



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA

JR MISC. APPLICATION 137 OF 2012

ANDREW O. NYANGWESO.....APPLICANT

VERSUS

CHIEF MAGISTRATE'S COURT.....RESPONDENT

AND

- 1. ALLOYS BARASA**
- 2. OYE ASHIOYA T/A ASHIOYA & CO. ADVOCATES**
- 3. EMMANUEL OTIANGALA T/A KURONYA AUCTIONEERS**
- 4. ALLICE ANIDO AYUKU.....INTERESTED PARTIES**

R U L I N G

1. Through the Notice of Motion application dated 19th October, 2015, the Applicant, Andrew Nyangweso prays for orders that:

“1. THAT this court be pleased to reinstate the abated application against the deceased 3rd respondent the late Emmanuel Otiangala T/A Kuronya Auctioneers.

2. THAT this honorable court further be pleased to grant leave to the Applicant to substitute the 3rd respondent now deceased with the 4th respondent Alice AnindoAyukuOminde who is now the successor or Administratrix of the deceased the late Emmanuel Otiangala T/A Kuronya Auctioneers.

3. THAT cost of this application bein the cause.”

2. The application is supported by the grounds on its face as follows:

“1. THAT the demise of the deceased was not properly communicated to the applicant on time so as to enable the applicant apply for substitution of the deceased with the name of his successor.

2. THAT the Applicant is still desirous of prosecuting his case against all the respondents /interested parties.

3. THAT by virtue of the death of the 3rd interested party/respondent Emmanuel Otiangala T/A Kuronya Auctioneers by 9th Dec. 2012 the Applicant's Application has now abated.

4. THAT the abated application ought to be reinstated against the successor of the deceased 3rd interested party/respondent.

5. THAT the name of the 4th interested party/respondent Alice AnindoAyukuOminde who is the administratrix of the deceased be substituted for 3rd interested party/respondent.

6. THAT it is just, lawful and equitable that the Applicant be granted leave to substitute the 4th interested party/respondent for the deceased 3rd interested party/respondent.

7. THAT the 3rd interested party/respondent died in the cause of the applicant's application and as such the court records cannot be maintained in the name of a dead person hence this application for reinstatement of the abated application and substitution of the 3rd interested party/respondent with the name of the 4th interested party/respondent AliceAnindoAyukuOminde.”

3. The application is also supported by an affidavit sworn by the Applicant on 19th October, 2015. The affidavit is a restatement of the grounds on the face of the application save the Applicant adds that since deceased died and was buried at Kakamega and the letters of administration of the estate of the deceased were issued on 14th July, 2014 nearly two years after the demise of the deceased, it cannot be said that this application has been delayed especially considering that the person granted the letters of administration to the estate of the deceased also lives in Butere.

4. The Respondent in the judicial review proceedings, the Busia Chief Magistrate's Court did not respond to the instant application. The 4th Interested Party opposed the application through a replying affidavit sworn on 14th July, 2016. The said affidavit does not specifically indicate that it is also sworn on behalf of the 1st to 3rd interested parties.

5. There is no document on record filed by Alloys Barasa, OyeAshioya T/A Ashioya & Co. Advocates and Emmanuel Otiangala T/A Kuronya Auctioneers being the 1st to 3rd interested parties although at the time of making his oral submissions on 20th July, 2016 Mr. Ashioya for the interested parties gave the impression that 1st and 2nd interested parties whom he was representing were also opposed to the application. I will therefore proceed on that presumption.

6. Alice AnindoAyuku commences her opposition to the application by averring that the same is vexatious, unmerited, incompetent, frivolous and oppressive and ought to be dismissed with costs. According to her, their inclusion in these proceedings as interested parties is un-procedural and illegal as the Applicant never obtained the leave of the court before enjoining them in these proceedings.

7. It is her case that by naming the Busia Chief Magistrate's Court as the Respondent, the Applicant is cunningly and mischievously trying to deny the interested parties an opportunity to reply to any application in this matter.

8. The 4th Interested Party deposes that the judicial review application filed by the Applicant does not cite any breach committed by the deceased 3rd Interested Party nor does it seek any specific orders against him, and it would be a useless and futile exercise to revive the application for academic purposes.

9. It is the 4th Interested Party's position that the judicial review application abated in respect of the deceased but survived against the other parties and the Applicant should have pursued those parties instead of waiting for an outcome of this application for reinstatement and substitution.

10. Turning to the substantive issues, the 4th Interested Party avers that the auctioneering business of the deceased 3rd Interested Party is still being wound up by the nominees and no net proceeds are yet to be passed to her as the legal representative of the estate of the deceased. Further, that any grievances the Applicant may have had against the deceased 3rd Interested Party arose from his work and it would only be just and proper that the parties settle any such grievances before they are passed over to the legal representative of the deceased.

11. It is the 4th Interested Party's case that the numerous suits and applications arise from execution of distress for rent against one John Nyangweso and Andrew Nyangweso, the Applicant herein is therefore a stranger to the cause of action.

12. The 4th Interested Party avers that the Applicant's reference in Case No. 1 of 2010 before the Rent Restriction Tribunal at Kakamega was dismissed on 12th June, 2015 because of the Applicant failure to prosecute it. Consequently, the 4th Interested Party argues that the mother case having been dismissed all the other cases pending before this court and other courts must collapse.

13. In a further affidavit sworn by the Applicant on 19th July, 2016 he avers that after the demise of the 3rd Interested Party his family shifted from Busia making it difficult for him to trace them thus the delay in filing the application herein.

14. It is the Applicant's averment that the liability of a licensed auctioneer in relation to the conduct of his auctioneering business is unlimited. He avers that the original suit was instituted in the personal capacity of the demised 3rd Interested Party whom the 4th Interested Party represents hence the need to make an application for substitution.

15. The law governing the fate of a suit where a party dies before its conclusion is found in Order 24 of Civil Procedure Rules, 2010. Rule 4, which is applicable in this instance states:

"4(1) 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, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2). Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3). Where within one year no application is made under sub-rule (1), the suit shall abate as against the deceased defendant."

16. This rule therefore requires that an application for substitution should be made within one year from the date of the demise of the defendant otherwise the suit shall abate. Rule 7(1) explains the effect of abatement or dismissal 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."

17. However, not all is lost because Rule 7(2) provides room for revival of an abated or dismissed suit as follows:

"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.”

18. It is not disputed that by the time the Applicant was filing the application at hand, the case against the 3rd Interested Party had abated. That explains why he seeks a reinstatement of the abated application. Mr. Ashioya’s assertion that a suit that has abated is as dead as a dodo is not entirely correct. The law gives room for revival upon the Applicant proving that **“he was prevented by any sufficient cause from continuing the suit.”** Once the Court is satisfied that the suit should be revived, it shall do so **“upon such terms as to costs or otherwise as it thinks fit.”**

19. In **Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 others [2015] eKLR** the Court of Appeal explained the provisions of Order 24 of the Civil Procedure Rules, 2010 as follows:

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.”

20. Although the Court of Appeal was addressing the effect of the death of a plaintiff on the plaintiff’s suit, I am of the view that the same position applies to a deceased defendant. The opportunity for revival of an abated suit extends to a situation in which a plaintiff, because of failure by the estate of a deceased defendant to apply to be enjoined to the suit, desires to have the legal representative of a deceased defendant brought on board to enable the matter proceed to conclusion.

21. Explaining the procedure to be followed where a suit has abated F. Gikonyo, J stated in **Leonard Mutua Mutevu v Benson Katela Ole Kantai [2014] eKLR** that:

“It should be understood that once the suit has abated, there is no suit, there is nothing and out of nothing you can derive nothing, hence the requirement to apply to resuscitate the suit to life first, albeit the order for substitution will ordinarily saddle upon the one for revival of suit. But in so applying the applicant must prove to the court that he had been prevented by a sufficient cause from applying within the one year provided in the rules”.

22. The Applicant herein has complied with the procedure as explained by the learned Judge. He has sought reinstatement of the abated judicial review application and followed the same by applying for substitution of the deceased 3rd Interested Party by the legal representative of his estate.

23. What I only need to consider is whether the Applicant has given sufficient explanation as to why he did not file the application for substitution within one year from the date of the demise of the 3rd Interested Party thus justifying the revival of his matter against the deceased.

24. I have looked at the 1st, 2nd and 4th interested parties’ grounds of opposition and I find that the same

are geared towards opposing the Applicant's intended substantive notice of motion. I say intended substantive notice of motion since the Applicant is yet to be granted leave to commence judicial review proceedings. Mr. Ashioya's submission that the Applicant ought to have acted within 21 days from the date of the filing of these proceedings has no basis as the Applicant could have only filed the substantive notice of motion within 21 days from the date of the grant of leave.

25. The Applicant avers, and his deposition has not been rebutted, that the 4th Interested Party only took out letters of administration in respect of the estate of the deceased on 14th July, 2014. He brought the instant application on 19th October, 2015 about fourteen months later. His explanation is that it was difficult locating the legal representative of the deceased 3rd Interested Party. Again his statement under oath has not been challenged.

26. The Applicant has thus convinced the Court that his delay was not inordinate and the prevailing circumstances did not grant him an opportunity to move the court within one year from the date of the passing on of the 3rd Interested Party.

27. In the circumstances of this case I find that the instant application has merit. I therefore allow the application and revive the application for leave dated 8th August, 2012 against the deceased 3rd Interested Party. I further order that the deceased 3rd Interested Party shall be substituted by his legal representative, Alice AnindoAyuku the 4th Interested Party in the current application. The said Alice AnindoAyuku shall henceforth become the 3rd Interested Party in the judicial review proceedings. The costs of the application shall be in the cause.

Dated, signed and delivered at Busia this 18th day of August, 2016

W. KORIR,

JUDGE OF THE HIGH COURT