



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

Civil Suit 27 of 2001

KIRAO KAMBI KANZALA.....PLAINTIFF

VERSUS

HAMID ABDALLA MBARAK.....RESPONDENT

R U L I N G

By an application by way of chamber summons dated 24th October 2005, and amended on the 18th day of May 2006, the applicant's seeks orders:-

1. *That this application be certified as urgent and services thereof be dispensed with in the first instance;*
2. *That an order for the first defendant's costs be made and to be recovered from the estate of the deceased plaintiff in respect of the plaintiff's suit which has so far abated;*
3. *That costs of this application be provided for;*

The application is based on the grounds:-

- (a) *That the plaintiff's suit stands abated, the plaintiff having died sometimes on the 25th October 2004;*
- (b) *That it is well over one year since the death occurred and since then no action has been taken by the legal representatives of the plaintiff, the first defendant is desirous that this matter be finalized as it is causing necessary anxiety and embarrassment;*
- (c) *That it is in the best interests of justice that this matter be finalized.*

The application is predicated upon the annexed affidavit of David K. Kirao and Nyevu K. Kambi sworn on the 19th day of July 2006.

For the applicant it was argued that they are the legal representatives of the deceased plaintiff who passed away on 25th October 2004. Subsequently they obtained letters of administration on 25th September 2005

exhibited as “DN” in the affidavit in support.

That a Mr.Odhiambo, an advocate then acting for the applicant, then prepared an application dated 5th October 2005 but was not filed immediately because there was a mistake in the case number which was erroneously indicated as **HCCC No. 27 of 2004** instead of **HCCC No. 27 of 2001**. Subsequently that application was made on 24th of October 2005 and amended by leave of the court on 18th May 2006.

By this application they seek the revival of the suit which has abated. They urged me to grant leave to the two legal representatives to be made parties to the suit.

The respondent filed grounds of opposition dated 7th February 2007 and relied on the same in opposing the application.

For the respondent it was argued that the application is incompetent and also misconceived. Equally, the applicants have concealed material facts to the court. They have come to court with unclean hands.

That the intended administrators actually obtained grant of letters of administration on 26th September, 2005. That limited grant was issued for a specific purposes filing of the suit. They cannot use the said limited grant to continue or revive a suit which has abated.

I have agonized over the legal issues raised herein. Order XXIII of the Civil Procedure Rules provide:

“3(1) 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 plaintiff or sole surviving plaintiff dies and the cause of action survives 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 subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff.”

True, a suit which has abated may be revived in terms of order XXIII rule 3 but a party seeking to do so must of necessity give cogent reasons.

The deceased passed away on 25th October 2004. Limited letters of administration were obtained on 26th September, 2005. The same was limited only to filing suit.

The plaint herein is dated 5th February 2001 and filed on 12th February 2001. The deceased passed away as I said earlier, on 25th October 2004. Letters of administration was obtained on 25th September 2005 limited to filing suit only by David K. Kirao and Nyevu Kambi. The two administrators now wish to use the same letters to continue a suit which was filed on the year 2001. The respondents contend that this goes against the grain. The respondent maintains that the said letters having been limited to filing suit only cannot be used to continue with a subsisting suit. The applicants should have obtained full grant. They had all the time in the world to do so.

In my judgment the limited letters of administration issued on 26th September 2005 were limited to filing suit only as opposed to continuing with an existing suit. If the applicant’s were interested in reviving the suit nothing would have been easier than to apply for and obtain a full grant considering that the deceased died on 25th October 2004 and this application was made on 24th October 2005 one day before the lapse of 12 months.

For the foregoing reason, I am of the view that this application is for rejection. Accordingly, I dismiss this application with costs to the respondents.

Dated and delivered at Malindi this 21st day of September 2007.

N.R.O.OMBIJA

JUDGE

Mr. Angima } for respondent.

Gekanana for Mr.Odhiambo } for applicant.