



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 544 OF 2016**

**DAVID WANGONYA KURIA.....PLAINTIFF**

**VERSUS**

**MOLYN CREDIT LIMITED.....1<sup>ST</sup> DEFENDANT**

**ERIC TIMOTHY BALONGO.....2<sup>ND</sup> DEFENDANT**

**REGENT AUCTIONEERS.....3<sup>RD</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before me is a Notice of Motion application dated 18<sup>th</sup> August, 2020 seeking an order that the deceased plaintiff, David Wangonya be substituted with Janeth Stephen Mwari (“the applicant”). The application was brought on the ground that the plaintiff died on 1<sup>st</sup> September, 2019 before the suit herein was heard and that the applicant was the legal wife of the deceased and as such the right person to pursue the claim herein on behalf of the deceased. The application was supported by the affidavit of the applicant sworn on 11<sup>th</sup> August, 2020 to which she annexed a copy of the deceased plaintiff’s death certificate and a limited grant ad-litem that was issued to her at the Chief Magistrates Court at Gatundu on 10<sup>th</sup> August, 2020.

The application was opposed by the defendants. The 1<sup>st</sup> defendant filed a replying affidavit sworn by Moses Anyangu on 28<sup>th</sup> October, 2020 in opposition to the application. The 1<sup>st</sup> defendant averred that since the deceased plaintiff had not been substituted as at 1<sup>st</sup> September, 2020, the suit abated. The 1<sup>st</sup> defendant averred that following the abatement of the suit, there was no suit in existence on which the orders sought could be granted. The 1<sup>st</sup> defendant averred that although the application for substitution was filed before the suit abated, the same was not prosecuted until after the abatement of the suit. The 1<sup>st</sup> defendant averred that although the court has jurisdiction to extend time within which substitution is to be done, the applicant was guilty of undue and unexplained delay which delay was prejudicial to the 1<sup>st</sup> defendant and as such she was undeserving of the extension of time. The 1<sup>st</sup> defendant averred that the applicant’s application was bad in law and amounted to an abuse of the process of the court.

The 2<sup>nd</sup> defendant opposed the application through grounds of opposition dated 28<sup>th</sup> October, 2020. The 2<sup>nd</sup> defendant contended that the applicant’s application had been overtaken by events following the abatement of the suit on 1<sup>st</sup> September, 2020. The 2<sup>nd</sup> defendant averred that the application was bad in law, a non-starter and an abuse of the process of the court.

The application was heard on 20<sup>th</sup> January, 2021 when Ms. Wambui appeared for the applicant, Ms. Kingayi appeared for the 1<sup>st</sup> defendant and Mr. Wamiti appeared for the 2<sup>nd</sup> defendant. The 4<sup>th</sup> defendant was represented by Mr. B. Njagi. In her submission in support of the application, Ms. Wambui relied entirely on the affidavit in support of the application and urged the court to allow the same. In her submissions in opposition to the application, Ms. Kingayi relied on the affidavit of Moses Anyangu sworn on 28<sup>th</sup> October, 2020. Ms. Kingayi argued that the applicant’s application was not prosecuted until after the suit had abated and as such the order sought could not be granted. Mr. Wamiti for the 2<sup>nd</sup> defendant reiterated the submissions by Ms. Kangayi and cited Rebecca Mijide Mungole & Another v Kenya Power & Lighting Ltd. & 2 other [2017] eKLR in support of the said submissions. On his part Mr. B. Njagi adopted the submissions by Ms. Kangayi and Mr. Wamiti.

In a rejoinder, Ms. Wambui submitted that the defendants’ objection to the application had no basis because what was required by the Civil Procedure Rules was for the application for substitution to be filed within one year which requirement had been met by the applicant.

I have considered the applicant's application together with the affidavit filed in support thereof. I have also considered the replying affidavit and grounds of opposition that were filed by the defendants in opposition to the application. Finally, I have considered the submissions that were made before me by the advocates for the parties. It is not disputed that the cause of action herein survived the deceased plaintiff. What is in dispute is whether the application for substitution was filed and prosecuted within time. I am in agreement with the applicant that she complied with the requirements of Order 24 of the Civil Procedure Rules as concerns the substitution of a deceased plaintiff. The plaintiff died on 1<sup>st</sup> September, 2019. The applicant applied for and was issued with a limited grant of representation on 10<sup>th</sup> August, 2020. On 19<sup>th</sup> August, 2020, the applicant filed the present application. It is not disputed that the application before the court was filed before the lapse of one year from the date of death of the deceased. That means that as at the time the application was filed, the suit had not abated. My understanding of Order 24 rule 3(2) of the Civil Procedure Rules is that, once an application for substitution has been filed timeously, the suit does not abate. The defendants' argument that a suit will abate if an application for substitution filed within time is not heard within one year of the death of a plaintiff has no basis in law. The Court of Appeal case of Rebecca Mijide Mungole & Another v Kenya Power & Lighting Ltd. & 2 other(supra) that was cited by the defendants does not support that argument. What was in issue in that case was whether an application for revival of a suit and substitution of a deceased plaintiff could be made after the expiry of one year before the time for such application is extended pursuant to the proviso to Order 24 Rule 3(2) of the Civil Procedure Rules. The Court of Appeal answered that question in the negative. That is not the case in the matter before me. In this case, the application for substitution was filed within one year of the death of the plaintiff. It was not necessary therefore to seek extension of time before filing the application since the suit had not abated.

For the foregoing reasons, I find no merit in the arguments put forward in opposition to the applicant's Notice of Motion application dated 11<sup>th</sup> August, 2020. The application is allowed as prayed. The plaintiff shall amend the plaint within 14 days from the date hereof to effect the substitution.

**Dated and Delivered at Nairobi this 28<sup>th</sup> day of January 2021**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Ms. Wangari h/b for Ms. Wambui for the Plaintiff

Ms. Kingayi h/b for Mr. Githinji for the 1<sup>st</sup> and 3<sup>rd</sup> Defendants

Mr. Wamiti for the 2<sup>nd</sup> Defendant

Ms. Fatma for the 4<sup>th</sup> Defendant

Ms. C.Nyokabi-Court Assistant