



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCC NO. 143 OF 2010

M'RITHARA M'IKIOME.....PLAINTIFF

VERSUS

H. YOUNG & CO(E.A.) LTD.....DEFENDANT

RULING

1. The defendant through an application dated 6th November, 2013 brought pursuant to Order 17 Rule 2(1),(3) and Order 51 Rule 1 of the Civil Procedure Rules sought that the plaintiff's suit filed on 11th November, 2010 be dismissed for want of prosecution. That costs of the application and entire suit be awarded to the defendant.
2. The application is based on the grounds on the face of the application inter alia; that the plaintiff failed to take steps to progress the suit for a period of over 3 years and that due to the plaintiff's inaction it is clear that he is no longer interested in this suit. The application supported by applicant's counsel affidavit dated 6th November, 2013.
3. The applicant's counsel has deponed that this suit was filed on 11th November, 2010 and Memorandum of appearance and defence were filed on 6th December, 2010 and service effected on the same date. That since service was effected it is about 35 months without the plaintiff and his advocate taking any steps to set the matter down for hearing. The applicant therefore contends that it is evident from the plaintiff's inaction that he is not interested in pursuing this case and there is therefore no reason why the defendant should continue incurring expenses in relation thereto and as such prayed for the suit to be dismissed with costs.
4. The advocate for the plaintiff/respondent on behalf of his client filed a replying affidavit dated 7th July, 2014 claiming he has authority to swear the affidavit on behalf of the proposed legal representative in this matter and averring that sufficient explanation has been given for the delay as it is alleged that it took time to obtain the limited grant of letters of administration ad litem and further he averred the letters of administration clearly relate to this case hence it is contended the applicant's application is meant to defeat the defendant's application.
5. The plaintiff's advocate filed an application dated 14th November, 2013 through one Mary Kiunga Ikiome pursuant to Order 24 Rule 1,2,3,4,7 and Order 51 Rule 1 of Civil Procedure Rules seeking orders to the effect that Mary Kiunga Ikiome be declared the legal representative of the deceased plaintiff, and that the suit herein be revived and costs of the suit be provided for.

6. The application by Mary Kiunga Ikiome is based on the grounds on the face of the application inter alia that the deceased died on 10th August, 2012, that the suit abated by operation of the law as no legal representative was appointed within one year of the plaintiff's death; that the applicant has obtained limited grant of letters of administration ad litem and is able and willing to be appointed as legal representative of the deceased plaintiff and lastly no prejudice will be caused to any of the parties if the application is allowed. The application is further supported by affidavit of the applicant who is the wife to the deceased plaintiff, who died on 19th August, 2012. The defendant alleges she applied for limited grant of letters of administration on 15th July, 2012 before the expiry of 1 year since the plaintiff's death and that due to intervening August vacation of the High Court, the letters were not issued until 24/9/2013. The applicant averred to have attached a Photostat copy of the grant as annexure marked "MKI" but on perusal of the court file annexure there is no such annexure or any in this application. The applicant further averred by the time the purported grant had been issued the suit had abated by the operation of law.
7. The defendant filed grounds of objection dated 26th June, 2014 averring inter alia, that the application is hopelessly out of time and that no attempt has been made to explain the delay occasioned between the date of death on 10th August, 2012 and 13th November, 2013 when the application was filed; that the suit abated on in August, 2013 and that no reasons have been advanced to explain why the suit should be revived; that the grant of letters of Administration ad litem refers to a totally different case and is therefore inapplicable in the present suit; and that the application is an attempt to defeat defendant's application to have this suit dismissed for want of prosecution which application came first.
8. When the applications came for hearing both counsel agreed to have the two applications consolidated and be heard together. The counsel further relied on the pleadings and urged the court to deliver its ruling on both applications.
9. The defendant's application was filed first during the lifetime of the plaintiff who is alleged to have passed on, on 10th August, 2010. The court is stating "alleged" to have passed on 10th August, 2010 as no copy of death certificate was exhibited or annexed in the plaintiff's counsel's affidavit and that of Mary Kiunga Ikiome. Further to that no limited grant of letters of administration ad litem was annexed or exhibited; but that notwithstanding at the time the defendant filed its application there is no denial that the plaintiff was alive and since the filing of this suit no action had been taken till he purportedly died.

10. Order 17 Rule 2(1),(2) and (3) of the Civil Procedure Rules provides"-

"1. (1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.

(2) When the court grants an adjournment it shall give a date for further hearing or directions.

2. (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

(3) Any party to the suit may apply for its dismissal as provided in sub-rule 1."

11. The court has considered the defendant's application and the response by the plaintiff's counsel and the applicant Mary Kiunga Ikiome and is in agreement with the defendant that the plaintiff/respondent did not show cause to the satisfaction of the court why the matter has not been prosecuted since it was filed.

12. This court is alive to the fact that as of the time of filing of the defendant's application the plaintiff might have been dead as alluded to by the applicant/respondent Mary Kiunga Ikiome that the plaintiff had died on 10th August, 2012, then if that is so this suit had abated by 10th August, 2013.

13. Under Order 24 Rule 3(2) of the Civil Procedure Rules it is provided:-

(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.

In view of the above the plaintiff's suit had abated as of 10th August, 2013 and when the defendant filed their application for dismissal of suit, there was no pending suit before this court as the plaintiff's suit had abated by the operation of law.

14. The applicant/respondent in her application concedes that this suit has already abated and seeks to have the same revived by virtue of Order 24 Rule 7(2) which provides:-

(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"

Any person claiming to be a legal representative of a deceased plaintiff may apply for an order to revive a suit which has abated. The burden is upon such an applicant to prove that he was prevented by any sufficient cause from continuing the suit and upon discharging that burden that is when court can revive the suit.

15. The applicant/respondent in her application averred to have been issued with a limited grant of letters of administration ad litem to continue with the deceased plaintiff's suit. This court has observed that the succession cause number has not been disclosed and that the alleged grant of letters of administration ad litem has not been annexed as an exhibit in the applicant/respondent's application. The defendant alludes to the fact that the applicant/respondent has not advanced sufficient reason to explain why this suit should be revived whereas the court may not be ruling out the reasons for delay of hearing of the applicant/respondent application filed on 15th July, 2012 and which application was not attached to the applicant's/respondent application the court cannot ignore the fact that the allegedly issued grant of letters of administration ad litem is not attached. It is doubtful whether such grant exists and would be wrong for the court to start speculating on the issue and issue orders based on speculation. In the absence of the alleged limited grant of letters of administration I find and hold that the applicant has no capacity to prosecute this application. The same is incompetent and is struck out.

16. In view of the fact that this suit abated before the defendant filed its application the same cannot be determined on its merits as it has been overtaken by events, however as the plaintiff's suit has already abated and the plaintiff/respondent filed the present application which I have found to be incompetent and struck it out, the defendant will get costs of this application as against the applicant/respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 23RD DAY OF OCTOBER, 2014.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Mr. B. G. Kariuki for the plaintiff/respondent

2. Miss Muriithi for the defendant/applicant

J. A. MAKAU

JUDGE