



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO. 652 of 1980

ESSAK ABDULREHMAN KANA PLAINTIFF

V E R S U S

AHMED ESMAIL SODHIA DEFENDANT

RULING

The application before the court seeks order to revive the suit which has abated under Order 23 rule 8 (2) Civil Procedure Rules which provides as follows:-

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

The facts pleaded are that the executors of the will of ESSACK ABDUL REHMAN KANA the plaintiff who died on 11.6. 1996 wish to revive this suit and to be substituted as plaintiffs to proceed with the suit. The reason why they did not apply before the abatement of the suit within one year is that they engaged an advocate in Malindi, Mr. Lughanje to apply for a grant of probate but he failed. Then in the year 1999 the deponent filed the necessary application in the High Court Probate Registry which grant was issued on 30.5.2000 by which time the suit had abated. For the above reasons the applicants could not have made application to be substituted as required by the law before obtaining the grant. The suit concerns a dispute over land which is currently in occupation of the executor Amina Abdulrehman Kana and the estate would be prejudiced if suit is not revived.

The defendants say that the applicants are guilty of delay. Their witnesses may have forgotten the evidence due to the long duration since the case was filed in 1980, the nature of evidence being proof of an oral agreement of sale. Some witness have died already. The deceased never proceeded with his case from 1980 to the date of his death on 11.6.1996. The defendant also say the plot was a township plot and it has no sentimental value to the executors who have always resided with their families in Mtwapa. I have perused the plaint and observe that the cause of action is a claim of land under an oral sale agreement entered into in 1976. The deceased paid some money to the defendant during the same year.

However by 26.9.1980 when this suit was filed the defendant had refused to perform his part of agreement and the plaintiff intended to obtain specific performance of that agreement and also other orders. The claim is denied by the defendants. There is no dispute that the action survives the deceased plaintiff. I am not here concerned with the merits of the suit at all. My role is to examine if the court can revive the suit if the applicants can show “any sufficient cause.”

The expression "legal representative" is defined under Section 2 of Civil Procedure Code to mean a person who in law represents the estate of a deceased person and where a party sues or is sued in a representative capacity the person on who the estate devolves on the death of the party so sued or suing. Also in the case of Kothari v. Qureshi 1967) E.A. 564.

It was held that an executor's position relates back to the date of death and he can be appointed legal representative for the purpose of Order 23 Civil Procedure Rules before obtaining grant. And in case of dispute as to who is a legal representative of a deceased party the court shall determined the issue as provided under Order 23 rule 5.

In this case the applicants were appointed by will of the deceased plaintiff and they could have made the application to be substituted within he time provided for. They did not make application until on 30th May, 2000 when the grant was issued but waited until 4.12.2001.

I find therefore that there is no sufficient cause shown to prevent the applicants from applying to be substituted for plaintiff in the suit. They are also guilty of inordinate delay in making applcation after the suit abated. The land subject matter of the suit is registered in the name of the defendants and the deceased was only a tenant. In the circumstances I see no injustice would be occasioned to the estate in dismissing the application which I hereby do with costs to the defendant for this application and on the suit. Dated this 7th June, 2002.

J. KHAMINWA

COMMISSIONER OF ASSIZE

Mr. Anjarwalla

On 26.1.1983 Prohibitory Order issued is cancelled,.

J. KHAMINWA

COMMISSIONER OF ASSIZE