



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 116 OF 1988

ZAKARI BILIKA.....PLAINTIFF

VERSUS

MMASABA MULEFU.....DEFENDANT

RULING

1. The applicant is the widow of the defendant. She prays for enlargement of time to substitute the *defendant*. The defendant died on 12th December 2001. Doubt is removed by the death certificate issued on 25th January 2002. The grounds are set forth in the notice of motion dated 21st April 2015; and, the deposition sworn by the applicant on even date.
2. The widow, *Mary Teresa Mmasaba*, is the legal representative of the estate of the deceased by dint of a certificate of confirmation of grant issued on 25th November 2010. At the time of the defendant's demise, the suit had been concluded. The applicant avers that the decree required the defendant to refund the plaintiff the deposit or consideration for purchase of land known as Trans Nzoia Sinyerere/133.
3. The defendant made a refund as per the annexure marked *MTM2b*. However, the plaintiff had lodged a prohibitory order against the title. Despite the refund, the plaintiff did not raise the prohibitory order. To be fair to the plaintiff, there is pending an application dated 30th September 2013 to lift the prohibition. It was served upon the applicant.
4. On 27th April 2016, I heard brief submissions from learned counsel for the applicant. The plaintiff did not appear despite service. No reply has been filed by the plaintiff. I have considered the application and submissions.
5. The legal parameters in a matter of this nature are well settled. Order 24 of the Civil Procedure Rules 2010 provides that a cause of action shall *not* be defeated merely by the death of the plaintiff or defendant. If the cause of action *survives* the deceased, a substitution must be undertaken within a *year* of the death; in default, the cause of action *abates* by operation of the law. In the present case, the suit had been *concluded*; and, the deceased had sought to make a refund in terms of the decree. It would thus be a misnomer to say that the suit has abated.
6. Section 95 of the Civil Procedure Act on the other hand grants the court power to enlarge the time for doing any act prescribed by the statute. The court has wide and unfettered discretion. The discretion must however be exercised judiciously. Some of the factors to be considered include the length of delay, the reasons for the delay, the nature of the dispute and whether the respondent will suffer prejudice if the court extends the time. See generally, *Leo Sila Mutiso v Rose Mwangi*, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported).
7. The Court must also pay heed to the overriding objective to do justice to the parties. See Article 159 of the Constitution and sections 1A, 1B and 3A of the Civil Procedure Act. See also *Harit Sheth T/a Harit Sheth Advocate v Shamas Charania*, Court of Appeal at Nairobi, Civil Application No 68 of 2008 [2010] eKLR.

8. Although there has been laches in presenting this motion, I am satisfied that the main suit had been concluded prior to the demise of the defendant. I am also satisfied that the defendant made a refund to the plaintiff as per the decree. The original court file got misplaced at some point; and, a skeleton file was opened. The original file has since been traced. I will thus excuse the delay. At the heart of this matter is the emotive question of *land*. The plaintiff has *not* opposed this motion. I am thus unable to say there will be *prejudice* in the circumstances. That may explain the plaintiff's motion to raise the prohibitory order dated 30th September 2013. Unless time is now enlarged; or, substitution allowed, the ends of justice will be defeated.
9. Granted those circumstances, I will exercise my *discretion* in favour of the *defendant*. Time is hereby enlarged by *fourteen days* of today's date within which to substitute the *defendant*. I am also satisfied that the applicant is the *legal representative* of the estate of the deceased. I thus order that *Mary Teresa Mmasaba* be and is hereby substituted in place of the *defendant*. I grant general leave to amend the pleadings or decree to reflect the new party. As the plaintiff did not appear; and, in the interests of justice, there shall be no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 28th day of April 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open court in the presence of:

No appearance for the applicant.

No appearance for the respondent.

Mr. J. Kemboi, Court clerk.