



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE NO. 262 OF 1999

JANET WANGARI MWANGI.....PLAINTIFF

VERSUS

JAMES MUCHOKI KARIUKI.....1ST DEFENDANT

BIDCO OIL REFINERIES LTD.....2ND DEFENDANT

RULING

The Plaintiff, Janet Wangari Mwangi, by a notice of motion dated the 2nd of May 2002 made an application under the provisions of **Order XLIX Rule 5 and Order XXIII Rule 4(1) and (3) of the Civil Procedure Rules** for orders that the time limited for applying to substitute the legal representatives of the deceased 1st Defendant be enlarged. The Plaintiff has further prayed that she be granted leave to substitute the 1st Defendant deceased with Pauline Wanjiku Muchoki, the administratrix of the estate of the said deceased Defendant. The grounds in support of the application is that since the 1st Defendant died on the 28th of August 1999, the Plaintiff was not able to establish who the administrator of the estate was until the time the application was filed. The Application is supported by the annexed affidavit of Simon Kamere, the Advocates for the Plaintiff.

The Application is opposed. The firm of Jones & Jones Advocates who are on record as acting for the 1st and 2nd Defendants have filed grounds of opposition to the Application. In the said grounds of opposition, the Defendants have stated that there is no suit pending against the 1st Defendant, the same having abated after the expiry of one year, the period that the Plaintiff was required to have made an application for substitution as provided by the rules. The Defendants further stated that the suit against the 1st Defendant having abated, there was no provision in law for an application to be made for the revival of an abate suit. It was their prayer that the application be dismissed.

In his submission before Court, Mr Kamere learned Counsel for the Plaintiff reiterated more or less the contents of the application and the affidavit in support thereof. He argued that the Plaintiff was not able to make an application before the expiry of the one year period provided as the Defendants refused to disclose the name of the administrator of the estate of the 1st Defendant to the Plaintiff. Mr Kamere urged this Court to allow the application in the interest of justice to enable the Plaintiff pursue the suit against the Defendants. Mr Ntabo, learned Counsel for the Defendants opposed the application. He relied on the statement of grounds of opposition. Further to that, he submitted that the application was incompetent because the affidavit in support of the application had its jurat appearing in a different page from the body of the application. He urged this Court to dismiss the Application.

I have considered the submissions made by counsel for the Plaintiff and counsel for the Defendants. I have read the application and the statement of grounds of opposition filed by the opposing parties in this application. From the outset I would state that the firm of Jones & Jones Advocates seems to have

confused their instructions. When the 1st Defendant died on the 28th of August 1999, the said firm of Advocates ceased to have instructions to either act on his behalf or on behalf of his estate. The said firm of Advocates could not therefore purport to act on behalf of the 1st Defendant who is now deceased. I would have disregarded their statement of grounds of opposition and the submissions made before me were it not for the fact that the said firm are also on record as acting for the 2nd Defendant.

Be it as it may, the issue for determination by this Court is whether this Court can extend time for the substitution of a deceased party once the period one year when the said substitution is required to have been made has expired.

Order XXIII Rule 4 provides that;

(1) where one or two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2)

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

The Plaintiff has submitted that under the provisions of **Order XLIX Rule 5 of the Civil Procedure Rules** this Court has discretion to extend time where a suit as already abated, in effect, reviving the said suit against the estate of a deceased person. The 2nd Defendant however is of the contrary view. The 2nd Defendant has submitted that once a suit has abated (no application for substitution having not been made within one year after the death of a deceased defendant), it cannot be revived. It has been stated that the 1st Defendant died on the 28th of August 1999. The Plaintiff did not make an application for substitution until the 2nd of May 2002, two years and nine months after the death of the deceased defendant. The suit against the 1st Defendant therefore abated in accordance with the provisions of **Order XXIII Rule 4(3) of the Civil Procedure Rules** when no application for substitution was made within one year after the death of the deceased defendant.

Can this Court grant the order sought by the Plaintiff to extend time by which the substitution of the deceased Defendant by the administrator of his estate can be made? Precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. See **H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321, Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrison & Crosfield Ltd –versus- Kassam [1982] K.L.R. 458. In Soni –versus- Mohan Dairy [1958] E. A. 58** it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period.

If I was to apply the reasoning of the Court in the above case, the Plaintiff in this case has to show sufficient cause why she did not apply for the substitution of the deceased 1st Defendant within the period of one year provided by the law. In the instant case the Plaintiff has stated that she was unable to establish the identity of the administrator of the deceased defendant’s estate within the period of one year. In **Phillips, Harrison & Crosfield Ltd –versus- Kassam [1982] E.A. 458** Hancox J (as he was then) stated that where there is undue delay an application for extension of time to revive an abated suit may be refused.

Having considered the applicable law and the reasons advanced by the Plaintiff in this case, I do find that the Plaintiff has not shown sufficient cause why she was unable to make an application for the substitution of the deceased 1st Defendant within the period of one year as established by statute. The Plaintiff did not exercise due diligence to establish the identity of the administrator of the estate of the

deceased 1st Defendant. Further the period of two years and nine months that the Plaintiff took before she applied for the substitution of the deceased 1st Defendant is inordinate. No reasonable explanation was given for the delay. In the circumstances therefore, I do find that the Plaintiff has not shown sufficient cause why the abated suit against the deceased 1st Defendant should be revived. The Application for enlargement of time is consequently dismissed with costs to the 2nd Defendant.

DATED at NAKURU this 23rd day of September, 2004.

L. KIMARU

AG. JUDGE