



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 348 of 2007

**ALLAN CALVIN KIRIMI.....PLAINTIFF/APPLICANT
versus
JEREMIAH KIMATHI.....DEFENDANT/RESPONDENT
RULING**

The Plaintiff’s Chamber Summons dated 4th February 2010 brought under Order XXIII rules 1 and 4 and Order VI A Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act, praying

- “A) THAT Elizabeth Kithiira Kimathi being a personal representative of Jeremiah Kimathi (deceased) be substituted as a party hereto,**
- B) THAT the Plaintiff/Applicant be granted leave to amend his pleadings in terms of the draft annexed hereto and the same be deemed as filed on payment of court filing fees,**
- C) THAT costs of this application be in the cause”;**

is opposed by the Respondent, Elizabeth Kithiira Kimathi, on the basis of Grounds of Opposition dated 11th February 2010 wherein it is pointed out that the Chamber Summons is fatally and incurably defective, incompetent, resjudicata, has no merits and is an after thought as it only amounts to an abuse of the court process because it is premised on a non-existent suit the said suit having abated following the death of the Defendant Jeremiah Kimathi on 16th December 2008.

There is no dispute between the parties as to the date of death. There is no dispute that following that death, a period of one year in terms of Order XXIII Rule 4(3) ended on 15th December 2009.

There is no dispute that the Plaintiff was entitled to make an application for substitution of the Defendant within that period of one year.

The Respondent’s learned Counsel, Mr. Kaburu Miriti pointed out that it was too late in the day for the Plaintiff to have brought this Chamber Summons dated 4th February 2010. He added that the Plaintiff could have filed such a late application only after obtaining leave of the court to file such an application. According to him, the Plaintiff had obtained no such leave.

On the other hand, the Plaintiff’s learned Counsel Mr. D.N. Gichuru while agreeing that the Chamber summons dated 4th February 2010 was filed out of time, he submitted that the necessary leave under Order XXIII Rule 4 (3) Civil Procedure Rules had been obtained when in an earlier application dated 16th October 2009 this court granted the Plaintiff liberty to re-apply after the court struck out the said application dated 16th October 2009.

That application dated 16th October 2009 by way of Chamber Summons was struck out by me on 5th November 2009 the day it was before me for hearing.

There is no dispute between the parties that the said Chamber Summons dated 16th October 2009 and filed on 19th October 2009 had been filed within the period of one year from the date of death of the Defendant in this suit. It is therefore understandable that the Plaintiff did not include in that Chamber Summons a prayer to revive the suit.

The Plaintiff prayed for substitution of the Defendant and also for amendment of his filed pleadings only.

Those were the prayers I struck out on the ground that by then the Plaintiff as the Applicant in the Chamber summons

dated 16th October 2009 was claiming, that one Elizabeth Kithiira Kimathi was the Legal representative of Jeremiah Kimathi the Defendant in this suit when the said Elizabeth Kithiira Kimathi

(i) was only a petitioner, and therefore not yet a legal or personal representative, in High Court succession Cause No. 1274 of 2009;

(ii) was not made a party in the Chamber Summons dated 16th October 2009 and had not therefore been served to appear and had not appeared before me for the interparty hearing of the Chamber Summons

When I struck out those prayers and therefore that Chamber Summons, I proceeded to grant liberty to the Plaintiff
“to re-apply when appropriate, and necessary”

By then, on 5th November 2009, the Plaintiff was still within time and there was no need for me to check time for him as he could re-apply the next day, or the next week or any day before 15th December 2009 or he could re-apply, as he did, after that date.

In any case, it was up to him to be on the look out, to be keen, as to requirements or his obligations.

My order for liberty to re-apply cannot, in the circumstances be stretched to include an order to revive an abated suit for which no relevant prayer was before me by then. This suit had not abated when on 5th November 2009 I struck out the Plaintiff's Chamber summons dated 16th October 2009 and I do not see how I could have included that limb of the order in the absence of a specific prayer to that effect even if I were to grant such an order.

Since there is no such a prayer in the Chamber Summons dated 4th February 2010, then clearly the Plaintiff/Applicant has to-date failed to make the necessary application for revival of the suit under Order XXIII Rule 4(3) civil Procedure Rules.

It follows I must accept what the Respondent is saying and reject what the Applicant is saying on the issue of revival of the suit herein.

Accordingly, as there should be no substitution of a party in a suit which has abated and there should be no amendment of a plaint in a suit which has abated, this Chamber summons dated 4th February 2010 is misconceived, improper and unmaintainable. The same be and is hereby dismissed with costs to the Respondent, Elizabeth Kithiira Kimathi.

Dated this 19th day of March 2010.

J.M. KHAMONI
JUDGE

Present:

Mr. Gichuru D.N. for the Plaintiff/Respondent
Mr. Kaburu Mriti for the Respondent