



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 73 of 2005

BISMARCK NYAKUNDI NYANYUKI:.....PLAINTAIFF

VERSUS

DAUDI RUTO CHEPSAT:.....1ST DEFENDANT

MAGDALENE CHEPKORIR RUTO:.....2ND DEFENDANT

RULING

The Plaintiff BISMARCK NYAKUNDI NYANYUKI brings this Application under Order XXIII Rules 4,5 and 8 of the Civil Procedure Rules, Order 1 of the said Rules and Order VIA Rules 3 and 4 of the said Rules and Sections 3 and 3A of the Civil Procedure Act praying for revival of the suit as against the 1st defendant. He also prays that the person named in the said application be substituted as the legal representative of the 1st defendant and the plaint be amended as in the draft attached to the Application.

The Application is brought on the grounds that the 1st Defendant died in September 2005 and his personal representative was not appointed so as to enable substitution. The delay was occasioned by awaiting the appointment of the legal representative and no prejudice will be suffered by the 2nd Defendant. The other ground is that it is in the interest of justice to have the issues in controversy determined by the court. There is an affidavit sworn by the Plaintiff in support of the application wherein he states that he has consulted the dependants of the 1st Defendant who have agreed that the first born of the 1st defendant be substituted in place of his father.

The Application is opposed and three grounds of opposition are filed. These are that the applicant is guilty of extreme laches and does not warrant the exercise of the court's discretion in his favour, the application is an abuse of the process of court and finally that the applicant does not come to court with clean hands.

At the hearing **Mr. Ombati** learned counsel for the applicant urged that the application be allowed so that the court is placed in a better position to fully and conclusively determine the matters in issue. He did not agree as alleged that the applicant had come to court guided by anything else but good faith and he said the apparent delay in bringing the application had been explained.

In opposition **Ms.Odede** learned counsel for the 2nd Defendant argued that the orders sought by the applicant were unknown to law and that the suit was not capable of being revived and that only leave to

substitute the deceased 1st defendant should have been sought. Counsel added that the applicant was guilty of undue delay and was only awoken by the 2nd Defendant's application to dismiss the suit for want of prosecution. She concluded that fairness is to both sides and as the suit can still proceed against the 2nd defendant she urged that the application be dismissed.

I have taken into consideration the application as filed and all the affidavits. I have also considered the grounds filed in opposition and submissions by both counsel herein. I must start at the point that I am totally at a loss at the averments by counsel for the 2nd Defendant that the orders sought are not known to law and that the suit cannot be revived. Suffice it here to quote the provisions under which the application herein is brought.

Order XXIII Rule 8(2)

The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal, and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

I accept the reasons given for not applying for substitution of the 1st defendant earlier. Counsel had good reasons for thinking that a legal representative of a deceased's estate ought to be appointed by court. That I think is sound reasoning. The alternative position is that a person: claiming to be the legal representative" could be substituted. The issue as to whether that person is indeed the legal representative is a matter for determination by the court under Order XXIII (5) whenever the issue may arise.

Upon consideration of this application I grant the following orders:-

1. The suit against the 1st Defendant is hereby revived.
2. AARON KIPKOECH ROTTO is substituted in place of the 1st Defendant.
3. Leave is granted to the Applicant to amend his plaint as per the draft and the same shall be deemed duly filed UPON payment of the requisite court fees.
4. Costs of this application are awarded to the 2nd defendant in any event.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT ELDORET THIS: 13th DAY OF MAY, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Paul Ekitela - Court clerk

Mr. Ombati - Advocate for the Applicant

N/A - for the Respondent.