REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

(MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL SUIT 100 OF 2003

MOUNT KENYA SUNDRIES LIMITED……………......……….. 1ST PLAINTIFF

SAPRA M.M…………………………………………………. 2ND PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY ……………………...…………… DEFENDANT

AND

KENWIDE MEDIA LIMITED …………………....……….……… 3RD PARTY

RULING

The Plaintiff's application dated 15th February, 2012 seeks the following orders:

"1. THAT this Honourable court be pleased to substitute the name of SAPRA M.M. the deceased 2nd plaintiff who died on 25th July, 2002 with the name of KULDIP SAPRA the personal representative of the deceased 2nd plaintiff's estate.

2. THAT the Honourable Court be pleased to revive the 2nd plaintiff's suit which has abatted and allow the suit to proceed for hearing on merits.

3. THAT the costs of this application be in the cause."

The application was supported by an affidavit sworn by **Kuldip Madan Mohan Sapra**, the son of the deceased 2nd plaintiff, **Sapra M. M**, hereinafter referred to as "**the deceased**." The deponent is also the Managing Director of the 1st Plaintiff. He stated that the deceased died on 25th July, 2002 and thereafter he applied and obtained a grant of probate of the written will which was subsequently confirmed. However, he did not know that it was necessary to apply for substitution of the deceased within one year of his demise.

In the meantime, Kuldip had instructed the plaintiff's advocates to enter into negotiations with the defendant's advocates with a view to reaching an amicable out of court settlement but no settlement was reached. But having commenced the negotiations he did not take steps to prosecute the suit which has

now abated.

The application was opposed by the defendant who filed grounds of opposition stating:

“1. THAT the applicant’s application is misconceived.

2. THAT the 2nd plaintiff/applicant’s suit abated on 25th July, 2003.

3. THAT the applicant herein is guilty of laches.

4. THAT there is no admissible evidence in support of the aforementioned application.”

The defendant’s Principal Legal Officer, **Michael Sangoro**, swore a replying affidavit and stated, *inter alia*,

· **that since the applicant was granted probate in respect of the Plaintiff’s will on 21st November, 2002 and no step had been taken within one year from the date of the deceased’s death to apply for substitution, the 2nd Plaintiff’s suit abated on 25th July, 2003.**

· **that since 21st March, 2006 this suit has been set down for hearing on various dates and the applicant has had opportunity to apply for revival of the deceased’s suit and/or substitution but that was not done.**

· **that on 9th February, 2012 when HCCC No. 522 of 2003, Mt. Kenya Sundries Ltd & M. M. Sapra V K.P.A & 2 others (a related case) came up for hearing before the Hon. Justice Kimondo, the Judge marked the deceased’s case as abated. This is what led to the filing of this application.**

Mr. Opiny for the plaintiff and **Mr. Muchiri** for the defendant agreed that the plaintiff’s application be determined on the basis of their respective submissions on record. I have carefully perused the submissions.

Order 24 rule 3(2) of the **Civil Procedure Rules** states as hereunder: -

“(2) Where within one year no application is made under subrule (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”.

In this application, the 2nd plaintiff’s suit abated on 25th July, 2003, that is, one year after the 2nd plaintiff’s death. However, the court has power to extend the time within which a legal representative of the deceased can apply to be made a party. But for the court to exercise such discretion good reason has to be shown by the applicant.

The provisions of **Order 24 rule 7** also come into play in considering an application of this nature. Under that rule, a legal representative of a deceased plaintiff may apply for an order to revive a suit which has abated. He has to show that he was prevented by a sufficient cause from continuing with the suit. If sufficient cause is shown “**the court shall revive the suit**” or set aside an order of dismissal of the suit that had been made earlier.

The applicant obtained grant of probate of written will on 21st November, 2002. He stated that he did not

apply for substitution of the deceased plaintiff immediately thereafter because he did not know that it was necessary to do so within one year of the death of the 2nd plaintiff.

I find that unacceptable because the plaintiffs were represented by Mr. Opini Advocate right from November, 2001 when this suit was filed. There is no denial that the advocate was well aware of that basic legal requirement regarding substitution of a deceased plaintiff. He is deemed to or ought to have advised the applicant accordingly. In any event, ignorance of the law on the part of the applicant, if at all, cannot amount to sufficient reason for failing to comply with a mandatory provision of the law, particularly where an applicant is represented by counsel.

The applicant cannot also argue that he failed to apply for substitution of the deceased plaintiff because of the negotiations that had been commenced with a view to settling the matter amicably. These were "**without prejudice**" negotiations which cannot bar an applicant from proceeding to apply for substitution of a deceased plaintiff.

In my view, the applicant is guilty of laches in bringing this application nearly 8 years from the date when he obtained Grant of Probate. I find no merit in the application and dismiss it with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2012.

D. MUSINGA
JUDGE

In the presence of:

Alex – Court Clerk

Mr. Njure for Mr. Opiny for Plaintiff

Mr. Muchiri for Defendant

No appearance for 3rd Party