



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 88 OF 2002

JOSEPHAT RICHARD THUMBI GICHUKI.....1ST PLAINTIFF

FREETRADE ENTERPRISES LTD2ND PLAINTIFF

-VERSUS -

STANDARD CHARTERED BANK (K) LTD..... 1ST DEFENDANT

KINYANJUI WANJU

T/A DOLPHIN AUCTIONEERS2ND DEFENDANT

CHARLES MURIUKI KARIENYE3RD DEFENDANT

THE COMMISSIONER LANDS4TH DEFENDANT

RULING (NO. 2)

1. This is the plaintiff's notice of motion dated 28th August 2012. It is expressed to be brought under Order 24 rules 4 and 7 of the Civil Procedure Rules 2010. The prayers are twofold: to resurrect the suit against the 2nd defendant (deceased) and to thereafter substitute the 2nd defendant with his personal representative Peter Wanjau Gatamu. A similar motion dated 22nd September 2010 was presented to court and dismissed on 10th November 2011. That motion was dismissed primarily because the person sought to be substituted was not clothed with legal authority to represent the estate of the deceased. The applicant's case now is that Peter Wanjau Gatamu has been appointed a legal representative and that the cause of action has survived the death of the deceased. The 1st plaintiff has deponed that he is not guilty of laches and that it is only fair and just to allow the application.
2. The motion is contested. There is a replying affidavit sworn by Peter Wanjau Gatamu. The gist of it is that the cause of action relates to the conduct and business of the deceased as a licenced auctioneer and court broker and who traded as Dolphin Auctioneers Limited. The deponent contends that he never participated in the business, is not an auctioneer and that the estate of the deceased cannot thus be liable for the conduct or business of the deceased. He also stated that the action should be maintained against Stanley Mugacha and Peter Waweru who were appointed by the Auctioneers Board to liquidate the business of the deceased. Lastly, it was submitted that the deceased was in any event only an agent of the 1st defendant bank and that the latter should continue to shoulder any ensuing liability.

3. I have heard the rival arguments. It is common ground that the 2nd defendant (deceased) died on 1st March 2010. That is now nearly 3 years ago. No valid application for substitution was brought within the prescribed period of 1 year. Accordingly, under Order 24 rule 3 (2) the suit against the 2nd defendant has abated by operation of the law. See Njonjo Njubi Vs Njubi Karungari Nairobi, High Court case 5530 of 1990 (O.S) [2013] e KLR, Rawal Vs Rawal [1990] KLR 275.
4. I would have been prepared to excuse the inordinate delay in bringing this motion. The applicant is not entirely to blame as a grant of representation was only issued on 18th July 2012. I say so because the court is now enjoined by the overriding objective to do substantial justice to the parties: it must disregard technical procedure and aim at the root of the dispute. That is the spirit and letter of article 159 of the Constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court:

“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC case 633 of 2011 [2012] e KLR.

5. There is however a caveat in this matter. Although the cause of action has survived, the deceased was an auctioneer appointed as such under the Auctioneers Act and trading as a limited liability company known as Dolphin Auctioneers Limited. The applicant does not contest that fact. First, a company is distinct from its shareholders and directors. Salomon Vs Salomon 1897 A.C. 22. Secondly, the liability of the estate for the acts of the auctioneer in his business *qua* auctioneer is doubtful and remote. True, the person known as Peter Wanjau Gatamu has been appointed the personal representative of Kinyanjui Wanjuu (deceased). It does not make him necessarily liable for the liabilities incurred by Dolphin Auctioneers Limited. I am fortified there by the appointment of the two other auctioneers, Mr. Stanley Mugacha and Peter Waweru to liquidate the deceased’s business.
6. Looked at against the cause of action that dates back to over 10 years ago in 2002, there is an obvious prejudice. He depones that he is completely unaware of the plaintiff’s claims, he is not an auctioneer; he never participated in the deceased’s business and accordingly has no evidence to tender at the trial. It is open to the court to revive the suit. See Benard Wanjala Namunwa Vs Geoffrey Kiveu and another Bungoma, High Court suit 70 of 2004 [2009] e KLR, Rosemary Bunny Vs Gichuru Kamotho [2005] e KLR. But the discretion of the court depends on the unique circumstances of every case. In the present case, reviving the claim after such lengthy delay and considering that the cause of action is more than a decade old will cause a grave injustice to Peter Wanjau Gatamu. One clear prejudice is that he can no longer muster evidence or procure witnesses to defend the suit. See Mount Kenya Sundries Limited and another Vs Kenya Ports Authority and others Nairobi, High Court case 522 of 2003 [2012] e KLR. There, I held as follows:

“I am alive to the overriding objective of the court to do substantial justice to the parties. That is the letter and spirit of the law at articles 50 and 159 of the constitution as read together with sections 1A and 1B of the Civil Procedure Act. But I also hold the view that justice is a two way street. The flip side is that the defendants would be prejudiced in getting a fair trial 11 years after commencement of the suit and nearly 10 years after the death of the 2nd plaintiff. I thus decline to exercise my discretion in favour of the applicant. I would decline to revive the 2nd plaintiff’s case. It follows that the application by Kuldip Sapra to be substituted as plaintiff fails”.

See also Rawal Vs. Rawal (Supra).

7. Granted all of those reasons I refuse to exercise my discretion to revive the suit or to substitute the parties. I take a little comfort in the fact that the deceased may have acted only as an agent of the 1st defendant bank. The plaintiffs, if well advised, are thus not left empty handed and without a remedy. The plaintiff's notice of motion dated 28th August 2012 is hereby dismissed. In the interests of justice, I order that each party shall bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 25th day of April 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

No appearance for the 1st Defendant.

Mr. P. Kiranga for Mrs. Oyatta for the 2nd Defendant.

No appearance for the 3rd Defendant.

No appearance for the 4th Defendant.

Mr. Collins Odhiambo Court Clerk.