



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
SUCCESSION CAUSE NO. 449 OF 2006

IN THE MATTER OF: THE ESTATE OF MBARAK ALI GADIM(DECEASED)

AND

IN THE MATTER OF:AN APPLICATION BY MOHAMED ALI GADIM

R U L I N G

Before court is the Preliminary Objection dated 4/3/2014. The Respondents have raised a Preliminary Objection to the continued hearing of the present Suit on the following grounds:-

1. *“The Suit has abated following the death of the Petitioner on the 27th of August 2011.*
2. *The application dated 29th May 2013 has been filed more than a year after the death of the Petitioner contrary to order 24 of the Civil Procedure Rules”*

This is a Succession Cause the estate in question being that of the late **MBARAK ALI GADIM** who died on 27th March 2005. The deceased was survived by his wife, two daughters as well as the applicant **MOHAMED ALI GADIM** who is the brother to the deceased. The said applicant however passed away on 27th August 2011 while the suit was still pending. By way of a Notice of Motion Application dated 29/5/2013 the present Applicant **NAGIEB OMAR GADIM** sought to be made a party in place of the late **Mohmaed Ali Gadim**. The matter was disposed of by way of written submissions. I have carefully considered the submissions filed by both counsel as well as the authorities cited therein. I take note of Order 24 rule 3(1) of the civil Procedure Code 2010 which provides;-

“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 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 sub Rule(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”

The basis of the preliminary objection is Order 24 Rule 3. The original Petitioner died on 27/8/2011. The application seeking to replace him was not made until 29/5/2013 almost two years **after** his death. The applicant claims that he was awaiting receipt of the letters of Administration *ad litem* before filing his application. The letters of Administration were not obtained until 24/10/2012. The petition for letters of

Administration was not filed until 21/10/2012 (though the same is dated 3/7/2012). The date of filing was therefore 14 months **after** the death of the deceased only 2 months beyond the 12 months set out in Order 24. I take note of the fact that this is not an ordinary Civil Suit but is a Succession Cause whose procedure is set out in the probate and Administration rules Section 63(1) of said rules provides that orders 5,10,11,17, 25, 44 and 49 will apply in succession matter. No mention is made of order 24. I note that on 1/8/2014 Hon. Justice Mohamed Ibrahim made certain orders in favour of the original applicant. To allow this Preliminary Objection would render those orders nugatory and of no consequences. As a court, I am obliged to render justice to all parties. Section 3A of the Civil Procedure Act provides that

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court”

As stated earlier this is a succession cause. It affects the rights and obligations of the applicant with regard to the estate of his late brother. Justice demands that he should not be turned away from the seat of justice. It is true that the one year period provided for under order 24(3) had elapsed. However I find that the applicant has not been unduly indolent. He did file his petition for letters of Administration ad litem and stated that he was awaiting the issue of these letters before filing his application to be substituted for the deceased in these proceedings. As a litigant the applicant had no control over how long it takes to have the letter of Administration as litem issued. This is purely a function of the court. I am further guided by Article 159(d) of the constitution of Kenya 2010 which provides that

“Justice shall be administered without undue regard to procedural technicalities”

Failure to follow laid down procedure should not bar this applicant from the courts. I find no merit in this Preliminary objection and I hereby dismiss the same. Each party to meet its own costs.

Dated and Delivered at Mombasa this 17th day of October, 2014.

M. ODERO

J U D G E

17/10/2014

In the presence of:

No appearance by either party.