**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Suit 579 of 1993**

**SAMUEL KAMAU KAGURA…………………..…...……………..PLAINTIFF**

**VERSUS**

**PEKAY HOLDINGS LIMITED…………………….....………….DEFENDANT**

**RULING**

The applicant in the chamber summons dated 7th December 2006, Esther Wangeci Kamau is the widow of the plaintiff Samuel Kamau Kagura who died on 17th December 1997. She has moved this court under Order 23 rule 8(2) seeking, inter alia, the following orders.

1. That this Honourable court be pleased to order the revival of the plaintiff's suit which abated following his demise on 17th December 1997

2. That the court be pleased to substitute the applicant in place of the late Samuel Kagura thereby allowing her to be made party to proceed with the suit.

The application is founded, mainly, on the grounds:

(i) That there has been, all along, an honest but mistaken belief that the suit exists.

(ii) That it has now dawned (sic) that the suit abated and Esther Wangeci Kamau is desirous of reviving the same and being substituted as a party to proceed with the same.

(iii) That the revival of the suit and the substitution of the applicant will cause no prejudice (to the respondent).

(iv) That the revival of the suit and the substitution will facilitate the expeditious disposal of the suit

The application is supported by the affidavit of the plaintiff's advocate Mr. Kahiga Waitindi who depones inter alia that:

(i) The applicant petitioned for a limited grant of letters of administration *ad colligenda bona* which was duly issued by the Honourable Lady Justice Aluoch, while sitting as vacation Judge at Nakuru, but the said grant was, however, not signed as the Honourable Judge left for Nairobi before appending her signature to the same.

(ii) That an application was made for the grant to be signed by another Judge, subsequent to which the same was signed by the Hon. Mr. Justice Musinga in June 2004.

(iii) That in the honest and mistaken belief that the suit existed, the parties herein made a number of attempts to fix the suit for hearing, despite the fact that the same had abated way back in 1998.

(iv) That it was not until counsel started preparing for the hearing of the suit that the issue of abatement became known.

(v) That the defendant/respondent had never raised the issue of abatement all along and that it was only after a court appearance on 21st November 2006 that counsel realised the suit had abated after perusing the court file.

(vi) That it would be in the interests of justice for the suit to be revived and the plaintiff substituted, particularly since the deceased plaintiff had already testified and closed his case, leaving only the production of a medical report pending.

The application is opposed on the strength of grounds of opposition field on 9th March 2007 to wit;

1. That the application is wrongly premised, incurably defective and ought to be struck out.

2. That the application is grounded on a defective affidavit sworn by incompetent person who has deposed to contentious matters thus rendering the affidavit and the entire application defective.

3. That the affidavit in support of the application contains matters that are not totally true and to that extent it ought to be struck out.

4. That the abatement of the suit is a matter that was all along known to the applicant, the same having been recorded in the form of a court ruling and delivered in the presence of the parties on 14th May 2002.

5. That the applicant cannot, on the basis of the limited grant be substituted for the deceased plaintiff.

At the hearing of the application the applicant was represented by Mr. Karanja while Mr. Nyamwange held brief for Mr. Musembi for the respondent. The submissions made by both counsel and the authorities cited in support of the application have been carefully considered.

Under Order 23 rule 8(2) the plaintiff or the person claiming to be the legal representative of a deceased's plaintiff may apply for an order for the revival of a suit which has abated and the court shall allow the application if it is proved that the applicant was prevented from continuing with the suit by any sufficient cause. This suit was filed way back in September 1993. A consent judgment on liability was entered on 20th September 1995 at 90%. The deceased then adduced his evidence on 11th November 1996 and closed his case. Counsel for the defendant then applied to call the doctor who had prepared a second report on the plaintiff's injuries and the suit was adjourned to 9th December 1996 for the hearing of the defence case. On the 9th December 1996 the matter was adjourned by consent for reasons that the plaintiff's advocate was bereaved. After a number of adjournments the suit was next set down for hearing on 24th February 1999. On that date Mr. Kiplenge appeared for the plaintiff and informed the court that the plaintiff had died on and that an application for a grant had been made with the view of continuing with the case. He applied to have the matter stood over generally in order to sort out the pleadings. The adjournment was allowed with consent of counsel for the defendant. The plaintiff's advocates appear not to have done anything towards having the suit continued, thereby causing the same to be listed pursuant to a notice to show cause why it should not be dismissed for want of prosecution.

Mr. Kahiga appeared for the plaintiff at the notice to show cause and informed the court that the plaintiff's wife *(the present applicant)* had petitioned for letters of administration in Nakuru High Court Succession Cause No. 260 of 1998. He intimated to the court that the applicant had met difficulties in

securing the signature of 'the magistrate' who issued the grant and requested for more time to enable the applicant apply to have the grant signed. In response Mr. Maraga, for the defendant, stated that he had never before heard that the plaintiff had died and that as far as he was concerned, the suit had abated. A ruling was then delivered by the Hon. Lady Justice Ondeyo in which the court specifically stated the following:

"*No application has been filed for the substitution of the dead plaintiff. There is no suit at the moment which can be dismissed for want of prosecution. It is about one year after the death of the plaintiff. It is marked as having abated.*"

Thereafter a notice of change of advocates was filed by Messrs Wambua Musembi & Company in place of Bowry Maraga & Co. Advocates for the defendants. However the firm of Mirugi Kariuki & Co. continued to act for the plaintiff. After intimating to the court (Apondi J) on 16th June 2004 that parties were negotiating amicable settlement and having the matter stood over generally, parties attended court on 28th February 2004 before the Hon. Mr. Justice Kimaru where Mr. Karanja (for the plaintiff) stated, yet again, that the plaintiff was deceased, requesting that the suit should be stood over generally for that reason. The next thing that happened was the filing of the present application on 14th December 2006. Before the same was heard the matter came up before the Hon. Lady Justice Koome on 19th January 2007 when the court directed that the same be mentioned on 26th February, 2007. On that date Mr. Mbiyu, holding brief for Mr. Karanja appeared for the plaintiff while Mr. Musembi appeared for the defendant. Mr Mbiyu intimated to the court yet again that the plaintiff had passed away and there was an application for substitution. The court ordered that the said application be heard on 9th March 2007. On that date Mr. Karanja appeared for the plaintiff and Mr. Musembi for the defendant. Surprisingly, the court was told that the matter '*was coming up for mention with a view of recording consent.'* Parties requested that the matter be stood over generally as no agreement had been arrived at. Thereafter the present application was fixed for hearing thrice without being heard but was finally heard before me on 11th March 2009.

I am of the view that the requirements of Order 23 rule 8(2) have not been fulfilled. Clearly from the above findings the depositions of Mr. Kahiga in paragraphs 8, 12 and 13 of the supporting affidavit do not represent the truth. The deponent is shown clearly in the court record to have been present when the suit was marked as having abated on the 14th May 2002 pursuant to a submission to that effect made by counsel for the respondent. That the applicant blames her present predicament on the difficulty in obtaining the requisite signature to the grant ad colligenda bona and at the same time claims to have been under a mistaken but honest belief that the suit subsisted demonstrates, quite clearly that the present application is an afterthought. In my thinking the application appears to be an attempt to go round the provisions of Order 23 rule 8(1) which bars the filing of a fresh suit based on the same cause of action as one that has abated. I am of the view that the suit, as filed, is not capable of continuation by the applicant with a view "*to recover(ing) damages arising out of the death of the deceased Samuel Kamau Kagura*" as is indicated in the limited grant of letters of administration, ad colligenda bona, annexed the supporting affidavit as annexture KWII."

For all the above reasons I disallow the application and the same is hereby dismissed with no order as to costs.

Dated, signed and delivered at Nakuru this 5th day of August 2009

**M. G. MUGO**

**JUDGE**