

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 370 of 1994

ROSEMARY BUNNY.....PLAINTIFF

VERSUS

GICHURU KAMOTHO.....DEFENDANT

RULING

The applicant filed an application by way of a chamber summons brought under **Order XXIII rule 3(1)** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act**. She urged the court to join her to this proceedings as a plaintiff in place of Rosemary Bunny (now deceased) and to order that the plaint be amended accordingly to reflect the substitution.

The application was made on the grounds that Rosemary Bunny, who was the plaintiff herein, passed away on 10th September 1999 and the cause of action herein survived her death. Pursuant to an order made on 17th June 2005, the suit herein was revived. The applicant, Diana Rosemary Bunny together with Paul Patrick Southcomb Bunny and Richard Drury Bunny are the legal representatives of the estate of their deceased mother.

In her affidavit in support of the said application, the applicant stated that the suit herein was of immense value to the deceased's estate since it related to recovery of possession in respect of one of the estate's prime properties and that she was desirous of proceeding with the same to its conclusive end for the benefit of the estate.

In arguing the application, Mr. Karanja for the applicant submitted that the court, having granted an application for revival of the suit, the same having abated, the time within which this application could be made had been extended by presumption of law. He urged the court to grant the orders sought and cited several authorities in support thereof. In his view, if the present application was not allowed, the order for revival of the suit would have been made in vain.

The respondent opposed the application and filed several grounds of opposition. He stated *inter alia*, that the application was misconceived, incompetent and bad in law. He further stated that the applicant was guilty of laches and that the applicant lacked capacity to move the court as she was not the legal representative of the deceased. Mr. Kagucia for the respondent submitted that the applicant was just one of the three legal representatives of the estate of Rosemary Bunny and could not therefore make the application for substitution alone. She could only do so together with the other two executors.

I have considered the submissions that were made by both counsel as well as the authorities that were cited by Mr. Karanja for the applicant. It is not in dispute that on 17th June 2005, Kimaru J granted orders for revival of this suit and ordered the applicant to pay costs of Kshs.15,000/-. The applicant paid the said costs and filed the present application twelve days thereafter. That being the case, the applicant cannot be guilty of laches in bringing this application. The issue of delay was sufficiently dealt with in the earlier application that sought revival of the suit after it had abated. I believe the respondent did not appeal against the ruling by Kimaru J aforesaid. In the circumstances, I do not see how this application can be

said to be *res judicata* and an abuse of the process of the court.

Order XXIII rule 3(1) of the **Civil Procedure Rules** states as follows:-

“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.”

In this particular case the sole plaintiff, Rosemary Bunny having died and the cause of action having survived and the suit having been revived by an order of this court, one of the legal representatives of the deceased, Diana Rosemary Bunny has now applied to be made a party, that is, the plaintiff, and proceed with the suit. Can she lawfully do so alone without bringing the application jointly with the other legal representatives? According to Mr. Kagucia, she had no capacity to do so but according to Mr. Karanja, the applicant has authority of the other legal representatives. Mr. Karanja submitted that the act of one legal representative was binding upon all the other legal representatives. In any event, he added, that issue was not raised during the hearing of the application for revival of the suit which was made by the applicant alone.

I would agree with Mr. Karanja that there is nothing to bar the applicant from bringing the present application alone as long as it has not been shown that the other legal representatives are opposed to the move taken by the applicant. The applicant, as one of the legal representatives of the estate of Rosemary Bunny, can competently file an application seeking to substitute her deceased mother. Although she did not expressly state that she had obtained consent of the other executors, she however, disclosed their existence right from the time when she filed an application for revival of the suit. I am therefore satisfied that the orders sought by the applicant are merited and I grant the same. The applicant will bear the costs of the application.

DATED, SIGNED and DELIVERED at Nakuru this 25th day of October, 2006.

D. MUSINGA

JUDGE

Ruling delivered in open court in the presence of Mr. Kagucia for the respondent and Mr. Kahiga for the applicant.

D. MUSINGA

JUDGE