



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 52 OF 1999 (OS)

MARK AKHONYA AMUNZE.....PLAINTIFF

VERSUS

GOPALBHAI KARSAN PATEL & 3 OTHERS.....RESPONDENTS

**ANDREW AMUNZE AYUKA (INTENDED PLAINTIFFS BY
SUBSTITUTION).....APPLICANT**

RULING

This is an application by way of Chamber Summons dated 12th July 2004. It was filed by Namada & Co. Advocates, on behalf of the applicant Andrew Amunze Ayuka. It is purported to be brought under Order XXIII rules 1, 8(2) and 12 and Order VIA rule 3 of the Civil Procedure Rules, as well as Section 3A of the Civil Procedure Act (Cap 21). It seeks for three orders that –

1. The court be pleased to allow and order that this suit be revived
2. Andrew Ayuka Amunze be consequently substituted as the plaintiff in this case in the place of Mark Akhonya Amunze (deceased)
3. Costs be in the cause.

The application has grounds on the face of the Chamber Summons, and is supported by the affidavit of Andrew Amunze, sworn on 12th July, 2004. The grounds of the application are that the plaintiff, Mark Akhonya Amunze who was the previous plaintiff in the case as administrator of the estate of the late Hebron Amunze Ayuka, died on 12th June, 2001. That, at the time of such death of Mark Akhonya Amunze, the case was already partly heard by Hon. Justice Nambuye. That the applicant, Andrew Amunze Ayuka, obtained Letters of Administration to the estate of Mark Akhonya Amunze on 9th May 2002. That an application for substitution of the Plaintiff, was lodged on 2nd August 2002, but could not be heard in time. When it was heard, the court found that the suit had already abated. That it was therefore in the interests of justice that the suit should be reinstated and heard to its completion, on merit.

The application is opposed. Grounds of opposition dated 3rd September 2004, were filed on 10/9/2004. At the hearing of the application, Mr. Mulanya appeared for the applicant, while Mr. Masiga appeared for the respondent.

Mr. Mulanya for the applicant submitted that the plaintiff (Mark Akhonya Amunze), who sued on behalf of the estate of his deceased father (Hebron Amunze) died in June, 2001. This was after the suit

was partly heard. The applicant (Andrew Amunze Ayuka) then obtained letters of administration to take over the suit from the deceased plaintiff. The applicant however delayed for more than one year before filing papers for substitution in the court case. When he filed an application to be substituted as plaintiff, he discovered that the suit had already abated.

He submitted that the suit related to the whole of the estate of the late Hebron Amunze. In his view therefore, the interests of justice required that the suit be revived. He sought to rely on the case of *Vyatu Ltd –vs- Public Trustee* [2003] KLR 688.

Mr. Masiga for the respondent opposed the application. He submitted that the application is misconceived and an abuse of the process of the court. He further submitted that Order XXIII rule 8 (2), only grants discretionary powers to the court. In order to succeed in such an application, an applicant should show sufficient reasons that prevented him from filing the substitution within the time stipulated by law. The allegation (in the supporting affidavit) that the file was missing, was not supported by evidence. This was the finding that had already been made by Hon. Justice Gacheche in a ruling delivered on 8th June 2004.

I have considered the application and submissions of both Counsel for the parties. I observe that, this application was filed after dismissal of an application for substitution dated 30th May 2002 by Hon. Justice Gacheche.

That application was dismissed on 8th June, 2004. The application for substitution of the deceased plaintiff by the applicant, was dismissed on the ground that the suit had already abated, as one year had lapsed between the time the plaintiff died and the time the application was made. The suit had already abated in terms of Order XXIII rule 3(1) and (2). Secondly, the advocate for the applicant Buluma & Company Advocates, who made that application, were not properly on record.

That is why the applicant came again to court and filed this application for revival of suit, as well as for substitution of Andrew Ayuka Amunze as plaintiff in place of the late Mark Akhoya Amunze.

Order XXIII rule 8(2) of the Civil Procedure Rules 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 with 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 does not appear to be in dispute that the applicant herein is a legal representative of the deceased plaintiff. He was issued with letters of administration on 9th May, 2002. That made him a personal representative, and entitled him to make this application. Counsel for the applicant has sought to rely on the case of *Vyatu Ltd –vs- Public Trustee Nyanza* [2003] KLR 688. In that case Githinji JA. held that a plaintiff or his legal representative has a right to apply for revival of an abated suit and the court has powers to revive an abated suit on terms as to costs as the court may think fit. The learned Justice of Appeal also held that the power to revive a suit does not extend to revival of appeals under the Court of Appeal Rules. That is the correct legal position.

Order XXIII rules 8(2) Civil Procedure Rules, requires an applicant for revival of a suit, to prove that he was prevented by sufficient cause from continuing with the suit before an abated suit can be revived by the court.

Though the applicant has deponed in the supporting affidavit that he was nominated by the family and obtained letters of administration on 9th May 2002, he does not give the reasons for the delay in making the application for substitution thereafter. The plaintiff, Mark Akhoya Amunze, died on 12/6/2001. This means that the suit abated on 11/6/2002. The applicant filed this application for revival of the suit on 14th

July, 2004. The major reason which he appears to rely on as the cause preventing him or delaying him from proceeding with the suit is paragraph 8 of the supporting affidavit, in which he deposes –

“8. I am advised by my advocates that they then applied to substitute my name as plaintiff but the court file went missing for a very long time until during the year 2003 when it was discovered to be amongst files kept in a jammed safe at the High Court and it took the opening of the said safe for the files to be retrieved, thus being among them.”

The applicant does not disclose who his advocates were. There is also no affidavit from his purported advocates to support his assertion that the file indeed went missing. More importantly, the issue of the alleged missing file was dealt with extensively in the ruling of Hon. Justice Gacheche delivered on 8th June, 2004. In that ruling the learned Judge had this to say on the alleged lost file –

“In any event, the file was available for taking dates for the suit on 31/10/2001. It was placed before the Honourable Judge on 26/11/2001, and 2/12/2001 when none of the parties was present. It was also available on 12/5/2003 when the application of 30/5/2002 was set down for hearing on 30/7/2003, and again on 9/9/2003 when the same application was set down for hearing on 27/11/2003. Therefore in the absence of concrete evidence by way of affidavit by a court official, that the file, which I note is not a strong room file, I can only but assume, that the applicant’s contention does not hold any water and it cannot therefore lie”.

Even in this current application for revival of the suit, the applicant has not bothered to obtain and file any affidavit from a court official on the alleged loss of the file. Order XXIII rule 8(2) requires the applicant to prove that he was prevented by sufficient cause from continuing with the suit.. He has not done so. A mere allegation that a file was lost or misplaced is not the proof that is required by law.

I am afraid, I find that the applicant has not discharged his burden of proving to court, on the balance of probabilities, that there was sufficient cause that prevented him from continuing with the suit, to justify its revival. He appears to be relying on sympathy that the suit relates to the lifetime investment of Hebron Amunze which affects all the dependants. That might be true, but it is not the legal justification envisaged in the law under Order XXIII rule 8(2) for reviving a suit. I decline to order the revival of the suit.

The second prayer for substituting Andrew Ayuka Amunze has also to fail in view of my decision on the first prayer for revival of the suit. As the suit has abated and has not been revived, Andrew Ayuka Amunze cannot be substituted as a plaintiff in a non-existed suit.

For the above reasons, I dismiss the application with costs to the respondents.

Dated and delivered this 10th day of May, 2006.

George Dulu,

Ag. Judge

Jeanne Gacheche

Judge