



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE 935 OF 2001
NJUGUNA MWAURA MBOGO.....PLAINTIFF
VERSUS
E. K. BANKS LIMITED
ENDAO COMPANY LIMITED.....DEFENDANTS/APPLICANTS
AND
ELIZABETH NYAMBURA NJUGUNA
FRANCIS KAMAU NJUGUNA.....RESPONDENTS

RULING

The defendants/applicants hereinafter referred as the Applicants have filed a Notice of Motion dated 13th July 2011 under order 24 Rule 3(1) and (2), Order 51 Rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law seeking the following orders;

That the Honourable Court be pleased to Order that the Respondents herein ELIZABETH NYAMURA NJUGUNA and FRANCIS KAMAU NJUGUNA be substituted as the Plaintiffs in this case in place of NJUGUNA MWAURA MBOGO who is now deceased.

That the Court do extend time for the filling for the filling of the substitution up to the filing date of this application.

That the costs of this application be provided for.

The application is supported by the affidavit of Sharack cherogony the Managing Director of the defendant Companies and is based on the following grounds;

1. That the plaintiff herein Njuguna Mwaura Mbogo died intestate and was survived by the Respondents herein as wife and son among others.
2. That the Respondents herein have been appointed by a Court of competent jurisdiction as the administrators of the estate of the deceased plaintiff.
3. That the matters in issue in this suit requires the respondents herein as the administrators of the Estate

of the deceased plaintiff be substituted as the plaintiff herein so as to enable the court to effectually and completely to adjudicate upon and settle all question involved in the suit.

4. That though time for applying for the said substitution has expired. This Honourable Court has the discretion to extend such time to file the application for substitution so as to meet the ends of justice.

5. That there will be no prejudice occasioned to the respondents herein if this application is granted.

The Respondents filed an affidavit sworn by Mr. Francis Kamau Njuguna. Parties also file written submission. I have read the affidavits, the submissions the cases cited and I find as follows.

The background of this application is that the plaintiff who filed this suit the case was heard and judgment was entered as prayed in the Originating summons. On the 6th of October 2004 the defendant filed an application to have the judgment set aside the application was partly heard by Justice Kubo. The applicants allege that they were not served. The plaintiff died on the 2nd of April 2006. The applicants filed an application to have the plaintiff substituted through an application dated 19th April 2007 but the application was withdrawn on the 3rd June 2008. The plaintiff’s legal representative moved to Nakuru High Court and obtained letters of administration on the 13th of August 2008.

There is no dispute that the plaintiff died in April 2006. The application to have the plaintiff substituted was not determined. The applicant have come to Court to have the plaintiff substituted with the two respondents, the applicant also seek to have time extended for the filing of the substitution.

Order 24 3(1) provides that *”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 or sole surviving 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.*

Order 24(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 awarded to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.

The suit against the deceased plaintiff abated a year from April 2006.No application was made within the year to have the plaintiff substitute. In the application before me the applicant has not applied to revive the suit. It therefore remains a suit that abated in the year 2007. The application before me therefore is premature and incompetent since the suit has to be revived before any application is made. I accordingly strike out the application dated 13th July 2011 with cost

Dated and delivered this 28th Day of March 2012

R. OUGO

JUDGE

In the Presence of:-

..... For the Applicant

..... For the Respondent

..... Court Clerk