



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CASE NO.167 OF 2008**

**MOSES NYACHIRO ABNER**

*(Suing as the legal representative*

*of*

**ABNER ONDIEKI NYACHIRO, DECEASED ..... PLAINTIFF**

**VERSUS**

**1. PETER BOSIRE MONYENYE**

**2. THE DISTRICT LAND REGISTRAR, CENTRAL KISII DISTRICT**

**3. THE DISTRICT SURVEYOR, CENTRAL KISII DISTRICT**

**4. ATTORNEY GENERAL ..... DEFENDANTS**

**RULING**

1. What is before me is the application by one, **David Ratemo Ondieki** (herein after referred to as “**the applicant**”) brought by way of Notice of Motion dated 1<sup>st</sup> July, 2013. In the application, the applicant has sought leave to be substituted as a Plaintiff in place of **Moses Nyachiro Abner**, deceased and to be deemed as the Plaintiff suing on behalf of the estate of **Abner Ondieki Nyachiro** also deceased. In the alternative, the Plaintiff has sought extension of time within which to apply to be substituted as the Plaintiff in this suit in lieu of **Moses Nyachiro Abner** and that the applicant be deemed as Plaintiff suing on behalf of the estate of **Abner Ondieki Nyachiro**. The applicant’s application has been brought on the ground that the Plaintiff herein who had brought the proceedings herein as the legal representative of the said Abner Ondieki Nyachiro, deceased, died on 17<sup>th</sup> May, 2012 and as such it has become necessary to substitute the deceased Plaintiff with the applicant so that the applicant may proceed on with this suit. Since the application has been brought out of time, the applicant has also sought the extension of time within which the application should have been brought. In support of the application, the applicant has annexed a copy of a grant of letters of administration ad litem with respect to the estate of Abner Ondieki Nyachiro that was issued in his favour on 3<sup>rd</sup> June, 2013. The applicant’s application was opposed by the 1<sup>st</sup> defendant through statement of grounds of opposition dated 17<sup>th</sup> July, 2013. In the said grounds of opposition, the 1<sup>st</sup> defendant contended that the suit herein has abated and as such the court cannot grant the orders sought. The 1<sup>st</sup> defendant contended further that the application is misconceived and amounts to an abuse of the process of the court. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants did not oppose the application.

2. When the application came up for hearing on 23<sup>rd</sup> July, 2013, Mr. Ochwangi appeared for the applicant while Miss Sagwa appeared for the 1<sup>st</sup> defendant. The applicant's advocate submitted that it will serve the interest of justice if the application is allowed. He submitted that although the application has been brought out of time, the applicant has sought extension of time. The applicant's advocate submitted that to disallow the application would be tantamount to denying the applicant his day in court. On behalf of the 1<sup>st</sup> defendant, Miss Sagwa, advocate submitted that the rules of procedure are there to be followed. She conceded that the court has power to extend time within which to substitute a deceased party but only for sufficient cause. The 1<sup>st</sup> defendant submitted that the suit herein has abated and as such the court cannot give orders sought on a suit which is nonexistent. The 1<sup>st</sup> defendant's advocate submitted that what the applicant should have done was to seek first the revival of the suit and thereafter file the present application.
3. I have considered the applicant's application and the grounds of opposition filed by the 1<sup>st</sup> defendant in opposition thereto. What the applicant is seeking in the present application in my view is essentially the extension of time within which to apply to be made a party to this suit as a plaintiff in place of the deceased original plaintiff and for the applicant to be deemed as a Plaintiff in place of the deceased original Plaintiff. The extension of time and the substitution of the deceased original Plaintiff by the applicant if allowed will have the effect of reviving this suit which has abated. I am not in agreement with the submission by the advocate for the 1<sup>st</sup> defendant that the applicant should have sought an express order for the revival of this suit prior to bringing the present application. I am of the view that the applicant's application in its present form is properly before the court. Whether or not to extend time for a legal representative of a deceased plaintiff to be made a party to a suit in place of such deceased after the expiry of the prescribed time is a matter that calls for the exercise the court's discretion. Order 24 rule 3 (2) of the Civil Procedure Rules provides that the court may extend time for good reason. I have noted from the record that the Plaintiff who is sought to be substituted died on 17<sup>th</sup> May, 2012. The application for substitution ought therefore to have been filed on or before 17<sup>th</sup> May, 2013. The present application was filed on 2<sup>nd</sup> July, 2013. The application was therefore filed out of time by about 1 ½ months. Although the applicant has not proffered any explanation for this delay, it is my finding that the delay is not so inordinate as to be a ground for denying the applicant the orders sought. I am not persuaded that the 1<sup>st</sup> defendant would suffer any prejudice if the orders sought are granted. On the other hand, I am in agreement with the submission by the applicant's advocate that if the orders sought are not granted an injustice would be occasioned to the estate of Abner Ondieki Nyachiro, deceased, whose cause of action against the defendants would have been brought to an end without a trial.
4. The upshot of the foregoing is that applicant's application dated 1<sup>st</sup> July, 2013 is well merited. The same is allowed in terms of prayers 4 and 5. The costs of the application shall be in the course.

**Delivered, dated and signed at KISII this 24<sup>th</sup> day of January 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:**

Mr. Kerongo h/b for Oguttu for the plaintiff

Mr. Onyango h/b for Asati for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

N/A for the 3<sup>rd</sup> defendant

N/A for the 4<sup>th</sup> defendant

Mobisa Court clerk

**S. OKONG'O**

**JUDGE**