



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**Civil Case No. 56 of 2000**

**NGAMBI MUTHIRA MEME:.....PLAINTIFF**

**(suing as legal representative of the Estate of the (deceased) ESTHER WANGARI NGAMBI**

**VERSUS**

**PATRICK MUSUNGA**

**ELDORET PACKERS LTD:.....DEFENDANT**

**RULING**

The Applicant is the administrator to the Estate of Ngambi Muthira Meme, deceased who died on 11<sup>th</sup> November,2001. The grant of letters of administration to the said Estate was issued on 3<sup>rd</sup> February,2005. The applicant is the daughter of the deceased who was the plaintiff in this suit. The suit abated 12 months after his death.

The application made under the provisions of inter alia, Order 23, Rules 3(1), 8(2) and 12 of the Civil Procedure Rules seeks the following orders:-

1. This suit be revived.
2. This Honourable court be pleased to cause the Legal representative of the deceased plaintiff, one **GRACE WAITHERA CHEGE** to be made a party to this suit in order that she may proceed with the same to its conclusion in that capacity.
3. Costs of this application be in the cause.

The Applicant in her affidavit sworn on the 9<sup>th</sup> March,2005 states that after the plaintiff died on 11<sup>th</sup> November,2001, she was advised by the advocates on record in this matter to look for money to file a petition for the grant of letters of administration. She says that her family are extremely poor and it took more than one year for them to get the required money. When she got the money she was advised that this suit had abated. She went ahead to apply for the letters of administration on 24<sup>th</sup> February,2003. The letters of Administration were finally issued on 3<sup>rd</sup> February,2005. The Applicant explains in the affidavit the processes the application for letters of administration went through. She asserts that she has all along been anxious to have the suit revived but the situation was beyond her control. She had no power to institute the application for the revival of the suit.

The application was opposed by the Defendants who filed the Grounds of opposition in the following

terms:-

1. The Application is incompetent, oppressive, misconceived and an abuse of the court process of this Honourable court, which ought to be struck out or dismissed with costs.
2. The Application has with the consents of parties been overtaken by events.

Counsel for the Respondents, argued that substitution cannot be granted with revival of the suit as revival must be done first. He says that they did not need a full grant to enable them revive the suit and the costs for this is not more than Shs.2000/=.

I have considered the application and the submissions by counsel. Order XXIII Rule 8 provides as follows:-

**“ 8(1) where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**

**(2) 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.”**

It is my view that under the provisions of Order XXIII, Rule 8(1) that once a suit abates that is the end of the cause of action thereof. The cause of action cannot in law be sustained in any subsequent or fresh suit. However, under Rule 8(2), a legal representative of the deceased or a trustee or official receiver in case of bankrupt plaintiff may apply to the court for an order to revive the suit which has abated. The court is given the discretion to decide whether there is any sufficient cause which prevented the legal representative, trustee or official receiver from continuing the suit. If the court makes a finding that such a sufficient cause existed then it must revive the suit upon any terms it thinks fit.

In this application, the applicant deponed that her family is extremely poor and it took her over 12 months to raise the sum of Kshs.15,000/= which the advocates had asked her to raise for them to apply for Letters of Administration.

Is this sufficient cause which prevented the Applicant from continuing with the suit? Can economic or financial factors/reasons constitute a sufficient cause/s which may be considered as having prevented an applicant from continuing with a suit?

Upon consideration, I am convinced and I do think that if a party is prevented from continuing with a suit which subsequently abates, by economic or financial reasons then this could possibly constitute sufficient cause for purpose of Order XXIII. This court takes judicial notice that poverty is prevalent in Kenya and the majority of Kenyans have very low income – earning capacity. A sum of shs.15,000/= is a very substantial amount to the average Kenyan that cannot be said to be readily available when needed. This court is not surprised that the Applicant took over 12 months to raise the said amount.

Apart from the economic or financial constraints referred to the court must consider whether the Applicant acted promptly and diligently once he/she raised the required funds or monies to apply for the grant of letters of administration. It is quite true that the period that the applicant herein took to obtain the Letters of Administration was quite long i.e. two years. However, the applicant has explained why it took so long and what efforts she made a long the way. I accept the said explanations and hold that the delay was excusable and justified in the circumstances.

The Respondent has submitted that the Applicant ought to have applied for a Limited Grant of Letters of Administration for purposes of continuing the suit and that such a process would have been cheaper and quicker. Though the Respondent did not file any affidavit, I agree that that option was open to the

Applicant. However, the Applicant relied on legal advice given to her by her counsel and they were entitled to go for the full grant. I will not hold this against her the same way I will not hold against her for applying for letters of Administration to the Estate of her father the plaintiff, instead of applying to be substituted as the legal representative of the Estate of Esther Wangari Ngari the deceased who is the subject of the present suit.

Finally, I do not think I had the Respondent has suffered much of a prejudice due to the delay in the prosecution of this suit. This is a 2000 suit and is a claim arising out of a road accident. It was filed within the limitation period of 3 years. It is not unusual in Kenya for suits or proceedings to take up to 5 years if not more. The Respondent's have not shown any exceptional prejudice, they may have suffered due to the delay herein.

As a result I do hereby grant prayer 1 and order that this suit be revived.

Prayer 2 is for substitution of the deceased plaintiff by the Applicant to enable her continue with this suit. I do agree that such substitution cannot take place without revival of the suit. However I do not see anything wrong in law or preventing an applicant from seeking such an order within the same application for revival. Once the court allows revival in Prayer 1, it is entitled to entertain the prayer 2 for substitution. I see no practical sense in the argument that the application for revival and substitution must be made separately with the one for substitution coming only after the application for revival is granted.

This court has the jurisdiction and discretion in reviving a suit and after that granting other orders sought in the same application. This is practical, expeditious, and less expensive for the parties. I therefore do hereby grant prayer 2. Costs shall be in the cause.

Dated and Delivered at Eldoret on this 28<sup>th</sup> day of March,2006.

**MOHAMMED K. IBRAHIM**

**JUDGE.**