



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

MISC APP. NO. 6 OF 2019

JULIUS MAINA KABIRU.....APPLICANT/ INTENDED SUBSTITUTE

AND

KABIRU KANG'ARA.....PLAINTIFF/ DECEASED

THOMAS IRUNGU KIGOI.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated **27th August 2021** brought under **Order 52 Rule 1 & Order 25 Rule (3(1) & (2))** of the Civil Procedure Rules, the Applicant herein **Julius Maina Kabiru**, has sought to be substituted with **Kabiru Kangara** his father (Deceased).

In his supporting Affidavit he averred that he is the son **Kabiru Kang'ara** who died on **25th February 2020**. That prior to his death, his father was and is still a beneficiary in this suit, whereby he had **L.R LOC.20/Gikindu/Mirira/746**. That he has been advised by his Advocates which advice he believes to be true that one must obtain letters of Administration to be substituted for a Deceased party in a suit. Further that he Petitioned and obtained a grant to give him capacity and pursue the case, and it is only **fair** and **just** that he is substituted in place of his Deceased's father Estate.

The Application is opposed and the Defendant/ Respondent swore a Replying Affidavit on **2nd December 2021**, and averred that the Application is bad in law and an abuse of the Court process as it offends the provisions of **Order 24** of the **Civil Procedure Rules** in that the Deceased ought to have been substituted within one year from the date of his death. That the Deceased died on **25th February 2020** and one year has lapsed, making the Application for substitution fatally defective. Further that the case filed against him has abated by operation of law as the cause of action did not survive the Deceased, and therefore the Applicant lacks locus standi to participate in these proceedings.

The Application was canvassed by way of written submissions which the Court has carefully read and considered. The Court has also read and considered the Notice of Motion and the Affidavits and finds that the issue for determination is whether the Application is merited.

In his Application, the Applicant has sought to be substituted with **Kabiru Kangara)(Deceased)** who was his father. The Applicant has produced in evidence letters of Administration confirming that he has authority as the administrator of the estate of the Deceased plaintiff (Kabiru Kang'ara). **Order 24** of the **Civil Procedure Rules, 2010** comprehensively outlines what ought to happen if a party or parties to a suit dies; **Order 24, rule 3** provides for procedure in case of death of one of several Plaintiffs or of sole Plaintiff t as follows:

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.

Further **Order 24, rule 7** provides for effect of abatement or dismissal of the suit as follows;

“7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

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”.

The Applicant has sought for substitution but it is not in doubt that by the time the Application of substitution was being sought, the suit had already abated as one year had already lapsed from the date of the Deceased’s demise and therefore in accordance to the provisions of **Order 24 Rule 7 (2)**, the Applicant ought to first have sought for the revival of the suit since the suit had abated before seeking to be substituted. In his submissions the Applicant has submitted that he intends to make an Application for revival of the suit and subsequently proceed with it. However, the provisions of law provide that a revival must first be sought and prove to the Court that sufficient cause has been shown before a substitution is done.

An order for substitution without a revival would be a nullity in law and what ought to have happened was to seek a revival and substitution in the same Application. See the case of **Mbaya Nzulwa ...Vs...Kenya Power & Lighting Co. Ltd [2018] eKLR**, where the court held thus;

“I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea”.

The Applicant has only sought for substitution without revival of the suit and from the above holding of the Court, it is not in doubt that the Applicant cannot be substituted in a suit that has abated without revival. Consequently, the Court finds and holds that the Application is not merited and the same is struck out with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 28TH DAY OF APRIL, 2022

L. GACHERU

JUDGE

28/4/2022

Delivered virtually

In the presence of

Kuiyaki - Court Assistant

Mr. Gori – Applicant/Intended Substitute

Plaintiff (Deceased)

No appearance for Defendant/Respondent

L. GACHERU

JUDGE

28/4/2022