



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1045 of 2001**

**DAVID NJIHIA .....PLAINTIFF**

**V E R S U S**

**KENYA POWER & LIGHTING LIMITED .....DEFENDANT**

**R U L I N G**

The Applicant herein, TERESIA WANJIRU THIRU, is the legal representative of the deceased Plaintiff herein, DAVID NJIHIA, who died on 2<sup>nd</sup> January, 2003. She seeks in this application an order under Order 23, rule 8(2) of the Civil Procedure Rules (the Rules) for revival of the suit, which has abated. She also seeks an order under rule 3(1) of the same Order for substitution of herself in place of the deceased Plaintiff. The application is supported by her affidavit sworn on 10<sup>th</sup> May, 2007.

The Defendant has opposed the application as set out in the replying affidavit of one ALAN OWITI sworn and filed on 28<sup>th</sup> May, 2007 He is a legal officer of the Defendant. The grounds of objection to the application emerging from the replying affidavit are, *inter alia*, that the application is an abuse of the process of the court; that there has been inordinate delay in bringing this application; and that the Applicant has not acted with due diligence. There is a supplementary affidavit sworn by the Applicant on 27<sup>th</sup> and filed on 29<sup>th</sup> June, 2007 in response to the replying affidavit.

I have considered the submissions of the learned counsels appearing; no authorities were cited. I have also read the supporting and opposing affidavits. An applicant for revival of a suit which has abated must prove that he was prevented by any sufficient cause from continuing the suit. If he does so, the court must then revive the suit upon such terms as to cost or otherwise as it thinks fit. See Order 23, rule 8(2) aforesaid. The applicable standard of proof is, of course, a balance of probabilities.

Has the Applicant herein proved that she was prevented by sufficient cause from continuing the suit? She has deponed in the supporting affidavit that the Plaintiff died on 2<sup>nd</sup> January, 2003; and that she subsequently applied for a grant of representation to the deceased Plaintiff's estate, which was granted and later confirmed on 20<sup>th</sup> September 2005. The Applicant does not state when she applied for the grant. But she has stated that although the deceased Plaintiff had told her of this case, it was being handled by his advocates. She is an elderly lay woman and expected the deceased Plaintiff's advocates to continue with the case and regularly brief her of its progress. When she failed to get any updates from the deceased Plaintiff's advocates she instructed a new firm of advocates to take up conduct of the matter. The new advocates perused the court records and she then discovered that no action had been taken in the matter by the previous advocates since the year 2002. She was then advised of the need for an application for revival of the suit and substitution.

The Applicant, it is apparent, has shifted blame to the advocates then acting for the deceased Plaintiff. But after the death of the Plaintiff there is not much that the advocates could have done without being approached by the Applicant, or any other interested person. The Applicant, by her own word, was aware of the suit. There is no explanation given why, upon the death of the Plaintiff, and at any rate within twelve months of the death, she did not seek legal advice over the suit. Had she done so, she would have been advised of the need to apply for substitution within twelve months of the death. As it happened she appears to have waited a whole two years before she applied for a grant of representation. She waited

nearly another two years to apply for revival of the suit. Again there is no explanation at all why she waited that long from the time she obtained the grant of representation to make the present application.

Having considered all matters placed before the court, I am not satisfied that the Applicant has proved that she was prevented by any sufficient cause from continuing the suit. I must therefore refuse this application. It is hereby dismissed with costs to the Defendant. Orders accordingly.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF NOVEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 30<sup>th</sup> DAY OF NOVEMBER, 2007**