



NO.118

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO.138 OF 2004

PENINA AUMA OTIENO (**Suing as a legal Representative**
of EZRA OTIENO ONGONG'A(Deceased)).....PLAINTIFF

-VERSUS-

1. CHARLES OTIENO AYOO
2. ALLOYS OCHIENG BONDO
3. JACKSON OMONDI NDULE

Sued as legal representatives

of NELSON NDULE BONDO (Deceased).....DEFENDANTS

RULING

1. What is before me is an amended Notice of Motion application dated 14th May, 2012 brought by one, Penina Auma Otiemo the administrator of the estate of Ezra Otiemo Ongong'a (deceased) ("hereinafter referred to as "**the applicant**"). The applicant has sought a total of three (3) principal prayers namely;-
 1. **An order for the revival of this suit which has abated;**
 2. **An order joining the applicant in this suit as a Plaintiff in place of Ezra Otiemo Ogong'a (deceased);**
 3. **An order joining one, Charles Otiemo Ayoo, Alloys Ochieng Bondo and Jackson Omondi Ndule as defendants in this suit in place of Nelson Ndule Bondo (deceased).**

When the application came up for hearing on 15th May, 2013, the applicant's advocate Mr. G.S. Okoth indicated to the court that the applicant did not wish to pursue prayer No. 3 in the application.

2. The applicant's application is supported by the affidavit of the applicant sworn on 5th March, 2012. This affidavit was filed in support of the applicant's original application for the same reliefs dated 5th March, 2013 which was amended by the applicant and which gave rise to the present application. The applicant's application has been brought on the grounds that; the original

plaintiff in this suit, Ezra Otieno Ongong'a is deceased. Ezra Otieno Ongong'a (**deceased**) died on 24th June,

2008 and the applicant who is his widow has obtained a grant of letters of administration ad litem of his estate limited for the purposes filing suit. The applicant is desirous of proceeding with this suit in which the cause of action survived the deceased. The applicant obtained the said grant of letters of administration on 26th May, 2009 within one (1) year of the death of the deceased but did not make an application to be joined in this suit within the time prescribed in the civil procedure rules due to inaction on the part of the advocates who had been handling this case on behalf of the deceased. This suit abated at the expiry of one (1) year from the date of death of the deceased. The applicant is therefore seeking the revival of the suit and the joinder of the applicant in this suit as a plaintiff in place of the deceased. The applicant has deposed in her affidavit in support of this application that the original defendant in this suit, Nelson Ndule Bondo (deceased) is also deceased. The original defendant died sometimes in February, 2010. In the circumstances, this suit has also abated as against the deceased original defendant. This explains the third limb of the applicant's application in which she has sought the joinder of Charles Otieno Ayoo, Alloys Ochieng Bondo and Jackson Omondi Ndule as defendants in place of the deceased original defendant. As I have mentioned above, the applicant decided not to pursue the joinder of the said persons as defendants in this suit at this stage. I don't know on what basis the applicant had intended to join these persons in this suit. They have been described in the applicant's affidavit in support of the application as the defendant's next of kin. I doubt whether a party can be joined in a suit in place of a deceased on the basis only on kinship. The provisions of Order 24 of the Civil Procedure Rules is very clear that only a legal representative of a deceased may be joined in a suit. There is no provision for the

deceased's next of kin. Alloys Ochieng Bondo, one of the persons whom the applicant had intended to join in this suit as a defendant in place of the deceased original defendant filed an affidavit in opposition to the application. His objection was based on among others the ground that he is not a legal representative of the deceased defendant. I do not wish to say more on the applicant's application to join the said persons as defendants in this suit because that part of the application was abandoned. The opposition to the application by Alloys Ochieng Bondo likewise does not require consideration as he has not been joined in this suit as a party and furthermore, the applicant had abandoned the prayer that sought to join him in the suit.

3. What the applicant is seeking in the present application is essentially the extension of time within which to apply to be

made a party to this suit as a plaintiff in place of the deceased original plaintiff. That extension of time and substitution of the deceased by the applicant will have the effect of reviving the abated suit as concerns the deceased plaintiff. Whether or not to extend time for a legal representative of a deceased plaintiff to be made a party to a suit in place of such deceased after the expiry of the prescribed time is a matter that calls for the exercise of the discretion of the court. Order 24 rule 3 (2) of the Civil Procedure Rules provides that the court may extend time for good reason. The reason that has been put forward by the applicant as an excuse for the delay in making the application to be joined in this suit in place of the deceased is that, the applicant had instructed the deceased's previous advocates to make the necessary application but they failed to do so. I have noted from the record that the applicant had obtained a grant of letters of administration in good time for the purposes of proceeding with this suit. That in my view is an indication that the applicant had a desire to proceed with this suit. The applicant seems to me to have been let down by the deceased's previous advocates who failed to take appropriate steps within the prescribed time to have the applicant joined in this suit as a plaintiff. I am satisfied that the applicant has given good reasons to warrant the granting of the orders sought.

4. Due to the foregoing, the applicant's amended Notice of Motion application dated 14th May, 2012 is allowed in terms of prayers 1 and 2 thereof. For the avoidance of doubt, this suit is revived only as concerns the deceased plaintiff. The applicant having abandoned prayer 3 of the application will have to decide on what to do with regard to the deceased defendant against whom this suit has

also abated. The costs of the application shall be in the cause.

Dated, signed and delivered at Kisii this 27th day of September, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. G. S. Okoth for plaintiff

No appearance for the defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.