REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 303 OF 2013

PAN AFRICAN TRUCKS & EQUIPMENT (E.A.) LIMITED......APPELLANT

VERSUS

GETHIN MACHOKA..RESPONDENT

(An appeal from the ruling and order of Hon. T.S. Nchoe in Milimani CMCC No. 9025 of 2006 delivered on 2nd May, 2013)

JUDGMENT

1. The Respondent (***'deceased***") filed a suit against the Plaintiff for recovery of damages arising from an accident which was alleged to have occurred on 4th August,2003. The deceased then died on 10th July, 2011. Following his death, Hellen Moraa Machoka and Caroline Kwamboka Machoka (***'the Applicants'***) filed an application on 20th February, 2013 seeking to substitute the deceased in this suit and that time for institution of this application the application be extended.

2. The reasons advanced for the delay in filing the application was that although the grant of letters of administration intestate was issued to them on 18th May, 2012, their advocate Okong'o Wandago & Company Advocates did not notify them of the same until December, 2012. That their current advocates Ogetto, Otachi & Company Advocates having no knowledge that they had obtained the grant of letters of administration intestate informed the court in December, 2012 that the Applicants did not have the document. It was stated that the death of the deceased does not cause the suit to abate as it survives him and that it is therefore necessary that they be substituted with the deceased. It was further stated that the substitution shall occasion the Appellant no prejudice.

3. In opposition to the application a grounds of opposition and a replying affidavit sworn by Andre Desimone who is the Director of the Appellant was filed on 22nd March, 2013. In the grounds of opposition it was contended that the application was frivolous, vexatious and an abuse of court process and should be dismissed with costs as the substantive suit stood abated; that the suit having abated the court could not enlarge time to have the Applicants enjoined in the suit nor order that they be substituted for the deceased and that the application is unprocedural and devoid of merit and should be dismissed as the Applicants have failed to provide adequate reasons for the ordinate delay in not making the application within one year of the deceased's death or immediately after obtaining grant of representation for the deceased's estate.

4. Mr. Andre contended that since the Appellant was informed that the deceased had died, it received no communication from the deceased's advocates until 21st November, 2012 when its advocates

were served with a mention notice. That when the matter came up on 5th December, 2012 for directions, the Applicants were directed to file a formal application seeking to be substituted. He contended that no such application was filed within one year after the demise of the deceased and as such the suit abated. That the Applicants have not given a reasonable explanation for not making an application within the stipulated time frame and that they have not provided the basis for which they were appointed legal representatives of the deceased and as such it cannot be ascertained whether or not they are able to actualize litigation risks such as costs.

5. A further affidavit was filed on 25th March, 2013 by Caroline Kwamboka Machoka. She stated that their inability to obtain an earlier date was a factor to the delay too since they had no control of the court diary. She further stated that they could not have filed the application before obtaining the grant of letters of administration intestate.

6. The trial court heard the application and allowed it on the basis that no prejudice would be suffered by the Appellant if the orders sought were allowed. The Appellant felt aggrieved by the said ruling and filed this appeal on the following grounds:-

i. ***The learned Magistrate erred in law and in fact by allowing the Applicants' application dated 20th February, 2013 seeking the legal representation of the deceased's estate to be made parties to the suit yet the suit had abated on 11th July, 2012, as no formal application had been made to the court within one year after the death of the deceased as required by the provisions of Order 24 rule 3(2).***

ii. ***The learned Magistrate erred in law by failing to appreciate that the suit having abated on 11th July, 2012, an order that the Applicants be substituted and/or made parties to the suit could only be considered and/or made after a formal application pursuant to Order 24 rule 7 (2) seeking that the suit be revived had been made by the Applicants***

iii. ***The learned Magistrate erred in law and in fact by disregarding set provisions of law and/or failing to distinguish and give reasons or rationale as to why they were not applicable in this case.***

iv. ***The learned Magistrate erred in law and in fact by upholding the Applicants' indolent delay in failing to file the application without sufficient reason within the stipulated period and finding that the delay was excusable and/or an exception within the aforementioned rules.***

v. ***The learned Magistrate erred in law by misconceiving and misapplying the overriding objective principle as provided for in section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya to the effect that the provision for Order 24 rule 3 (2) and 7 (2) Civil Procedure Rules could be disregarded.***

vi. ***The learned Magistrate erred in law by misapplying the provision of the Civil Procedure Rules thereby arriving at a decision that is totally inconsistent with the law and wholly prejudicial to the Appellant.***

7. This appeal was canvassed by way of written submissions. The Appellant took the position that since an application seeking to substitute the deceased was not made within one year from the date of his death, the suit abated in terms of Order 24 rule 3 (1) and (2) of the Civil Procedure Rules, 2010. The Appellant cited **M'Mboroki M'Arangacha v. Land Adjudication Office Nyambena & 2 Others (2005) eKLR** where the Judge held that the language used in the aforesaid provision being mandatory, the suit automatically abates if an application for substitution is not brought within one year of the death of the party sought to be substituted.

8. The Appellant contended that Rule 3(2) provided that the time for filing such an application shall be extended based on the applicant providing good reasons but that the trial magistrate did not

deliberate or provide reasons as to why it allowed the indolent delay caused by the Applicant. The Appellant argued that the onus was on the Applicants to prove that they were prevented by sufficient cause from filing the application within the prescribed time. It was further argued that where a suit has abated, an applicant is required to apply for the suit to be revived. That Under Order 24 rule 7 of the Civil Procedure Rules, the application was fatally defective for failure to apply to have the suit revived. Citing **Patrick Njuki v. Duncan Nyamu Muriuki and another (2015) eKLR** and **Evanson Nguti Kamanda v. Peter Gicharu Ngige (2006) eKLR** it was argued that the application for enlargement of tine could only apply if the suit existed. That the lack of communication between the Applicants and their advocates was not a sufficient reason for delay. It was submitted that the proper procedure for the Applicants was to seek the revival of the suit under Order 24 rule 7(2).

9. The Applicants on their part contended that the court exercised its discretion and extended time for the reason that an application could not have been filed before they obtained the grant of letters of administration intestate. It was argued that the discretion to extend time is exercised on a case to case basis as was the holding in **Nicholas Kiptoo arap Korir Salat v. IEBC & 7 others., Supreme Court Application No. 16 of 2014**. Referring to **Joseph Gachuhi Muthanji v. Mary Wambui Njuguna (2014) eKLR**, it was argued that in exercise of discretion to extend time, the court consider factors such as the period of delay, the reasons for delay, the degree of prejudice to the respondent and whether the matter raises issues of public importance. That the trial magistrate considered the application and found that the Appellant would not be occasioned any prejudice by granting the orders sought. It was further argued that the Applicants' advocates' delay in informing them of the grant should not be visited on the Applicants as that would go against the overriding objective in civil litigation.

10. *Numerous court decisions have set out the principles that should guide a court sitting on a first appeal which principles I am guided by. In* ***Peters v. Sunday Post (1958) E.A. 424 at 429*** *it was stated:-*

' It is a strong thing for an appellate court to differ from the finding on a question of fact, of the Judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion.' "

11. The application to substitute the deceased was filed on 20th February, 2013. That is close to two years after the death of the deceased. By the time the application was made, the suit had abated by virtue of Order 24 rule 3 (2) of the Civil Procedure Rules. The said sub-rule provides:-

"Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."?(Emphasis mine)

12. As a matter of law therefore, the suit against the Respondent has abated. The suit having abated, the Applicants should have sought for the revival of the suit under Order 24 rule 7(2) but they did not. They instead sought for extension of time for filing the application for substitution. By the time the Applicants made the application dated 20th February, 2013, there was no suit in existence. It follows therefore that the orders made by the trial court were null and void. In the circumstances, I find that the trial magistrate misapprehended the law. I hereby set aside the said ruling and order. I find merit in the appeal and it is allowed with costs to the Respondent.

Dated, Signed and Delivered in open court this 30th day of July, 2015.

J. K. SERGON

JUDGE

In the presence of:

.............................for the Appellant.

.... for the Respondent.