



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO. 3396 OF 1992**

1. CATHERINE ATIENO OKONGO  
2. ZIPORA AKEYO ODONGO.....PLAINTIFFS

**VERSUS**

1. JOHN MWANGI KARANJA  
2. SWAN CARRIES LIMITED.....DEFENDANTS

**RULING**

1. The Applicants, George Otieno Odongo and John Ouma Oketch have filed a Notice of Motion dated 23rd January, 2014 seeking to have them substituted as the Plaintiffs in place of Catherine Atieno Okongo and Zipora Akeyo Odongo. They also sought that this suit be revived and that time for filing this application be extended.
2. The application is supported by the Affidavit of John Ouma Oketch sworn on 23<sup>rd</sup> January, 2014. The motion is premised on the grounds that the Plaintiffs herein died on 26<sup>th</sup> May, 2003 and 23<sup>rd</sup> March, 2004 respectively; that the Plaintiffs were survived by the Applicants who obtained a limited grant of administration ad litem in Rongo Succession Cause No. 29 of 2014; that George Otieno Odongo who is the only surviving child of the 1<sup>st</sup> Plaintiff was a minor at the time of the Plaintiffs' demise and was only advised by a relative of this pending suit in November, 2013. They contended that it is in the interest of justice that the orders sought be granted.
3. The application was canvassed orally by way of submissions. Mr. Ouma submitted that before their demise, the Plaintiffs were pursuing their claim through the firm of Khan and Katiku advocates. The accident occurred in Awasi Market within Kisumu. He stated that the Applicants were unaware of the existence of this suit, rather they thought a suit for the claim had been lodged in Kisumu. He stated that in the year 2003, his Co-Applicant George Otieno Odongo, the only surviving son to the 1<sup>st</sup> Plaintiff was a minor aged fifteen (15) years. That the deceased Plaintiff's were wives to the late Charles Odongo Nyandegge who is his brother. That they got to know of this suit's existence in November, 2013 through a relative. That when the Applicants went to Khan and Katiku Advocates in Kisumu, they were referred to Najila advocates in Nairobi. It is at Najila advocates that they found the particulars of this case. They then proceeded to the Supreme Court building where the archivist advised them to obtain grant letters of administration which they obtained on 20<sup>th</sup> January, 2014. He submitted that the application for dismissal of the suit was served upon Najila Advocate in the year 2003 but they were never informed. He urged that the Defendant will not be prejudiced if the application is allowed. George Otieno concurred with John Ouma's submissions and urged that the application be allowed.
4. The 1<sup>st</sup> Defendant opposed the applications vide grounds of opposition dated 12<sup>th</sup> November, 2014. The grounds were that:-

i. *The Notice of Motion dated 23rd January, 2014 is mischievous, misconceived and an*

*abuse of the court process.*

- ii. *The Notice of Motion dated 23rd January, 2014 is an ingenious attempt by the Applicants to re-introduce the suit and the delay in prosecuting the matter herein is inordinate, it has not been explained and, therefore, inexcusable.*
  - iii. *The conduct of the Applicants in not prosecuting this suit within reasonable time is indolent and should not excite any lenient exercise of discretion by the court.*
  - iv. *The application if allowed will be highly prejudicial to the Defendant owing the inordinate delay in filing of the slated application.*
5. Mr. Wanjohi, learned counsel for the Defendant submitted that no reason for the delay was been given. That the 1<sup>st</sup> Applicant was 25 years of age at the time the Plaintiffs died. That the Applicants have not tendered any evidence to show that they followed up on the matter in Kisumu; that the affidavit of the relative who informed them of the existence of the suit was not produced; that this case has been indolent for twelve (12) years and there will be prejudice as the accident occurred in 1992; that where there is delay in prosecuting a case, the delay must be acceptable. He stated that the Defendant will suffer prejudice as it does not have the original file as the same was disposed of by Kimani Michuki Advocates after six years and that the Defendant cannot trace its witnesses. He also submitted that the Applicants have not tendered evidence to prove their relationship with the Plaintiffs. Counsel cited **Netplan East Africa Ltd v. Investment & Morgages Bank Ltd (2013) eKLR** where it was held that a delay of 10 months to re-instate a suit was inordinate.
6. I have taken the liberty to peruse this case file and the following facts emerge. This suit was filed in June, 1992 seeking damages arising out of an accident that occurred on 4<sup>th</sup> September, 1991. Among the beneficiaries named was George Otieno Odongo who was stated to be aged six (6) years at the time. The Defendant filed an application dated 29th October, 2002 seeking the dismissal of this suit for the reason that since 17<sup>th</sup> June, 1993 no steps had been taken to prosecute it. The 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs died on 26<sup>th</sup> May, 2003 and 23<sup>rd</sup> March, 2004, respectively. The application for dismissal was duly served but was unopposed and the court proceeded and dismissed the suit on 6<sup>th</sup> October, 2003. The Applicants obtained grant letters of administration on 20<sup>th</sup> January, 2014.
7. Order 24 of the Civil Procedure Rules is the relevant provision for an application such as this. It stipulates:-

***Order 24 Rule 1, 3 (1) (2) and 7(2)***

***"1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues...***

***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...***

***7 (2). 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."***

8. It is clear from the record that this application has been filed approximately ten (10) years after the Plaintiffs' deaths. As a matter of law therefore this suit abated since no application for substitution was made within one year of the death of the Plaintiffs. A suit that has abated is no suit for all purposes; it is non-existent in law. See **Eliakim Saka Odipo v Dismus Kweyu Malalaso [2009] eKLR** and **John Chege Mwangi & 3 Others v Obadiah Kiritu Methu [2012] eKLR**. However, the law allows for revival of such a suit where it is established that the Applicant was prevented from applying for substitution and revival within the prescribed time by sufficient cause. In the instant case nine (9) years had lapsed before the Plaintiff's death without them prosecuting their case. By the time the application for dismissal of the suit for want of prosecution was filed and served, none of the Plaintiffs had passed on. They took no step to respond to or to oppose the application. The application was subsequently allowed on 6<sup>th</sup> October, 2003 by which time only the 1<sup>st</sup> Plaintiff had died. It follows therefore that this suit was dismissed not out of abatement but for want of prosecution.
9. Even if I were wrong on this point, the delay in filing this application has not been satisfactorily explained. It was prudent for the Applicants to avail an affidavit of the relative they claim informed them of the existence of the suit to prove that they truly were unaware of its existence. While I pity the Applicants, it is worth noting that the laxity with which the Plaintiffs handled this matter is wanting. In the case of **Reggentine v. Beechholme Bakeries Ltd (1967) 111 Sol. Jo. 216** quoted in **Netplan East Africa Ltd (supra)** it was held that:-

***"...Public policy demands that the business of the courts should be conducted with expedition...the delay is far beyond anything we can excuse..."***

10. Whilst I am alive that the 2<sup>nd</sup> applicant must have been a minor in 2003 when the 1<sup>st</sup> Plaintiff died, (he was 15 years old) three (3) years later he turned 18 years. He has not explained what predicament he was suffering from between 2007 and 2014, a period of seven (7) years. For this court to look at him favourably, it was incumbent upon him to explain this delay. This he failed.
11. In any event, I am alive to the Respondent's contention that the accident having occurred in 1991, there may be no witnesses and that the original file for the case has been destroyed. I believe that reviving the suit would be prejudicial. Further, there was no prayer to re-instate the suit which had been properly and legally dismissed in 2003 by the court for want of prosecution. The Applicants have a recourse, if any to the firm of Advocates who were served with the application for dismissal for want of prosecution and failed to attend court or get in touch with the Applicants to advise them of the progress or outcome of the case.

The upshot is that this application is dismissed. In view of the circumstances of the case, each party is to bear his own costs.

Dated, Signed and Delivered at Nairobi this 27<sup>th</sup> day of February, 2015.

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**A MABEYA**

**JUDGE**