



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 104 of 2007

CORNER HOLIDAY INN LIMITED 1ST PLAINTIFF

PETER KIMEMIA NJOROGE 2ND PLAINTIFF

JOSEPH KURIA WANGUNYU 3RD PLAINTIFF

VERSUS

ANDREW KURIA WANGUNYU 1ST DEFENDANT

DAVID CURURU WANGUNYU 2ND DEFENDANT

R U L I N G

1. By a Chamber Summons dated 14th May, 2012 the Applicants have applied that the 3rd Plaintiff be substituted with Catherine Gathoni Gitau. The application is brought under Order 24(1) (3) and (7) of the Civil Procedure rules and Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by the Affidavit of Catherine Gathoni Gitau sworn on 14th May, 2012.

2. The Applicant contends that the 3rd Plaintiff passed away on 18th October, 2010, that the cause of action survives the 3rd Plaintiff, that Catherine Gathoni Gitau was issued with a Limited Grant of letters and litem on 1st November, 2011, that it is more than one year since the passing on of the 3rd Plaintiff and his suit has abated, that she therefore sought the extension of time and the substitution of the 3rd Plaintiff accordingly.

3. The Defendants opposed the application through the grounds of opposition filed on 12th June, 2012. The Defendants contended that the application was fatally defective as the applicant had approached the court by way of a summons instead of motion, that there being no suit against the 3rd Plaintiff the orders being sought were incapable of being enforced, that no reasons had been advanced to explain the delay in the making of the application. Ms. Munga, learned Counsel for the Defendant submitted that a similar application had been made and dismissed earlier. She urged that the application be dismissed.

4. I have considered the application, the Affidavit in support, the grounds of opposition and the submissions of Counsel.

5. Under Order 24 Rules 1, 2 and 3 the death of a party does not cause the suit to abate if the cause of action survives such a party. The suit only abates if there has been no application to substitute a deceased party for more than a year. However, that period can be extended by the court under the proviso to Rule 3(2) of Order 24.

6. From the record, there is no dispute that vide the Death Certificate No.003605 produced as “CGG-1”, the 3rd Plaintiff passed on 18th October, 2010, that the cause of action survives him and that on 1st November, 2011, the High Court of Kenya at Nairobi granted the applicant Letters of administration ad litem limited for the **“purposes of taking over the deceased suit in Milimani HCCC No. 104/2001”**, that is, this suit. On the foregoing it can be said that the application before court squarely lies under Order 24 of the Civil Procedure Rules. On the foregoing facts, can the application succeed in view of the objections raised by the Defendant?

7. As regards the procedure the Applicant took, I agree with Ms Munga that it was wrong to bring the application as a summons instead of by way of Notice of Motion. However, that being a mere technicality and by virtue of Order 51 Rule 10(2) of the Civil Procedure Rules, I will excuse the defect as being of a technical nature and/or want of form. In any event, no prejudice has been suffered by the Defendants by the said defect.

8. The other objection is that the orders sought cannot be enforced as there is no suit against the 3rd Plaintiff. I do not think this is a serious objection. The use of the terms **“as against”** in my view did not mean a suit against the 3rd Plaintiff but, the 3rd Plaintiff’s suit. If I am wrong in my interpretation of the 1st prayer of the application, which I think I am not, the same does not cause any prejudice to the Defendants. I accordingly reject the same.

9. The other objections were that no reasons have been advanced for the delay and that the matter is res-judicata. On res judicata this court is aware that on 11th May, 2012 it dismissed a similar application by the 2nd Plaintiff. The basis for the dismissal was that it was being made by a person without any locus standi. The 2nd Plaintiff could not purport to make such an application. However, the present application has been brought by the administrator of the estate of the 3rd Plaintiff herself. In my view, the parties to this application are different from those who made the earlier application. For this reason, that objection fails. As regards delay, I agree with Ms Munga that the affidavit of the applicant is silent on the reasons for the delay. This should disentitle exercise of this court’s discretion to grant the prayers sought.

10. However, I am mindful of the following:-

a) that humanly speaking, sometimes after being left by a loved one (especially a bread winner in the family) the bereaved spouse takes quite some time to re-organize herself. Pending litigation may take a back seat as the widow sorts out the other pressing family issues,

b) some legal practitioners flippantly handle the parties cases without caring the legal ramifications thereof. In the instant case, I am convinced that the drafter of the Supporting Affidavit may have carelessly failed to consider Rule 3(2) of Order 25 the Civil Procedure Rules.

c) the 1st application that was dismissed was filed on 7th February, 2012 and dismissed on 11th May, 2012. The present application was filed almost immediately, on the 15th May, 2012. There was no much delay.

d) there may have been a delay in the process of obtaining the Letters of Administration which was finally concluded on 1st November, 2011.

11. Taking the foregoing into consideration, and there being no prejudice that have been shown by the Defendant to have been suffered as a result of the delay and applying the principles of the overriding objective of the Civil Procedure Act, I hereby exercise my discretion in favour of the Applicant extend the time for making the present application and accordingly allow the application dated 14th May, 2012 in terms of prayer Nos.1, 2, 3 and 4.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26th day of September, 2012.

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A. MABEYA
JUDGE