



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
Civil Suit 70 of 2004

BENARD WANJALA NAMUNWA

DANIEL WANJALA NAMUNWA PLAINTIFFS

~VRS~

GEOFFREY KIVEU JARED DEFENDANT

AND

DAVID MUSEE NAMUNWA.....APPLICANT

RULING

This is a ruling on an application dated 19/01/2009 brought under section 3 and 3A of the Civil Procedure Act and Order XXIII Rule 3(1) and 8(2) of the Civil Procedure Rules. The Applicant David Musee Namunwa seeks for the following orders:

- a) *That this Honourable Court be pleased to make an order reviving the suit herein in respect of the 1st Plaintiff.*
- b) *That this Honourable court be pleased to substitute the 1st Plaintiff herein with on David Musee Namunwa.*
- c) *That costs of this application be provided for.*

The application is grounded on the grounds on its face and on the affidavit of the Applicant sworn on the 19th January, 2009. Briefly, the facts are that the 1st Plaintiff in this case died on 25/09/2007 and was not substituted within the prescribed period of twelve (12) months. The Applicant is the son of the deceased and has now obtained a limited grant in order to pursue this civil case. With the substitution period having expired, the Applicant seeks the orders of this court to revive it and get substituted in place of the deceased.

Mr. Makali represents the applicant while the Respondent is represented by Mr. Situma of Bulimo & Company Advocates.

The grounds relied on are that the Applicant had to obtain a death certificate of the deceased on advice of his advocates. Due to financial hardships he was not able to procure it until 28/07/2008. He was also not able to pay for the necessary legal expenses to facilitate the advocates to move the court. To obtain the limited grant also took time due to the congestion of the diary in the High Court.

The application is opposed through the Respondents replying affidavit. It is argued that the application is not well grounded since no sufficient reasons were given for the delay in substitution. The Respondent had to remind the Applicant about the neglected suit through his advocates in writing yet the Applicant took too long to act. After obtaining the grant, the Plaintiff took about four months to act.

I have carefully considered the arguments of the counsels herein and the pleadings of the parties in this application. The prevailing circumstances are that the suit of the 2nd Plaintiff is still surviving. That of the first Plaintiff

abated twelve months after his death. This application has not been brought without delay and I agree with the Respondent that the Applicant took too long to pursue his rights. He has explained that he had financial hardships and could not obtain the required documents to facilitate the substitution on time. His counsel submitted that his firm wrote to the family of the deceased informing them of the need to do substitution upon learning of the death. However, most of the things which were to be done to enable them to act were beyond the control of the advocates.

The cardinal principle is that no party should be denied of his rights of seeking justice where a reasonable explanation has been given. The Applicant herein has explained among other things that he was financially challenged which contributed to the delay. As far as the Respondent is concerned, no prejudice will be caused to him since the 2nd Plaintiff's suit is in existence and has not been heard.

The Applicant in his capacity as the son of the deceased has been appointed the legal representative of the deceased's estate. He has a right to apply for revival of his deceased father's abated suit and this court has powers to grant the relevant orders under Order XXIII rule 3, under this order, the court requires that the Applicant for revival of a suit, prove that he was prevented by sufficient cause from continuing with the suit before it abated.

I am satisfied that the Applicant has satisfied the court on the requirements of the law. I accordingly grant the orders sought for in this application.

Dated, Delivered and Signed at Bungoma

This 10th day of June 2009 in the presence of Mr Murunga for plaintiff and Mr. Makokha for Eboso for defendant.

F. MUCHEMI

JUDGE