



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 1052 OF 2003**

**THOMAS NJUNG'E.....PLAINTIFF**

**VERSUS**

**THIERERE MEITII..... 1<sup>ST</sup> DEFENDANT**

**JAMES KAMONDE.....2<sup>ND</sup> DEFENDANT**

**ROSALIND KIBANYA.....3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR KIRINYAGA DISTRICT .....4<sup>TH</sup> DEFENDANT**

**CATHOLIC DIOCESE OF MURANG'A.....5<sup>TH</sup> DEFENDANT**

**RULING**

What I have before me is the plaintiff's application by way of Notice of Motion dated 6<sup>th</sup> June 2014 seeking the following orders:

1. That the court be pleased to revive this suit against the estate of Rosalid Kibanya, the 3<sup>rd</sup> defendant herein.
2. That the limited time to substitute the said Rosalind Kibanya, deceased, with her legal representatives be enlarged.
3. That Gichero Kibanya, Margaret Mumbi Kibanya, Michael Njeru Kibanya and Mary Kibanya, the appointed administrators of the estate of the late Rosalind Kibanya, the 3<sup>rd</sup> defendant herein be made parties to this suit as 3<sup>rd</sup> defendant in place of the late Rosalind Kibanya.

The application which is supported by the affidavit of the plaintiff sworn on 6<sup>th</sup> June, 2014 has been brought on the grounds that the 3<sup>rd</sup> defendant, Rosalind Kibanya (**"the deceased"**) is deceased having died on 12<sup>th</sup> August 2010 and Gichero Kibanya, Margaret Mumbi Kibanya, Michael Njeru Kibanya and Mary Kibanya (hereinafter referred to as **"the respondents"**) have been appointed as the administrators of her estate. The plaintiff has averred that the application was not brought earlier for reasons which were beyond his control. He has stated that he came to know of the deceased's death in December, 2011 and notified his then advocates accordingly. The said advocates did not take immediate action to find out the details of the administrators of the estate of the deceased for the purposes of applying to court for the substitution of the deceased with her legal representatives. At the same time, the advocates who were on record for the deceased continued to attend court and appear for the deceased as if nothing had happened. The said advocates failed to notify the plaintiff of the death of the deceased and the deceased's legal representatives.

The plaintiff has averred that it was in the year 2013 that he came to know the names of the legal representatives of the estate of the deceased after he obtained a copy of the grant of letters of administration in respect of the estate of the deceased by which time the time within which the deceased should have been substituted in the suit with her legal representative had lapsed and the suit abated. The plaintiff has averred that he is desirous of continuing with the suit against the estate of the deceased and that failure to apply for the substitution of the deceased with her legal representatives was neither intentional nor caused by indolence but by factors beyond his control the particulars of which have been highlighted above. The plaintiff has averred that he would suffer immensely if the orders sought are not granted. The Plaintiff annexed to his affidavit, a copy of grant of letters of administration intestate of the estate of the deceased that was issued to the respondents on 11<sup>th</sup> April 2012 by the High Court at Embu in Succession Cause No. 488 of 2011.

The plaintiff's application was opposed by the respondents, the 5<sup>th</sup> defendant and the former advocate for the deceased, Anthony Maina Macharia t/a K. Macharia and Company Advocates. The respondents filed grounds of opposition dated 13<sup>th</sup> January 2015 and a replying affidavit sworn on 15<sup>th</sup> August 2015 by Gichero Kibanya in opposition to the application. The 5<sup>th</sup> defendant opposed the application through grounds of opposition dated 22<sup>nd</sup> July 2014 while Antony Maina Macharia advocate opposed the application through a replying affidavit sworn on 11<sup>th</sup> May 2015. In their opposition to the application, the respondents contended that the plaintiff's application has no basis and is an abuse of the process of the court.

The respondents contended that the death of the deceased was a matter that was in the public domain and was covered extensively in the electronic and print media and as such it is not true that the plaintiff was not aware of the death of the deceased as he has claimed. The respondents contended further that the plaintiff knew the deceased well up to her home and he did not at any time make inquiries from the respondents as to the legal representatives of the estate of the deceased if he was at all keen on substituting the deceased with her legal representatives. The respondents have contended that the plaintiff has not given any valid reason for not bringing the application herein earlier and as such he is guilty of laches.

The deceased's former advocate Mr. Anthony Maina Macharia has on his part contended that the plaintiff was aware of the deceased's death and even attended her funeral. Mr. Macharia contended that the plaintiff has not given any reasonable explanation for the delay in substituting the deceased with her legal representatives. On its part, the 5<sup>th</sup> defendant contended that the plaintiff's application is defective, bad in law and is without merit.

On 11<sup>th</sup> June 2015, the court directed that the plaintiff's application be argued by way of written submissions. The plaintiff, the respondents and the deceased's former advocate, Anthony Maina Macharia filed their respective submissions and the same are on record. The 5<sup>th</sup> defendant did not file submissions. I have considered the plaintiff's application together with the grounds of opposition and replying affidavits filed by the respondents, the 5<sup>th</sup> defendant and the deceased former advocate Anthony Maina Macharia in opposition to the application. I have also considered the parties' respective submissions and the authorities cited in support thereof. Order 24 rules (4)1 of the Civil Procedure Rules provides that where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, the court on an application made in that behalf shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit and where no application is made for the deceased's legal representative to be made a party to the suit, the suit shall abate as against the deceased defendant.

Order 24 Rule 7 (2) of the Civil Procedure Rules provides among others that the plaintiff may apply for an order to revive a suit which has abated and if it is proved that he was prevented by any sufficient cause from continuing with the suit, the court shall revive the suit upon such terms as it thinks fit.

What I need to determine in the present application is whether the plaintiff has established or demonstrated that he was prevented by sufficient cause from applying within time for the legal

representative of the deceased to be made a party to this suit so that he may continue with the suit against the estate of the deceased. What constitutes a sufficient cause in my view depends on the circumstances of each particular case. From the circumstances of the case before me, I am satisfied that the plaintiff has shown sufficient cause to warrant the revival of the suit. It is not in dispute that the legal representatives of the estate of the deceased were not appointed until 11<sup>th</sup> April 2012 in Succession Cause No. 488 of 2011. Under Order 24 rule 4(3) of the Civil Procedure Rules, this suit abated as against the 3<sup>rd</sup> defendant on 12<sup>th</sup> August 2011. This was before the appointment of the legal representatives of the deceased. It follows therefore that, the plaintiff could not have applied for the respondents to be made a party to this suit before the suit abated on 12<sup>th</sup> August 2011. This could only have been done after the appointment of the respondents as legal representatives of the deceased on 11<sup>th</sup> April 2012. There is no evidence before the court that the plaintiff knew the respondents to have been in a position to apply for them to be appointed as legal representatives of the deceased for the purposes of being made parties to this suit.

In his affidavit in support of the application herein, the plaintiff has deposed that he learnt of the appointment of the legal representatives of the deceased in April, 2013 after carrying out personal investigations that took him to the High Court registries in Nairobi, Nyeri, Kerugoya and Embu. I have noted from the record that the plaintiff's first application seeking the substitution of the deceased 3<sup>rd</sup> defendant with the respondents herein was filed on 3<sup>rd</sup> July 2013. This application fell into headwinds. It was objected to on the ground that the suit had abated and as such there was no suit to which the respondents could be made parties. That application was abandoned by the plaintiff who filed a fresh application on 23<sup>rd</sup> August 2013, this time round seeking only an order for the revival of this suit. Like the earlier application, this second application also met turbulence. It was objected to on the ground that in addition to seeking the revival of the suit, the plaintiff should have at the same time also sought to have the legal representatives of the deceased made parties to the suit. The application was said to be incompetent.

Faced with this objection, the plaintiff once again abandoned the application of 23<sup>rd</sup> August 2013 and filed a new application on 11<sup>th</sup> June 2014 which is before me. It is clear from what I have set out above that soon after the plaintiff learnt of the appointment of the respondents as the legal representatives of the deceased in April, 2013 as he has claimed, the plaintiff has consistently made attempts to have the suit revived and the respondents made parties to the suit so that the plaintiff may continue with the suit against the estate of the deceased. It is therefore not true as claimed by the respondents and the deceased's previous advocates that the plaintiff went to sleep after the death of the deceased in the year 2010 and only came to court to seek revival of the suit 4 years later in the year 2014.

I am of the view that in the circumstances of this case, I would still have exercised my discretion in favour of the plaintiff even if there was delay in bringing of this application. I have noted that this matter is part heard and the plaintiff has expressed a desire to continue with the suit against the estate of the deceased. It has not been contended and I am not satisfied on the material before me that the respondents and the 5<sup>th</sup> defendant stand to suffer any injustice or prejudice which cannot be compensated for in costs if the suit herein is revived as against the estate of the deceased and the respondents made parties thereto in place of the deceased.

For the reasons given above, I find the plaintiff's application dated 6<sup>th</sup> June 2014 well founded. The same is allowed in terms of prayers 3, 4 and 5 thereof. The plaint shall be amended within 14 days from the date hereof to effect the joinder of the respondents in the suit. The costs of the application shall be in the cause.

**Delivered, Dated and Signed at Nairobi** this 29<sup>th</sup> day of January, 2016

**S. OKONG'O**

## **JUDGE**

### **In the presence of**

N/A for the Plaintiff

Mr. Kimani h/b for Kemunto for 2<sup>nd</sup> Defendant for the Defendants.

Mr. Mwangi for the legal representative of the 3<sup>rd</sup> Defendant