



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MALINDI

ELC CASE NO. 57 OF 2017

1. BAYA YAA BAYA

2. RICHARD MARK BINNS

3. FELICITY ANN BINNS.....PLAINTIFF

VERSUS

1. SIMEON KAZUNGU BAYA

2. ENGLISH VOICE REAL ESTATE LIMITED.....DEFENDANTS

RULING

1. By this Chamber Summons application dated and filed herein on 14th March 2020, Baya Yaa Baya, Richard Mark Binns and Felicity Ann Binns (the Plaintiffs/Applicants) pray for orders as follows: -

1. That this Honourable Court be pleased to extend/enlarge time within which to file this application.

2. That this Honourable Court do grant leave to revive this suit.

3. That this Honourable Court do grant leave to Baraka Ngoka Kazungu the Legal Representative of the Estate of Baya Yaa Baya to be joined and allowed to continue this suit as the 1st Plaintiff in place of the deceased.

4. That the costs of this application be in the cause.

2. The application which is supported by an Affidavit sworn by the said Baraka Ngoka Kazungu as the Administrator of the estate of the 1st Plaintiff is grounded on the following: -

1. That the time within which to file the application has lapsed;

2. That the 1st Plaintiff passed away on 26th May 2018 and the suit abated on 26th May 2019;

3. That the said Baraka Ngoka Kazungu was only granted Letters of Administration and Litem on 11th April 2019;

4. That the Applicant could not file this application or substitute the 1st Plaintiff on time as the file was pending for a Ruling which was delivered on 28th February 2020; and

5. That it is only fair and just to grant the orders prayed for herein.

3. The application is opposed by the 2nd Defendant-English Voice Real Estate Ltd. In their Grounds of Opposition dated 28th April 2020 and filed herein on 30th April 2020, the 2nd Defendant opposes the application on grounds that: -

1. The application and the affidavit in support thereof are fraught with averments that are untrue and inconsistent with the matters in Malindi Succession Cause No. 112 of 2014: In the matter of the Estate of Baya Yaa Baya (Deceased);

2. The proceedings instituted by the 1st Plaintiff against the 2nd Defendant which is the basis of the application are an outright fraudulent misrepresentation of material facts considering the proceedings filed in Malindi Succession Cause No. 112 of 2014: In the Matter of Baya Yaa Baya (Deceased) and ought to be struck out;

3. Without prejudice to the above, the 1st Plaintiff's estate has failed to provide sufficient cause to justify the negligence or indifference in pursuing the alleged 1st Plaintiff's rights and remedies; and

4. The 2nd Defendant stands to suffer immense prejudice if the proceedings by the 1st Plaintiff filed against the 2nd Defendant are not dismissed and struck out.

4. I have considered the Plaintiffs' application and the response thereto by the 2nd Defendant. While the 2nd Defendant put a lot of emphasis on proceedings filed in **Malindi Succession Cause No. 112 of 2014: In the Matter of the Estate of Baya Yaa Baya (Deceased)**, no such proceedings were availed to this Court to enable it see how the averments made herein are untrue or inconsistent therewith.

5. The application before me is for the substitution of a deceased Plaintiff by a personal representative. In that respect, Rule 3 of Order 24 of the Civil Procedure Rules provides as follows: -

“3(1) 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.

(2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased Plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.

Provided the Court may, for good reason on application, extend the time.”

6. I understand that provision to be saying that upon death of a Plaintiff and on an application by the legal representative, the Court has the discretion to substitute the deceased Plaintiff and further, that even where the suit has abated, the Court is still vested with jurisdiction to extend the time.

7. In the instant matter, it is not contested that the 1st Plaintiff passed away on 26th May 2018. The Applicants have not only annexed a copy of the Death Certificate to that effect but also a copy of a Limited Grant of Letters of Administration Ad-Litem issued to the deponent of the Supporting Affidavit Baraka Ngoka Kazungu on 11th April 2019.

8. While that Grant was issued just before the suit could abate, the Applicants have explained that they were unable to file the application for substitution as at the time, this matter was pending before the Court for a Ruling. That Ruling from the record was not delivered until 28th February 2020, some eleven days before this application was filed.

9. In the premises, I am unable to find any fault with the Plaintiffs' application dated 11th March 2020. Accordingly, the suit by the 1st Plaintiff is revived and I do grant leave to the said Baraka Ngoka Kazungu to be substituted for the deceased Plaintiff.

10. The cost of the application shall be in the cause.

Dated, signed and delivered at Malindi this 19th day of February, 2021.

J.O. OLOLA

JUDGE