



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

CIVIL SUIT NO. 67 OF 2011

JOSEPH MUTUKU MWANTHI.....1ST PLAINTIFF
JAMES MWANTHI MUTUKU.....2ND PLAINTIFF
JOSEPH MUINDE MUTUKU.....3RD PLAINTIFF
ELIZABETH MUTUKU.....4TH PLAINTIFF
DAVID KIOKO MUTUKU.....5TH PLAINTIFF
NZIOKA MUTUKU.....6TH PLAINTIFF
ESTHER MUKULU MUTUKU.....7TH PLAINTIFF

VERSUS

AIMI MA KILUNGU COMPANY LTD.....DEFENDANT

RULING

The Plaintiffs are seeking the substitution of the 1st Plaintiff with Elizabeth Nthuka Mutuku and Micheal Nzioka Mutuku, who are the 4th and 6th Plaintiffs respectively, and who have been appointed administrators of the estate of the 1st Plaintiff pursuant to a Limited Grant of Letters of Administration issued to them by this Court on 14th March 2015. This prayer is in an application by way of a Notice of Motion dated 21st October 2015 and filed in Court on the same date.

The Plaintiffs' advocate, Jacob M. Malelu, deponed in a supporting affidavit sworn on 21st October 2015 that the 1st Plaintiff died on 2nd January 2014, and attached the grant of letters of Administration issued to the 4th and 6th Plaintiffs with respect to the estate of the 1st Plaintiff. He stated that the Defendant will not be prejudiced in any way if the orders sought are granted.

B.M. Musau & Co Advocates for the Plaintiffs filed written submissions dated 9th May 2016 on the application, wherein it was conceded that the suit herein had abated by the time the application for substitution was filed on 21st October 2015, by dint of the provisions of Order 24 Rule 4 of the Civil Procedure Rules. However, reliance was placed on the proviso to Order 24 Rule 3 of the Civil Procedure Rules and various judicial authorities for the submission that the Court may for good reason on

application extend time.

It was urged that the difficulty in getting proper instructions from the Plaintiffs, some of whom live abroad was good reason to extend time for the Plaintiffs to file an application for substitution, and to allow the prayers in the application.

The application was opposed by the Defendant in Grounds of Opposition dated 10th February 2016 and submissions dated 3rd May 2016 filed in Court by its Advocates, O.N. Makau & Mulei Advocates. The Defendants state that the 1st Plaintiff's suit has already abated by operation of Order 24 Rule 3 (2) and the application before the Court is a non-starter. Further, that the applicants have not sought extension of time within which to make the application, and the application is thereby defective. Reliance was placed on the decision of the Court of Appeal in **Said Sweilem Geithan Saanum vs The Commissioner of Lands and 5 Others, Malindi Civil Appeal No. 16 of 2015** that an application to extend requires to be made once a suit has abated.

I have read and carefully considered the pleadings and submissions filed. Since it is not contested that the suit herein by the 1st Plaintiff has abated, the issue for determination is whether I can substitute the 1st Plaintiff without an application for extension of time. Order 24 Rule 3 of the Civil Procedure Rules provides as follows in this regard:

“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.

(2) Where within one year no application is made under subrule (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.”

I am in this regard in agreement with the decision of the Court of Appeal in **Said Sweilem Geithan Saanum vs The Commissioner of Lands and 5 Others, Malindi Civil Appeal No. 16 of 2015**, that the proviso to Order 42 Rule 3 requires an application to be made for extension of time, and that the good reason for extending time should be shown in the said application.

In the instant application there was no prayer for extension of time and revival of the suit by the 1st Plaintiff, and therefore the legal position is that there is presently no suit by the 1st Plaintiff before this court in which the said Plaintiff can be substituted. In addition, the facts that were the basis of the good reason to extend time were given by the Defendant's Advocate in the submissions, and not in an affidavit as required by law.

I accordingly hereby decline to issue the order prayed for by the Plaintiffs in the Notice of Motion dated 21st October 2015 for the foregoing reasons. The 1st Plaintiff's representatives are however at liberty to apply if the suit by the 1st Plaintiff is revived.

The Defendant shall have the costs of the Notice of Motion dated 21st October 2015.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 29th day of November 2016.

P. NYAMWEYA

JUDGE