



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO.522 OF 2003

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

SAPRA M.M2ND
PLAINTIFF

- VERSUS -

KENYA PORTS AUTHORITY.....1ST
DEFENDANT

KENWIDE MEDIA LTD2ND
DEFENDANT

GEORGE SUNGUH t/a MEDIA CONCEPT3RD
DEFENDANT

RULING

1. This is the plaintiffs' notice of motion dated 15th February 2012. A minor amendment was allowed by court to the heading of the motion. The motion is thus expressed to be brought under order 24 of the Civil Procedure Rules 2010 as well as sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by an affidavit sworn by Kuldip Sapra on even date.
2. The plaintiff seeks to substitute Kuldip Sapra as plaintiff in place of Sapra M.M. who is now deceased. The latter was the 2nd plaintiff and died on 25th July 2002. The plaintiff also prays for revival of the 2nd plaintiff's case which has since abated.
3. The application is contested by the defendants. There is filed a replying affidavit of Michael Sangoro, the 1st defendant's legal officer, sworn on 24th February 2012. The 2nd defendant was duly served but did not appear. The case against the 3rd defendant has since been withdrawn.
4. Order 24 rule 1 of the Civil Procedure Rules 2010 provides that the death of a party shall not cause the suit to abate if the cause of action survives or continues. However, rule 3(1) and (2) provides as follows;

“3. (1) 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.

(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”.

5. At paragraph 6 of the plaint is pleaded as follows;

“The Plaintiffs while in the course of their business of making and selling postcards, maps and other souvenirs in 1995 or thereabouts produced a picture or photograph which they printed on a postcard No.SSOTA 518 (Called Lion and Lioness before Kilimanjaro) which picture or photograph was original in character and the Plaintiffs have a copyright to the said picture and or post card and have since marketed the same throughout the East African region”.

6. From the plain meaning of those words, the claim by the plaintiffs seems to be joined at the hip. It is perhaps the kind of claim contemplated at order 24 rule 2 where the surviving plaintiff can proceed with the cause of action. But the 1st plaintiff is of a different mind because the copyright in the suit picture may have belonged to the 2nd plaintiff or his estate. Unfortunately, the 2nd plaintiff died nearly 10 years ago on 25th July 2002. On 9th February 2012, the court marked the 2nd plaintiff’s suit as having abated. Whether or not to revive the suit or to allow substitution of parties involves an element of discretion of the court and a sense of fairness and justice. See *Rosemary Bunny Vs Gichuru Kamotho* [2005] e KLR, *Ngambi Muthira Meme Vs Patrick Musunga and another* [2006] e KLR and *Gabriel Mutiso Maanda Vs Davanis Suppliers Ltd and 4others* Nairobi, HCCC No 89 of 2007 (unreported). The present application for substitution is made too late in the day and in complete contravention of order 24 rule 3 (2). See *Mary WanjiruNjugunaVs Hezekiah Mathara* Civil Appeal No 8 of 2007, Court of Appeal [2010] e KLR.

7. The plaintiff explains the delay as follows: that the 1st plaintiff was unaware that substitution was necessary; and that there were negotiations to settle the suit. This suit was commenced by plaintiff in the year 2001. In the year 2003, it was transferred to this court and renumbered. The 2nd plaintiff had died in between those dates. Ignorance of the law is not a good defence. The plaintiffs filed suit through an advocate. The ignorance is thus far beyond any excuse. With regard to the negotiations, the 1st defendant submitted that negotiations only begun in September 2011. The 1st plaintiff has not rebutted that claim. I am thus of the view that the present application is dilatory. The delay is inordinate and inexcusable. 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 Kuldir Sapra to be substituted as plaintiff fails.

8. In all this I am comforted a little by what I said earlier. The claim in the plaint as pleaded was joint. The remaining plaintiff, if well advised, may be entitled to pursue remnant elements of the claim. But that I say *obiter dictum*.

9. In the result, the plaintiffs’ notice of motion dated 15th February 2012 is hereby dismissed. In the interests of justice, I shall not order any costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 4th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

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Mr. Njue for Mr. Opiny for the 1st Plaintiff.

Mr. Njue for Mr Opiny for the 2nd Plaintiff

Mr. Muchiri for the 1st Defendant.

No appearance for the 2nd Defendant.

No appearance for the 3rd Defendant.