

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

Civil Suit 79 of 2001

EVANSON NGUTI KAMANDA:.....PLAINTIFF

VERSUS

PETER GICHARU NGIGE:.....DEFENDANT

RULING

The plaintiff, Evanson Ngute Kamanda died on 25th November,2001 and this suit abated one year later since there was no substitution of the plaintiff within one year. The applicant, who is one of the Administrators to the Estate of the deceased brought this application on 16th June,2005 for revival of the suit and substitution of the deceased plaintiff by the administrators of the Estate.

The Defendant opposed this application on the grounds that:-

1. That an earlier application dated 25th March,2004 for enlargement of time within which to substitute the plaintiff had been dismissed by the court.
2. The application is res judicata as the issue raised had been tried and determined.
3. There is delay in the making of the application.
4. The Defendant will suffer great prejudice if the suit is revived.

When dismissing the application for enlargement of the time within which the plaintiff was to be substituted, Justice Dulu held as follows:-

“ In my view, the effect of the lapse of one year from the time that the plaintiff died is that the suit abated as concerned the deceased plaintiff in terms of Order 23 Rule 3(2) Civil Procedure Rules.

Enlargement of time could apply only if the suit was in existence at the time of making application. This court has powers under Order 49 rule 5 to enlarge time to which a time limit for doing something has been provided for in the Civil Procedure Rules. However, in this particular situation the suit has already abated as concerns the deceased plaintiff by operation of law. Therefore this court cannot enlarge the time to have the applicants be enjoined in the suit nor can it order that they be substituted for the deceased plaintiff. The suit does not exist as far as the plaintiff that they want to be substituted is concerned. The proper procedure would be for the applicants to come to court seeking revival of the suit with regard to the plaintiff, and then apply to be substituted in the place of the place.”

From the foregoing, it is clear that the application which was dismissed was under Order 23 Rules 3(1) and (2) for enlargement of time and substitution of the plaintiff. It was not for revival of the suit as envisaged in order 23, Rules 8(2). The Judge for proper reasons dismissed the application. The application before me is for revival of the suit and also for substitution of the deceased plaintiff by the administrators of the Estate. This is the application that the judge had stated they should have brought.

Are the Applicants barred from making the application on the ground that the issue had been determined or ought to have been raised and therefore res judicate under the provisions of section 7 of the

Civil Procedure Act? I have carefully considered this points and submissions made on behalf of the Defendant. I am of the view that the issue of enlargement of time to substitute the plaintiff and revival of the suit are two different issues. The question of revival was never before the court. Should it have been raised? It could have been raised in the said application because the application was defective as it was not for revival. In any case, the suit was never revived and no issue or question was determined in the said suit. The court could not determine any issue within the suit as it had not been re-opened or revived. What was involved here was a procedural process and not a substantive one.

The application was dismissed on 20th April,2005 and the present application was filed on 16th June,2005. I do not think that there was any delay in the filing of the present suit. The dismissed application was filed well over a year since the abatement of the suit,14 months to be exact. This court notes that it took time for the Applicants to obtain Letters of Administration to the Estate of the deceased. This was issued on 5th May,2003. The Applicants did not immediately file the application and there was certainly some delay in doing so.

Be that as it may, the court has considered the application, the nature of the claim and all circumstances. I am of the view that there will be no prejudice to the Defendant if the suit herein is revived. The amount claimed is substantial and the Estate is entitled to pursue the claim. The issues in the suit are straight – forward. I also note that the Defendant is also an Estate of another deceased, the late Samuel Ngige Gituro and it is defending through its legal representative.

Exercising this court's discretion, I do hereby grant prayers 2 and 3 of the chamber summons dated 16th June,2005. The plaintiffs shall now be **FRANCIS KARISHO NGUTI** and **GITAU NGUTI**, as the Administrators to the Estate of Evanson Nguti Kamanda, deceased. The plaintiffs shall pay the costs of the application to the Defendant.

DELIVERED AND DATED AT ELDORET ON THIS 16TH day of May, 2006

M. K. IBRAHIM

JUDGE