The application is supported by the affidavit of Gideon Mworja sworn on 31st August, 2016 reiterating the grounds of the application. The application is opposed. The 4th Defendant/Respondent John Wycliffe Mureithi Gituma filed a replying affidavit where he depones that it is true that the 3rd Defendant is deceased and the suit abated after the Plaintiff failed to substitute the Plaintiff within the prescribed time. Apart from the suit abating the Plaintiff was well aware that the 1st Defendant is a limited company had been transferred to the Plaintiff and as such cannot exist as a Defendant.

He depones further that the Plaintiffs have not obtained any decree and the suit was in itself defective and cannot be reinstated as it stands. The suit as pleaded was basically against a limited company and not the deceased estate and the company is not a property of the estate. That the claim does not exist against the estate of 3rd Defendant and it would be an exercise in futility to revive the case.

He avers that the nature of the case is one that cannot survive the deceased and cannot be visited onto the estate or deceased survivors, and it is will be unfair, unjust and an abuse of court process to re-open a suit that even on the face of it lacks merit.

By consent this application was canvassed by way of written submissions. Both parties filed respective written submission. Wandabwa Advocates for the applicant submitted that Order 24 Rule 7 of the Civil Procedure Rules confers jurisdiction to this court to revive an abated suit and allow for substitution. In exercising the discretion counsel submitted that the court must be satisfied that the applicant was prevented by sufficient cause from continuing the suit. He submitted that in this suit the Applicant was prevented from filing for substitution as letters of administration had not been obtained by the estate which fact was not disclosed to the applicant. He submits that their explanation is reasonable and truthful, finally counsel submits that this is a monetary cause of action which survives the deceased.

Gikunda counsel for the defendants submitted that the subject matter in this suit was a contract that was between the Plaintiff and 1st Defendant and which contract was concluded and the Plaintiffs had the 1st Defendant Company transferred to them. The Plaintiffs are now also directors of 1st Defendant. He submits that the estate of the deceased is independent of the 1st Defendant. Counsel further submitted that there are the 3rd and 4th Defendant who are alive and against whom he can proceed with the suit.

This application is premised on the provisions of Order 24 of the Civil Procedure Code. Order 24 provides: -

“O. 24 (1) the death of a Plaintiff or Defendant shall not cause the suit to abate if the cause of action survives or continues.”

It is common ground in this suit that the 3rd Defendant Silas Gituma was sued by the Plaintiff in the plaint filed on 31st July, 2014. It is also not in dispute that the said Silas Gituma is now deceased. It is not in dispute that Margaret Kanyua Gituma and John Mureithi who were also sued jointly with him are still alive. It is also common ground that Letters of Administration in respect of the estate of Silas Gituma have been obtained and finally it is clear that this is a money suit which survives the death of the Defendant.

It is also common ground that the suit has abated no action having been taken for substitution for a period of one year. These facts being not in dispute, the only issue for determination in this application is whether the applicant have shown sufficient cause for this court to exercise its discretion and grant an order for revival of the suit. This is the requirement of Order 24 Rule 7 (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.”

What the court would consider as sufficient cause has been held to be in: -

“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 Backs Law Dictionary, 9th Edition page 521), Sufficient Cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges Mind. The explanation should not leave unexplained gaps in the sequence of events.”

The Applicant’s explanation for the delay in filing for substitution was that they deceased’s defendants had not applied for letters of administration and that when it came to their knowledge, they filed a citation in Meru Succession Cause No. 246 of 2015. All these were in an effort to maintain that suit against the estate of the deceased. This according to him explains the delay. This explanation objectively examined appears plausible, reasonable and truthful. It is, therefore, in my view, demonstrates that the Applicant was prevented by reasonable cause from substitution cause from continuing the suit. I am, therefore, satisfied that the application for revival of the suit is well grounded and order that the suit against the 2nd Defendant be and is hereby revived. I also direct that **Margaret Kanyua Gituma** (2nd Defendant) and **John Wycliffe Mureithi** as legal representatives of the estate of **Silas Gituma** be substitute to the late Silas Gituma (Deceased).

Dated, signed and delivered at Nairobi this 18th day of September, 2017.

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S N RIECHI

JUDGE