



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

MISC. APPLICATION NO. 70 OF 2004

REPUBLIC.....PLAINTIFF

VERSUS

DISTRICT LAND REGISTRAR MERU

NORTH DISTRICT.....1STRESPONDENT

M'NKUBITU ZACHARY.....2ND RESPONDENT

N'NYAKI KIMENYI.....EX- PARTE APPLICANT

R U L I N G

This application is dated 30th May, 2012 and seeks:

- (a) An order that the applicant Robert Mungatia M'Yaki be appointed as legal representative of Exparte Applicant.***
- (b) That the court do order for revival of application herein and order application to be heard on merit.***
- (c) That the court do make any other orders for ends of justice.***

The applicant explains that the Exparte Applicant filed a chamber summons dated 21.4.2004 in which he sought leave of court to apply for judicial review orders of mandamus to compel the District Land Registrar, Meru North District, to register the Exparte Applicant as owner of land parcel No. ITHIMA – NTUNENE/294. Leave was granted on 11.05.2004. The apposite Notice of Motion was filed on 21.5.2004 within 21 days from the date leave was granted.

According to the applicant in his submissions, the Exparte Applicant died on 24.3.2009. A succession cause No. 63 of 2010 was filed and a Limited grant was issued on 4.3.2011 to Robert Mungaria.

The applicant states that Order 24 rule 3 allows the court, on an application by the legal representative of a deceased plaintiff to be made a party, to allow that representative to proceed with the suit.

The applicant also says that he seeks to revive the application made vide the Notice of Motion dated 31.5.2004. He says that Order 24 rule 7 (2) provides that the 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.

The applicant also says that he seeks to revive the notice of motion dated 31.5.2004. He says that Order

24 rule 7 (2) provides that the 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.

The applicant submits that the limited grant was obtained by him after the lapse of 12 months from the death of the Exparte Applicant by which time the suit had abated.

The firm of Charles Kariuki & Co, Advocates, which represents the applicant in this matter says that previously this matter was handled by the firm of Menye & Kirima, advocates, which had not made the necessary application to this court. They say that they were appointed and instructed on 23.5.2012 and filed the Notice of Appointment on 24.5.2012 and thereafter filed the current application dated 30.5.2012 on 1.6.2012 which was barely 2 weeks after being instructed.

The applicant's advocates referred this court to the case of Mark **Akhonya Amunze Versus Gopalbhai Karsan Patel & 4 Others [2006] eKLR** where the court referred to the authority of **Vyotu Ltd Vs Public Trustee Nyanza [2003] KLR 658** where Githinji J. A. held that a legal representative of a deceased plaintiff has a right to apply for revival of an abated suit and the court has powers to revive an abated suit in terms as to costs as the court may think fit. The advocates also said that in the Supra authority the court had referred to Order XXIII rule 8(2) of CPR (now Order 24 rule 7(2)) and said that the applicant for revival of a suit was required to prove that he was prevented by sufficient cause from continuing with the suit before it abated.

The applicant submitted that he had shown sufficient cause as the letters of administration were issued after 12 months after the death of the Exparte Applicant. He also blamed the previous advocate in this matter for failure to file the necessary application in court and said that such failure should not be visited on an innocent client. For this position he proffered as his authority the case of **Kenya Industrial Estates Ltd Versus Samuel Sard & Hema Investments Ltd – Court of appeal, Civil Appeal No. 280 of 2007 (UR 171/2007)**.

The advocates for the applicant also opined that this court should be guided by the overriding objective as enshrined under SIA & IB of the Civil Procedure Act and allow this application.

The 1st respondent has submitted that the application is brought under provisions of the law which do not exist. He also points out that in his replying affidavit, the applicant has stated that the Exparte Applicant died on 31.12.2009 while the annexed letters of administration indicate that he died on 31.3.2009.

The 1st respondent submits that the applicant has not stated why he took so long before he applied for letters of administration and points out that he took two years after obtaining letters of administration before filing this application. It is submitted that the applicant is an indolent party and the court is urged not to entertain such a litigant and, as he slept on his right, he ought to suffer the consequences of his action.

The 1st respondent also submits that the application is bad in law as the provisions quoted are non-existent. For this reason and for the very long delay before the applicant filed this application, the 1st respondent urges this court to dismiss the application with costs.

The 2nd respondent has taken issue with the claim in the Notice of Motion dated 30.5.2013 that the application is brought under Section (A), (B), 3 (A), Order 24M rule (7), (2) 51 1 & 2 of the Civil Procedure Rules and all other enabling provisions of the law. The 2nd Respondent refers to his grounds of opposition dated 15th October, 2012 and filed in court on 18th October, 2012 which say that the application is legally incompetent, an abuse of the court process and that there was an inordinate and inexcusable delay in bringing this application to court.

The 2nd respondent has submitted that the applicant does not explain the contradictions in his pleadings. He says that on the supporting affidavit, it is stated that the Exparte Applicant died on 31.12.2009, the

Limited Grant (annexture "RYI") states he died on 31.3.2009 and the applicant's submissions at paragraph 6 second last paragraph states that he died on 24.3.2009.

It is also submitted that the claim by the applicant that he was prevented from proceeding with the suit because the letters of administration were issued 12 months after the death of the Exparte Applicant, by which time the suit had abated, was just an afterthought as the applicant has not shown why he did not apply for the letters of administration in time. The 2nd Respondent points out that Annexture "RYI" (Limited Grant) clearly shows that the succession cause was filed in the year 2010 and the Limited Grant was issued to the applicant on or about 4.3.2010. However, this application was filed in court on 11th June, 2012, more than 2 calendar years from the date of issuance of the Limited grant.

The 2nd respondent submits that the applicant is guilty of inordinate, unexplained and inexcusable delay in filing this application thus rendering it incompetent and abuse of the process of court.

The 2nd respondent opines that the applicant has submitted on the application dated 30.5.2010 and not on the instant application dated 30.5.2012. He has also opined that the applicant has not made any attempt to explain the contradictions in the application. The respondent submits that the wrong and non-existent provisions of the law have not been explained.

The issues in this application are only two:

- 1. Whether or not to appoint the applicant as the legal representative of the Exparte Applicant**
- 2. Whether or not to order the revival of the suit and to order that it be heard on merit.**

At the outset, let me say that the handling of the pleadings in this application by the applicant have been rather pedestrian and careless. It is said to be based on some non-existent provisions of the law. It has also in three separate documents given the dates of death of the Exparte Applicant as 31.12.2009, 31.3.2009 and 24.3.2009.

All the parties agree that this suit abated one year after the demise of the Exparte Applicant. What they do not agree upon is whether the suit should be revived to allow the applicant to be the legal representative of the deceased Exparte Applicant. The applicable guidance is contained in order 24 Rule 3 of the Civil Procedure Rules which states as follows:

"3 (1) where one or more plaintiffs die and the cause or action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or , 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.

3(2) Where within one year no application is made under sub-rule (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"

It is clear that upon operation of the law this suit abated 12 months after the demise of the Exparte Applicant. The suit is non-existent. But the legal representative of the deceased plaintiff is granted a chance to revive the suit, albeit conditionally, by order 24 rule 7 (2) of the Civil Procedure Rules which says:

"The plaintiff or the person claiming to be the legal representative of the 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 set aside an order for 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 cost or otherwise as it thinks fit."

The onus is on the legal representative to prove that he was prevented by any sufficient cause from

continuing the suit. This is an area which a legal representative should take seriously. In any application made before abatement of a suit, the court has no discretion whatsoever not to make a legal representative a party to the suit but for any application made after a suit has abated, the applicant is required to prove that there was sufficient cause that made him/her not continue with the suit.

This application was filed over two years after the applicant got his letters of limited grant. In his submissions the applicant does not explain why he did not obtain Letters of Grant before the suit abated. Although he attempts to blame the firm of Menye Kirima & Co. advocates, he does not demonstrate how the said firm of advocates is to blame. He does not even claim that he instructed the said firm of advocates to represent him in the apposite succession cause. Indeed, in his submissions filed by the firm of Charles Kariuki & Co. Advocates, he does not indicate, for this court's benefit the exact date on which succession cause No. 63 of 2010 was filed.

Having considered the averments, submissions and the authorities proffered in this application, I find that the applicant is guilty of inordinate and inexcusable delay. I do not find that he has proved that he was prevented by any sufficient cause from continuing the suit. In the circumstances, I find that this application has no merit. It is dismissed.

Costs are granted to the Respondents.

It is so ordered.

Delivered in Open Court at Meru this 14th day of January 2015 in the presence of:

Cc. Lilian/Daniel

Mutembei h/b 2nd Respondents

Nyamu Nyaga h/b Kiome for 1st Respondent

P. M. NJOROGE

JUDGE