

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO.80 OF 1999

NELSON MUGUKU NJOROGE.....PLAINTIFF

VERSUS

FURNCON LIMITED.....DEFENDANT

RULING

1. Leah Wanjiku Muguku, the administrator of the estate of the deceased plaintiff has brought this amended Notice of Motion amended on 14th June, 2013 seeking to be substituted as the plaintiff in this suit and that this suit which has abated be revived.

2. The grounds upon which the motion is premised are on the face of the application and the supporting affidavit of Leah Wanjiku Muguku sworn on 21st June, 2013. She averred that the deceased died on 10th October, 2010. She applied for and obtained grant letters of administration intestate on 29th April, 2011. It is averred that it is necessary that the deceased be substituted and the suit be revived since it has abated.

3. Miss. Waweru Learned Counsel for the applicant stated that she would rely on the grounds of the application and the affidavit in support thereof. She in response to the defendant's Counsel's submission stated that Order 24 Rule 3 of the Civil Procedure Rules allows the court to extend time for filing an application for substitution of a deceased party. She also contended that the defendant would suffer any prejudice.

4. The defendant filed grounds of objection dated 27th October, 2014 in opposition to the motion. The defendant contends that; the motion does not satisfy the requirements of Order 24 Rule 7(2) of the Civil Procedure Rules which is a fatal error.

5. That the estate of the deceased has already been distributed and reviving this suit shall open the defendant to in-compensable prejudice in the event judgment in the matter is set aside and the defendant is successful in the matter and that there is nothing before this court to warrant invocation of jurisdiction to exercise the discretion of revival of an abated suit.

6. Mr. Bwire, Learned Counsel for the defendant reiterated the issues raised in the grounds of objection and submitted that Order 24 Rule 3 presents the remedy as of right within one (1) year after death. That the relief under Order 24 Rule 7 is discretionary and is based on sufficient reason being shown. He contended that the applicant has not explained the delay in filing an application for substitution of the deceased.

7. I have taken the depositions of the parties herein and the applicable law into consideration. Order 24 Rule 3 (1) stipulates that where a sole plaintiff dies and the cause of action survives him/her, the court shall on an application made on his/her behalf, cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit. Subrule (2) provides that the suit shall abate if such an application is not made within one year. It is not in dispute that this suit has abated by operation of the law and the applicant has correctly argued that Order 24 Rule 3 allows a party to apply for revival of such a suit. For the court to revive such a suit, sufficient cause for the delay in filing an application for substitution ought to be given by the applicant. What falls for this court's consideration therefore is whether the sufficient reason has been given for the delay in filing this application. The deceased died on 10th October, 2010 and a grant of letters of administration intestate was obtained on 29th April, 2011

before the lapse of one (1) year within which the application was to be made. The first application was filed on 8th October, 2011 and the amended application on 25th June, 2013 which is more than one year after the prescribed period. No explanation for the delay has been furnished at all. The delay though is not inordinate.

8. Despite the foregoing, it is note-worthy that the defendant also did not take any action to move the court to strike out this suit. This coupled with the fact that this is a land matter which is very emotive and close to the heart of many Kenyans. I am inclined to allow this application. I accordingly, allow the application. Costs shall be in the cause.

Dated, Signed and Delivered in open court this 28th day of November, 2014.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant