



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

Civil Case 649 of 2001 (OS)

HARRISON CHARLES KIMERIAHPLAINTIFF

V E R S U S

HOUSING FINANCE CO. OF KENYA.....DEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in the years 2005 and 2006 and the long attendant recuperation. The delay is regretted.

The application under consideration in this ruling is the amended chamber summons dated 11th May, 2006. The original application is dated 27th January, 2006. The application is by one FAITH WANJIRU KIMERIA (herein called the Applicant). She seeks two orders. The first one is to revive the suit which has abated. The second one is for her substitution in place of the deceased Plaintiff.

The application is stated to be brought under sections 3A and 95 of the Civil Procedure Act, Cap. 21 (the Act); Order 23, rules 3 and 8 and Order 49, rules 3A and 5 of the Civil Procedure Rules (the Rules); and section 29 of the Law of Succession Act, Cap. 160. It is stated in the grounds on the face of the application that the Plaintiff died on 4th January, 2004; that the cause of action survived him; that the Applicant is the deceased Plaintiff's widow; that the deceased Plaintiff died intestate; that the Applicant has been mourning for the past one year and only managed to get the necessary grant of letters of administration intestate dated 3rd January, 2006 on 25th January, 2006; that the delay was caused by the court registry whose officials said there was a backlog of cases occasioned by the death of a family division judge, thus leaving only one judge on duty; that the said delay should not be visited upon the Applicant; and that it is fair and just that the orders sought be granted.

There is no affidavit supporting the amended application. However there is an affidavit sworn by the Applicant in support of the original application. To it are annexed the deceased Plaintiff's death certificate and a grant of letters of administration intestate dated 3rd January, 2006 in respect to his estate in favour of the Applicant.

The Defendant filed grounds of opposition dated 5th June, 2006 in response to his original application. Those grounds are, that the application is an abuse of the process of the court and that the Plaintiff's suit has abated. There are further grounds of opposition dated 12th May, 2006 filed in response to the amended application. They are:-

1. The Applicant has not demonstrated that she was prevented from making an application to substitute

her late husband with herself as the legal representative between 4th January, 2005 and 4th January, 2006.

2. The Applicant ought to have obtained a limited grant of letters of administration *ad litem* under a certificate of urgency, in order to continue this suit in the period 4th January 2005 to 4th January 2006, as provided under Order 23, rule 3(1) and (2) of the Civil Procedure Rules.

3. The applicant has not demonstrated that she was prevented by sufficient cause from continuing the suit as provided under Order 23, rule 8(2) of the Civil Procedure Rules.

4. The application is an abuse of the process of the court.

I have considered the submissions of the learned counsels appearing, including the cases cited. The Plaintiff herein died on 4th January, 2005. Without application for substitution of his legal representative in his place within one year from the date of death, the deceased Plaintiff's suit abated. See Order 23, rule 3 of the Rules. However, there is provision for revival of the suit. That provision is to be found in subrule (2) of rule 2 of the same Order. It provides:-

“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 a 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.”

In order for the Applicant to succeed in the prayer for revival of the suit, therefore, she must prove on a balance of probabilities that she was prevented by any sufficient cause from continuing the suit. She could not continue the suit without being substituted in place of the deceased Plaintiff. She was obliged under the law to seek that substitution within one year from the date of death of the Plaintiff. In practical terms, therefore, what the Applicant needs to do in respect to the prayer for revival of the suit is to prove that she was prevented by sufficient cause from seeking substitution of herself in place of the deceased Plaintiff within the one year following his death.

What evidence, if any, has the Applicant offered? It emerges from the supporting affidavit that the Plaintiff died after a long chronic diabetic illness. But the Applicant does not explain at all why she did not seek substitution within the time permitted by law. It may be inferred from the affidavit that she did not seek substitution because she did not have the necessary grant of representation to the Plaintiff's estate duly issued by a competent court of law. Such grant was made to her on 3rd January, 2006; but she did not collect the same until 25th January 2006. Two questions are begged here. One, why didn't the Applicant obtain the grant of representation earlier? Two, the grant having been made on 3rd January, 2006, why did she wait until 25th January, 2006 to collect it?

These questions are not answered at all by the supporting affidavit. Whereas there are explanations in the grounds set out in the amended application, there is no affidavit evidence to back up those explanations; as already pointed out, there is no affidavit sworn in support of the amended application. The explanation given in the grounds in the amended application is that she was mourning for one year after the Plaintiff's death and managed to collect the grant on 25th January, 2006. It is also stated in those grounds that she diligently filed her application for letters of administration intestate on 19th October, 2005 but that there was delay occasioned by the court registry following the death of a Family Division judge. As the Plaintiff died on 4th January, 2005, why did the Applicant wait until 19th October, 2005 to apply for a grant of representation? There is no explanation. Although there cannot be any doubt that she indeed mourned the death of her husband, she should have explained by affidavit how such mourning prevented her from taking the necessary action towards substitution of herself in place of her deceased husband. There is no affidavit sworn in support of the amended application, and the affidavit sworn in support of the original application is bare of any explanation.

It was incumbent upon the Applicant to prove that she was prevented by any sufficient cause from

seeking substitution within the time provided by law. She has not done that. I must therefore refuse the application for revival of the suit. Having done so, the application for substitution must also fail for the reason that without revival of the suit there is no suit in which substitution can be made.

In the event, the amended chamber summons dated 11th May, 2006 is refused. It is hereby dismissed with costs to the Defendant. Order accordingly.

DATED AT NAIROBI THIS 15TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 17th DAY OF AUGUST, 2007