REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT 370 OF 1994

ROSEMARY BUNNY..PLAINTIFF

VERSUS

GICHURU KAMOTHO.....................................DEFENDANT

AND

DIANA ROSEMARY BUNNY...........................APPLICANT

RULING

The applicant Diana Rosemary Bunny, has made an application under the provisions of **Order XXXII Rule 8(2) of the Civil Procedure Rules** (actually Order XXIII Rule 8(2)**) and Section 3A of the Civil Procedure** Act seeking the orders of this court to revive the suit which had been filed by Rosemary Bunny – deceased and which suit had abated. The application is based on the grounds stated on the face of the application and supported by the annexed affidavit of Diana Rosemary Bunny. The application is opposed. The respondent, Gichuru Kamotho, filed grounds in opposition to the application. The grounds in support of the application are that the applicant, being the administratrix of the estate of Rosemary Bunny came to learn about the suit which had been filed by the deceased when she was informed by the advocates, who were then on record for the deceased. The applicant states that when she became aware of the suit, she instructed counsel to make an appropriate application in court so that she could be enjoined in the suit.

According to the applicant, the said advocate did not follow her instructions. When she became aware that no action had been taken, she instructed another advocate, who unfortunately filed an application in abuse of the established procedure. The application, which had been made, related to substitution of the plaintiff instead of the revival of the suit which had abated. The said application was struck out. The applicant craves for the discretion of this court to have the suit revived as the suit related to land, which the administrators of the deceased were interested in safeguarding for the benefit of the deceased's estate and her beneficiaries. The applicant stated that justice demanded that her case be ventilated on merits and not on mere technicalities. She prayed the court to allow her application to revive the suit so that the issues in dispute could be ventilated on merits.

On his part, the respondent opposed the application. In his grounds of opposition he stated that the applicant had been guilty of indolence in that she had not filed the application before the suit was abated nearly five years ago. The respondent further stated that the applicant had brought the application under the wrong provisions of the law and had further brought the application when she clearly lacked capacity to make the application on behalf of the estate of the deceased. The respondent further contended that the

application filed herein was res judicata, the same having been decided by this court when the applicant made such an unsuccessful application in the past. The respondent further stated that the applicant had not shown any sufficient reason to enable this court exercise its discretion in her favour and revive this suit.

At the hearing of the application, Mr Kahiga, Learned Counsel for the applicant and Mr Kagucia, Learned Counsel for the respondents made submissions urging their respective client's point of view. I have considered the submissions made. I have also carefully read the pleadings filed by the parties in respect of this application. **Order XXIII Rule 8(2) of the Civil Procedure** rules provides that:

> ***"The plaintiff or the person claiming to be the legal***
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> ***representative of a deceased plaintiff or the trustee or***
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> ***official receiver in the case of a bankrupt plaintiff may***
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> ***apply for an order to revive a suit which has abated or to***
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> ***set aside an order of dismissal; and, if it is proved that he***
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> ***was prevented by any sufficient cause from continuing the***
>
> ***suit, the court shall revive the suit or set aside such dismissal***
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> ***upon such terms as to costs or otherwise as it thinks fit."***

To succeed in her application, the applicant had to establish that she had a sufficient cause that prevented her from continuing with the prosecution of suit before it was abated. The issue for determination by this court is whether the applicant has established such sufficient cause to enable this court revive the suit which had abated.

It is the applicant's case that she did not get information for the counsel who was then representing the deceased in time to enable her make the necessary application to revive the suit. She further deponed that she gave instruction to another advocate to appear on her behalf but unfortunately the said advocate made the wrong application, which application was dismissed by the court. The applicant did not give up. She instructed another advocate who made the current application before this court. The applicant depones that she is interested in pursuing the case against the respondent to its logical conclusion on merits. She further deponed that the title of the suit land was still registered in the name of the deceased and thus the estate of the deceased would benefit if the suit succeeds.

The respondent does not want the suit to be revived. In the first instance, the respondent has pointed out that the application was filed under the wrong provision of the **Civil Procedure Rules.** The respondent further urged this court to find that the applicant had been indolent in that she had brought the current application five and a half years after the suit had abate. Further, the respondent submitted that the application was *res judicata* in that this court had previously heard and determined the application of a similar nature. The court dismissed the applicant's application. The respondent submitted that for the applicant to bring this application again is res judicata. The applicant further submitted that as a joint administrator the applicant ought to have enjoined all her co-administrators to this application. The respondent submitted that no sufficient reasons had been advanced to enable this court exercise its discretion in favour of the applicant.

Having considered the arguments made, it is not disputed that the suit herein relates to ownership of land. The deceased, Rose Mary Bunny, filed suit seeking declaratory orders of this court that the respondent did not have any right over the suit land known as **LR. No. 1144/I/IX**. She further sought the orders of the court to have the respondent evicted from the suit land. In her plaint she valued the land plus the developments thereon to be Kshs 3,800,000/= as at 1994. The said value must have appreciated by this date. Unfortunately the deceased died before the suit was determined on merits. Due to chain of events

that the applicant encountered in her quest to revive the suit, she was not pointed to the right direction until the current application.

The objections raised by the respondent that the applicant had been guilty of delaying in seeking to be enjoined to this suit after the death of the plaintiff is not without merit. However putting into consideration all the circumstances of this case and particularly the persistence of the applicant, it would only be just and fair to allow the applicant a shot at the seat of justice. Although the applicant quoted the wrong section of the Civil Procedure rules (i.e. *Order XXXII instead of Order XXIII of the Civil Procedure rules)* in my humble opinion, the said mistake was a typographical error which cannot be visited upon the applicant and result in the application being dismissed.

Having also perused the record of this court, I do hold that this application is not res judicata. The previous applications filed by the applicant (*including the one which was withdrawn*) were not properly before this court. They did not relate to the application currently before this court which relates to the revival of the suit which had abated. As stated earlier in this ruling, the applicant's persistence in seeking to be enjoined to this suit clearly shows that she is interested and determined to have the suit herein heard and adjudicated upon on merits. Despite of the misadventure of obtaining improper legal advice, the applicant did not give up until this moment that she has properly brought herself within the purview of the rules of the Civil Procedure.

As was held by the Court of Appeal in **Trust Bank Limited –versus- Amalo Company Ltd C.A. Civil Appeal No. 215 of 2000 (Kisumu) (unreported)** at page 4

> ***"The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by George C.J. (Tanzania in the case of Essanji & Anor –vs- Solanki [1968] E.A. at page 224).***
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> *"The administration of justice should normally require that the substance of all the disputes should be investigated and decided on merits and that errors should not necessarily deter a litigant from the pursuits of his right."*
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> ***That accords with the policy of the law as can be gleaned from Order 9(1) of the Civil Procedure Rules whereby a litigant has the right to appear file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so."***

The applicant has established sufficient reasons to enable this court exercise its discretion in her favour. Although it might be said that as a person European descent the applicant may not be beholden to land as emotionally or sentimently the way a Kenyan African would, in the circumstances of this case, it is only proper that the estate of the deceased is allowed to ventilate its case to its natural conclusion on merit. The fact that the applicant made the application on her own without enjoining her coadministrators does not render this application incompetent.

For the reasons stated hereinabove, the application filed by the applicant on the 5th of October 2004 is hereby allowed. The suit herein which had abated is hereby ordered revived. The applicant will make an appropriate application to be enjoined as a party to this suit.

As regard the respondent, he shall be adequately compensated by an award of costs. The respondent has been taken on a merry go around by the applicant in her dogged pursuit to have this suit revived. I will assess the costs to be paid to the respondent in respect of the applications filed here to be Kshs 15,000/=. The said amount shall be paid by the application within fifteen (15) days of today's date. In default thereof the orders issued in favour the applicant herein shall automatically lapse and her application shall stand dismissed. It is so ordered.

DATED at NAKURU this 17th day of June 2005.

L. KIMARU

JUDGE