



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 227 OF 2002**

**SAID SWEILEM GHEITHAN SAANUN.....PLAINTIFF**

**- V E R S U S -**

- 1. THE COMMISSIONER OF LANDS being sued through THE ATTORNEY GENERAL**
- 2. THE MUNICIPAL COUNCIL OF MOMBASA**
- 3. NORMAN ATAHERALI DAWOODBHAI**
- 4. HASSAN TAHERALI DAWOODBHAI**
- 5. ALI RAMADHANI MWATSAU**
- 6. MOHAMED NAMAN MOHAMED ..... DEFENDANTS**

**RULING**

[1] The applicant in this case brings his application praying that the court do enlarge and or extend the time within which this application can be made. Further he prays that this suit which has abated be revived.

[2] The plaintiff in this case died on 28th August, 2004. This suit therefore abated on 27th August, 2005. When no one applied for substitution of the deceased plaintiff. Under the Civil Procedure Rules in Order 24 rule 3 (2) the court may, for good reason on application extend the time.

[3] The applicant who claims that he has obtained letters of administration for the estate of the deceased and who has filed the Notice of Motion dated 7th June 2013 all she need to show is "good reason" why time should be extended.

[4] On perusal of the grounds supporting the motion the only ground I can see to that end is (f) where she says that the advocate who was instructed did not take necessary steps to revive the suit and his failure or mistake cannot be attributed to the applicant. The other grounds explain what will happen to the applicant if the application is not granted and the chances of success of her application. Other grounds explain what the suit is all about and her plight in this case and her general perception about the defendants and the oxygen principle.

[5] I have also perused and considered the applicants' 13 page detailed affidavit. As far as I am able to sift through the affidavit that seems to be a statement of facts, I was only able to find para 10 (vi )

which seems to explain that she had an advocate Taib A. Taib who was elected Mayor of Mombasa in 2003 and that the said Mr. Taib handed all the files to Mr. Nabhan Swaleh Advocate to take over and deal with the same and that the matter was not handled by either advocate each assuming the other was handling the matter and as a result confusion among the said advocates arose and after the death of the plaintiff no one dealt with abatement of this suit and that the error of advocate should not be visited on her.

[6] The other reason towards "good reason" for reviving the suit I found on para 10 (ix) where the applicant says she is an advanced in years and is still coming to terms with the loss of her husband.

Paragraph 15 and 16(v) are a repeat of what I have mentioned earlier. All other averments in other paragraphs in the supporting affidavit have no assistance to the applicant in showing "good reason" as required in the proviso under Order 24 3(2). They deal with issues that are not relevant to "good reason" in my view.

[7] The Attorney General for the first defendant opposed this application, he argued that the applicant was indolent. That the delay was inexcusable. He argued that the applicant obtained letters of administration in the year 2009. The delay therein was 5 years. He further argued that the Advocate on record was Taib A. Taib and that there has never been any notice of change of advocate. On the allegation made that the court file went missing the Attorney General argued that there was no application anywhere to reconstruct the file. The Attorney General argued that the office of the 1st defendant has now been abolished and that therefore they would suffer prejudice in obtaining further instructions.

[8] The second defendant vehemently opposed the application. He stated that the Grant of Letters of administration were issued to Noor Salim Mohammed and not the applicant. That there was no indication anywhere that the file was lost at any stage. The second defendant argued that the court cannot exercise its discretion on one who has been indolent.

The issue for determination in this Notice of Motion is a simple one. The same is whether the applicant has shown a "good reason" for the delay that can allow the court exercise its discretion for extension of time and the revival of this abated suit.

[9] It is worth of note that the advocate for the applicant has always been Taib A. Taib advocates. I have carefully perused the court file and I cannot find any entry on to the record of Nabhan Singh advocate. There is not a single appearance by that firm in court for the plaintiff. I therefore find that Nabhan Singh has not been a counsel in this matter. The allegation that there was a confusion between him and Taib A. Taib is unfounded and cannot be accepted by the court. The advocate for the plaintiff has always been Taib A. Taib. The same firm is also on record for the applicant. Indeed, there was no Affidavit on record by either Mr. Taib or Mr. Nabhan Singh to clarify that issue. I am therefore unable to accept that as a good reason for delay.

[10] The plaintiff died on 28th August, 2004, all it required the applicant who had services of counsel, was to file an application for ad colligenda Bona under the Succession Act Cap. 160 to proceed with the suit. These applications are granted by courts as a matter of course and one need not wait for full grant if their purpose is to conduct an existing suit. I was urged to consider the overriding objective of the court and assist the applicant. Under Order 1A (3) parties to Civil Proceedings are under a duty to assist the court to further the overriding objective of the Act and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.

[11] A party who does not take out temporary letters of administration to enable him to proceed with an existing suit and takes 5 years to do so and even after taking the letters then takes another 4 years to bring this application to revive the suit cannot benefit from the oxygen principle in my view. This hardly helps in the efficient disposal of the business of the court. I am of the view that the 9 years that has passed from the time the plaintiff died to when this application was filed, the delay was inordinate. I am afraid I agree with the 1st and 2nd respondent that the applicant with due respect to her and her age, was indolent.

[12] This court must look at the interests of the defendants too. They should not be allowed to suffer prejudice occasioned by the delay herein. I was told that the status of the 1st defendant and 2nd defendant has changed due to the new Constitutional dispensation and that evidence for the defendants on a revived suit would be problematic. I am inclined to agree. This is of course through no fault of the defendants.

For those reasons I have found no good reasons advanced to extend the time. Consequently I am unable to revive the abated suit.

This application is dismissed with no order as to costs.

**Dated and delivered in open Court at Mombasa this 26th day of May, 2014.**

**S. MUKUNYA**

**JUDGE**

**26.5.2013**

In the presence of:

Mr. Lumatete Advocate for 2nd defendant

Mr. Ngari Advocate for the 1st defendant