



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

Civil Case 4409 of 1991

1. Land and Environmental Law Division
2. Subject of main suit
 - i) Commercial Law
 - ii) Partnership/dissolved in 1991
 - iii) Issue pending – premises LR209/36119
 - iv) A/c's of business - who owns the same
3. Application 16 September 06 substitution of 4th plaintiff
 - a) 4th plaintiff Kinuthia Njoroge alia James Kinuthia dies 6 January 92
 - b) 14 years later application of 16 September 06 seeking to substitute the said 4th plaintiff.
4. Preliminary objection by respondent
 - a. The suit against/for the 4th plaintiff fails under order 23 r 2 (3) Civil Procedure Rules
 - b. Substitution to be done within 1 year
 - c. Matters taken 14 years
 - d. Application be dismissed as court has not jurisdiction
4. In reply
 - a) Justice be done nonetheless and allow application
6. Held: application incompetent and struck out. Preliminary objection upheld.
7. Case law – Nil

8. Advocates:-

M. Kimani for Ndumu Kimani & Co. Advocates for the 1,2,3 and 5th plaintiff

N. Mugo for Mbijiwe Mugo & Co. advocates for the 4th plaintiff

L.A. Machio for Judy Thongori & Co. Advocates for the defendant.

JOHN KARANJA WANJAU

JAMES WAWERU KANG'ETHE

DOUGHLAS MUCHOKI

KINUTHIA NJOROGE

GIKONYO KIHUMBA.....PLAINTIFF

VERSUS

MAINA GITHAIGA

JOHN NGETHE

DANIEL MWANGI MUHIA

MUREITHI URUGARI

KIRUGI GATHONGO

JOHN KINGARA

KAMAU NJORA

ALI HUESSIN.....DEFENDANTS

RULING

I: BACKGROUND OF APPLICATION DATED 16 September 06 AND FILED 18 September 06

1. The subject of the main suit is commercial Law. The original five plaintiffs and 8 defendants were partners in a joint business venture. This included business in hotel bar restaurant, butchery and plots.

2. The plaintiff 1 to 5 including one Kinuthia Njoroge the 4th plaintiff (herein but now deceased) filed suit before this High Court on 8 August 1991. Another suit related to this matter was filed in the subordinate court as No. CMCC 10634/99 and by consent of the parties was consolidated to this suit on 17 April 01 (an application to set aside these orders appear to be pending) (the application is dated 13 November 03)

3. It seems that the partnership was dissolved in 1991 (25 October 91). The only aspect remaining was the issue of LR209/36119 that involved premises where the 5th plaintiff Gikonyo Kihumba was then still in possession. Income was being still earned from this property.

4. From the file it transpired that the plaintiff No.1 John Karanja Wanjau passed away on 23 September 97 Plaintiff No.4 Kinuthua Njoroge passed away on 6th January 1992 and the 7th defendant Kamau Njoroge passed away on undisclosed dates. Parties wished to proceed with the suit regardless of this.

5. In this matter the application herein is concerning the plaintiff No.4 Kinuthua Njoroge now deceased.

II: Application dated 16th September 2006

6. The late Kinuthua Njoroge as stated earlier passed away on 6th January 1992. The new administrators to his estate allegedly claim to be administrators and prayed that the two, Stanley Njoroge and John Heho Kinuthua be substituted as legal representatives.

7. The advocate for the defendants raised a Preliminary Objection which is the subject of this Ruling.

III Preliminary Objection

8. The main grounds of the Preliminary Objection is that this suit has abated under order 23 r (1) and (2) Civil Procedure Rules the proposed the proposed administrators are not permitted to be substituted as the suit abated 14 years ago. Under order 23 r (1) (2) Civil Procedure Rules it reads.

“Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone or a sole surviving plaintiff dies and the cause of action service or continues, the court on an application made in that behalf shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.

2) Where within one year no application is made under sub rule (1) the suit shall abate so far as the deceased plaintiff is concerned, and or the application of the defendant, the court may award to him the costs which he may have incurred in defrauding the suit to be recovered from the estate of the deceased plaintiff”.

9) The respondents sought for the application to be struck out.

III Finding

10) This matter herein has indeed come to court after 14 years. The law provides that an application be made within 1 year. There is I recall an amendment that was made under LN5/1996 that where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action. Order XXIII r 8 (1) Civil Procedure Rule.

But under XXIII r 8(2) it provides:-

That a plaintiff or the persons claiming to be the legal representative. ... may apply for an order to revive a suit which has abated and if it is proved that he was prevented by any sufficient case from continuing the suit the court shall revive the suit . . . as to costs or otherwise as it thinks fit....:

11. The plaintiff have not applied for an order to revive the suit which has now abated, namely order XXIII r 8(2) Civil Procedure Rules has now been complied with. Further the aspect of 14 years no sufficient cause given why there was a delay is not apparent on the face of the application.

12. I uphold the preliminary objection and reject this application of

16 September 06 as having not complied with order XXIII r 3 (2) as read with order XXIII r 8 (2) Civil

Procedure Rules. This suit has abated as against the 4th plaintiff.

13. I award costs to the 1,2,3,5th plaintiff and 1 – 8th defendants.

Dated this 22nd day of May 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

M. Kimani for Ndumu Kimani & Co. Advocates for the 1,2,3 and 5th plaintiff

M. Mugo for Mbijiwe Mugo & Co. Advocates for the 4th plaintiff

L.A. Machio for Judy Thongori & Co. Advocates for the defendants.