



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 57 OF 2020

JOHN MUTHEE MATUMO PLAINTIFF

VERSUS

THOMAS GERISHON & 4 OTHERS ...DEFENDANT

RULING

(Application to revive an abated suit and extend time for substitution of deceased 1st defendant; one year having lapsed since the demise of the 1st defendant and suit against 1st defendant thus abating; no grant of letters of administration yet issued to any person to represent the estate of the deceased; application premature; application ought to be filed after there is a legal representative appointed in respect of the estate of the deceased; application dismissed)

1. The application before me is that dated 14 October 2021 filed by the plaintiff. The application is said to be brought pursuant to Order 24 Rules 4 and 7 of the Civil Procedure Rules, 2010. The orders sought are as follows :-

- i. That this Honourable Court be pleased to revive the suit against the 1st defendant.
- ii. That this Honourable Court do extend time to substitute the 1st defendant herein Thomas Gerishon (deceased) with his legal representatives and the suit against him be deemed as subsisting.
- iii. That cost of this application be provided for.

2. The supporting affidavit is sworn by the applicant himself who has deposed that the 1st defendant died on 9 September 2020 or thereabout. He avers that the family of the 1st defendant are yet to file for letters of administration and that he has been patiently waiting for the family to appoint a legal representative. He states that he has not received any communication from the family of the deceased on whether a legal representative has been appointed. Based on the refusal by the family to appoint a legal representative, he avers that he has filed a Citation Cause No. 100 of 2021 to prompt Teresia Kawira Thomas and Joshua Gedion Gichunge to accept or refuse letters of administration intestate. He avers that the citation is slated for hearing on 3 November 2021.

3. No party filed anything to oppose the motion, and Ms. Nyambura Kamau, learned counsel for the applicant, made written submissions which I have considered before arriving at my decision.

4. Order 24 Rule 4 provides as follows :-

4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 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 subrule (1), the suit shall abate as against the deceased defendant.

5. It will be seen from a reading of Rule 4 (3) above, that a suit abates after one year of death. In this case, the 1st defendant is said to have died on 9 September 2020. The suit against him therefore abated on 9 September 2021. This application was filed on 15 October 2021 after the abatement of the suit.

6. Nevertheless, under Order 24 Rule 7, a court has discretion to revive an abated suit. That provision of law is drawn as follows :-

(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.

7. It will be noted that a plaintiff is at liberty to apply to court for revival of an abated suit. That is what the plaintiff seeks in prayer (i) of this application. However, I do not see how I can revive an abated suit where there is no legal representative appointed for the deceased defendant. The procedure should first be to have a person appointed to represent the estate of the deceased before an application for revival of an abated suit can be made. The applicant appears to have commenced citation proceedings in respect of the estate of the deceased. It is upon completion of those proceedings, and upon appointment of a person to represent the estate of the deceased, that he can then come to court to seek the revival of the abated suit and substitution of the deceased defendant. My view is that this application is premature.

8. I will therefore dismiss it for the above reasons but make no order as to costs.

9. Orders accordingly.

DATED AND DELIVERED THIS 16TH DAY OF FEBRUARY, 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA