REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT EMBU

ELC CIVIL CASE NO. 220 OF 2014

SILAS NJERU NJIRU.....1ST PLAINTIFF/APPLICANT

PETER NJUE MUCHUKE.....2ND PLAINTIFF/APPLICANT

DAVID MUTU MACHUKE.....3RD PLAINTIFF/APPLICANT

VERSUS

MUGO MUKERE.....DEFENDANT

LEONARD NJERU MUKERA.....INTENDED 1ST DEFENDANT/RESPONDENT

ALFRED MUNYI MUGO.....INTENDED 2ND DEFENDANT/RESPONDENT

RULING

INTRODUCTION

1. What is for determination before me is a motion on notice dated 8TH April 2021, filed in court on 9th April 2021. The motion is expressed to be brought under Order 24 Rules 1, 2 and 3 of the Civil Procedure Rules.

APPLICATION

2. The Applicants are **SILAS NJERU NJIRU, PETER NJUE MUCHUKE** and **DAVID MUTU MUCHUKE**, who are Plaintiffs in the suit, while the Respondents are **MUGO MUKERE** who is the only Defendant now in the suit, with **LEONARD NJERU MUKERA and ALFRED MUNYI MUGO** being the intended Defendants. It is apparent that Mugo Mukere is now deceased. The intended defendants are meant to replace or substitute him.

The motion came with three (3) prayers which are as follows:

> *i)* **THAT** the Defendant herein MUGO MUKERE alias BENSON MUGO deceased be substituted with LEONARD NJERU MUKERE and ALFRED MUNYI MUGO.
>
> *ii)* **THAT** the pleadings be amended so as to enjoin the said LEONARD NJERU MUEKE and ALFRED MUNYI MUGO the Legal representatives of the Estate of MUGO MUKERE as the defendants in this case instead of MUGO MUKERE-deceased, and that this case be revived for hearing and determination on merits.
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> *iii)* **THAT** costs of this application be provided for.

3. The application is anchored on grounds interalia, that the defendant died on 27th December 2014 but that the subject matter, land parcel Mbeti/Gachoka/1555 and the cause of action survived him. It is pleaded that the intended defendants are legal representatives of the defendant's estate, vide Embu Succession Cause No. 6 of 2017 and they should be joined in the suit to enable them proceed with the case on behalf of the defendant's estate.

4. With the application also came a supporting dated 8.4.2021, sworn by David Mutu Machuke, the 3rd applicant, which reiterates the grounds in the application. It was further pleaded that the applicants became aware that the respondents had filed succession in respect of the estate of the defendant when they were served with an application dated 11th July 2019 in Misc Application No. 10 of 2009 (O.S).

5. According to them, after the defendant's demise they caused a citation to be issued to the successors of the defendant upon which the successors appointed an advocate who filed a notice of appointment but failed to notify the applicants, that they had filed for succession in the estate of the defendant. It is their assertion that they were granted letters of administration to the defendant's estate on 23.10.2018 in Siakago Succession Cause No. 78 of 2018.

6. The delay in taking action in the matter has been blamed on the successors to the defendant's estate who are said to have failed to notify the applicants of the succession proceedings to the defendant's estate. According to the applicants, the orders sought should be allowed as they are keen on proceeding with the matter which they plead involves their inheritance.

RESPONSE

7. The application was responded to by way of replying affidavit filed on 28.4.2021 and dated 27.4.2021. The replying affidavit was sworn by Leonard Njeru Mukera in his capacity as administrator to the estate of the deceased.

8. According to him, the application before the court ought to have been brought under Order 24 rule 4 on substitution of defendant and Order 17 rule 2 on dismissal of suit. The 1st intended respondent sought to rely on the affidavit dated 31.3.2021 in support of dismissal of the case which was as a result of a Notice to show cause issued by the court against the applicants' suit. It was pleaded that the Notice to show cause had been issued against the applicants' for failing to prosecute the matter upon death of the defendant.

9. It was said that Order 17 Rule 2 mandates the court to take action to have the suit dismissed where no action is taken within a year and it was argued that the court was justified in taking out the notice to show cause as the matter is said to have been inactive for six and a half years from date of filing the application.

10. The intended respondent argued that the provisions of Order 24 Rule 4 of the Civil Procedure Rules were mandatory and that the plaintiff ought to have caused substitution within a year from death of the defendant. According to the intended respondent time to substitute a defendant cannot be extended. It is pleaded that in Misc Appl No. 10 of 2019, the court had given the applicants 30 days to take steps to revive the abated suit and yet one year later the applicants were filing the present application to revive the suit after being awakened by the Notice to show cause.

11. The intended respondent said he had appealed against the ruling in Misc Appl No. 10 of 2019 as according to him there is no law that provides for substitution of a deceased defendant after lapse of one year. It was pleaded that when a suit abates a court lacks jurisdiction to order substitution except in an application to revive the suit in the case of a plaintiff. In the case of death of a defendant the suit abates. It was argued that the jurisdiction of the court had not been properly invoked to grant the orders sought. Ultimately the court was urged not to bend the law in exercising judicial discretion but to uphold the law under Order 24 rule 4 of the civil procedure rules by dismissing this application.

SUBMISSIONS

12. The application was canvassed by way of written submissions. The applicants filed their submissions on 22.10.2021. They reiterated the averments in their application and cited the provisions of Order 24 Rule 1,2 and 4 of the Civil procedure Rules. The applicants further cited the provisions of Section 2 of the Civil Procedure Act and submitted that for one to institute and prosecute an action in respect of a deceased person then the litigant must have locus upon obtaining a limited or full grant of letters of administration.

13. The applicants relied on the cases of **Julian Adoyo Ongunga Vs Francis Kiberenge Abano Civil appeal No. 119 of 2015** which cited with approval the case of **Hawo Shanko Vs Mohamed Uta Shanko (2018) and the case of Otieno Vs Ougo & Another (1986-1989)** which emphasised on the importance of having locus standi before the court. It is their case that after the death of the defendant, his legal representatives were to be substituted to continue with the case within a year as the cause of action survived the defendant's death. According to them, this was prevented by the successors to the estate of the defendant who even after citation refused to file for succession proceedings or disclose that there were already succession proceedings against the estate of the defendant.

14. It was argued that by seeking to invoke the provisions of Order 24 rule 4 of the Civil Procedure Rules, 2010, the respondents were seeking dismissal based on technicalities. It was pointed out that the respondents are to blame for failing to take out letters of administration or informing the applicants of the succession proceedings that they had filed. The applicants also took the position that the matter was not ripe for dismissal under Order 17 rule 2 of Civil Procedure Rules because they have been diligent in their efforts to ensure that the matter is prosecuted.

15. It is the applicant's assertion that a plaintiff can make an application to revive a suit and substitute the defendant where the suit had abated provided one has sufficient cause to show why they were unable to make an application for substitution within the stipulated time. In support of this reliance was made on the case of **Arnold Mbaabuh Vs Sheikh Nahmoud Abdulraham & 4 Others (2020) Eklr** & the case of **Kenya Farmers Co-operative Union Limited Vs Charles Murgor (deceased) t/a Kaptabei Coffee Estate (2005) eKLR**.

16. Reliance was further made on the case of **Abdiraham Abdi Vs Safi Petroleum Products Ltd & 6 Others (2011) Eklr** and it was stated that courts should not place undue regard on technicalities of procedures when determining issues, as that may result in miscarriage of justice. It was urged that the court should exercise it's discretion judiciously by considering the circumstances of the case. Finally, the application was said to have merit and that the court should allow it in the interest of justice.

17. The respondent's submissions were filed on 18.11.2021. They reiterated the averments in their replying affidavit. It was said that the present application was only an action to pre-empt the dismissal of the suit for want of prosecution. They relied on Order 24 rules 1,2 & 4 of the Civil Procedure Rules which was said to be clear that substitution ought to be done within a year. It was argued that the provisions for extension of time within which to file an application for substitution only applies to a plaintiff according to Order 24 rule 3(2) of the Civil

Procedure Rules. It was further said that the matter herein concerns the death of a defendant and that there is no provision for extending time. It was alleged that after one year without substitution the suit abates as against the defendant. The intended respondents relied on Order 24 rule 4 (1), (2) and (3) in support of this.

18. The onus of moving the court for substitution was said to be on the party seeking to substitute a deceased and not on the one likely to obtain letters of administration. The explanation by the applicants on how they obtained letters of administration or attempted to substitute the defendant was said to be of no use. It was contended that in Misc Appl No. 10 of 2019, the judge by extending the 30 day period for revival of the abated suit had amended the law which justified their appeal against that decision.

19. The suit was said to have abated and that the court lacked jurisdiction to entertain any proceedings. To support this, reliance was made on the case of **Kenya Farmers Co-operative Union Ltd Vs Charles Murgor(Deceased) t/a Kaptabet Coffee Estate HCCC No. 1671 of 1994.** Ultimately the issue of abatement was said not to be a matter of technicality to be addressed under Section 159(2) of the constitution and the court was urged to dismiss the application with costs.

ANALYSIS AND DETERMINATION

20. I have considered the application, the response made, and the rival submissions. I have also looked at the court record. There are four issues that commend themselves for determination to me viz:

i) Whether citation of a wrong provision is fatal to the application?

ii) Whether the Court can extend the time within which the defendant should have been substituted?

iii) Whether there are sufficient reasons to allow revival of the suit?

iv) Whether the intended respondents should be substituted in place of the deceased defendant?

21. Before I proceed to determine the issues above, I wish to point out that in the application filed before me the applicants in prayer 2 are seeking for orders to enjoin the intended respondents in the suit by virtue of them being legal representatives to the estate of the deceased. From the reading of the application what the parties are essentially seeking is for the intended respondents to be part of the suit in place of the defendant, which is for them to join the suit.

22. I wish to point out that there is a difference between join and enjoin. In **Re Estate of Barasa Kananje Manya in Kakamega Succession Cause No. 263 of 2002**, the court which had been moved on an application that sought to enjoin the parties to the suit distinguished the two terms and stated as follows

> *"To "join" a party to a suit means to add that person to the suit. To "enjoin," in law, means to injunct, or to bar a party from doing something. "Enjoinder" means a prohibition ordered by injunction".*

Despite the difference in meaning of the two words the court allowed the application and in so doing, justified the exercise of it's discretion by stating as follows

> *"I am inclined to stretch the application of Article 159 of the Constitution and Rule 73 of the Probate and Administration Rules, to presume that the applicants intended to apply for "joinder" as opposed to "enjoinder," and to proceed to determine the application on its merits based on that presumption".*

Whether citation of a wrong provision is fatal to the application?

23. Under paragraphs 6 and 24 of the replying affidavit, the applicants have been accused of moving the court under the wrong provision and according to the intended respondents the court lacks jurisdiction to determine the application as it has not been properly invoked. I have looked at the pleadings. In the application, the applicants moved the court under order 24 rule 1, 2 and 3 as opposed to Order 24 rule 4 which sets out the procedure to be followed in case of death of a defendant. It is trite law that the court ought to be moved under the correct provision especially where an act of parliament expressly provides for such provision. However in the event it is not, is the court stripped of its jurisdiction?

24. In the case of **Republic v Anti-Counterfeit Agency & 2 others Ex-Parte Surgippharm Limited [2014] eKLR** the court stated as follows

> *"…. in light of the provisions of Article 159(2)(d) of the Constitution the mere fact that a party cites the wrong provisions of the law ought not to deprive the Court of a jurisdiction where such jurisdiction exists.*

25. Further in the Supreme Court case of ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*** **[2013] eKLR**, the court stated as follows:

> *"The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in*

the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite [the relevant provision] will not be fatal to the applicant's cause."

26. In placing reliance on the above cases, citation of the wrong provision is not fatal to a suit. The court has a duty to consider an application filed before it under the correct provision of the law, the wrong one cited notwithstanding. I shall therefore proceed to consider the application under Order 24 rule 4 and Order 24 rule 7 of the Civil Procedure rules.

Whether the Court can extend the time within which the defendant should have been substituted?

27. From the facts of the case the defendant in the suit died in the year 2014. The law under Order 24 rule 4 of the civil procedure rules mandates that upon death of a defendant and where the cause of action survives, then the plaintiff should make an application to cause the legal representative of the deceased defendant to be made a party to the suit. Order 24 Rule 4(3) on the other hand provides that within one year where no application for substitution is made, the suit shall abate as against the deceased defendant.

28. In this matter, it is not disputed that the suit has abated by virtue of failure by the applicants to file an application for substitution within a year. According to the intended respondents, the provisions of Order 24 rule 4 of the Civil Procedure Rules are in mandatory terms, in that where no application is made to substitute, then the suit abates as against the deceased defendant. They have argued that the law does not provide for any provision for extending time for substitution of an abated suit as against the defendant and such extension of time only applies to an abated suit as against a deceased plaintiff.

29. The legal provision that deals with revival of an abated suit is found under Order 24 rule 7 (2) of the Civil Procedure Rules which provides; "

"The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt 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."

30. Guided by the provisions of Order 24 rule 7(2) of the Civil Procedure Rules, it is clear that a plaintiff can make an application seeking for revival of a suit that has abated or setting aside of an order of dismissal. I find that this is what the applicants in this case are seeking by moving this court to revive an abated suit as against that deceased defendant. The court therefore has powers to consider applications and grant orders where a plaintiff seeks to revive an abated suit against a deceased defendant as in the case herein.

Whether there are sufficient reasons to allow revival of the suit?

31. From the provisions of Order 24 rule 7(2) of the Civil Procedure Rules cited above it is provided that an application for revival of suit can be allowed if the applicant shows that he was prevented by a sufficient cause from continuing the suit.

What is sufficient cause was defined in the Court of Appeal in the case of **The Hon. Attorney General Vs the Law Society of Kenya & Another Civil Appeal (Application) No. 133 of 2011**

"Sufficient cause or good cause in law means:-

The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See Blacks Law Dictionary, 9thEdition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judges mind. The explanation should not leave unexplained gaps in the sequence of events".

32. The applicants have submitted that they have sufficient cause for failing to substitute the defendant on time. I have considered the reasons given by the applicants. It is trite law that substitution of a deceased person in a suit can only be by or with a legal representative of an estate. The applicants in prompting the successors to the deceased estate to take out letters of administration filed for citation against such successors. There is evidence before the court that the successors instructed an advocate to file a notice of appointment but the citation was never defended and the applicants were issued with letter of administration to that estate. It is not disputed that the successors had themselves filed for succession in a different succession cause and despite knowledge of the citation proceedings failed to inform the applicants of this.

33. In my view, the applicants were zealous litigants who were committed to ensuring continuity of the suit and the successors to the estate of the deceased prevented them from doing so. In the case of ***Geoffrey Mwangi Kihara Vs Mwihoko Housing Company Ltd & 3 others [2015] e K.L.R***

"In the instant application, the Plaintiff averred that he filed a succession cause to compel the deceased 2nd Defendants wife to take letters of administration ad litem to represent the deceased in the suit, after it became apparent that the 2nd Defendants family was not keen on taking out letters of administration. This, in my view, is good reason to revive the suit against the 2nd Defendant, and also to extend time for the Plaintiff to make his application for substitution, noting that it was indeed the delay by the deceased's family to take out letters of administration that caused the suit herein to abate as against the 2nd Defendant."

34. I find that the applicants have sufficient reason to seek for extension of time to revive the suit as they were clearly prevented from doing so by the actions and/or omissions of the successors of the deceased defendant. However, the intended respondents on the other hand have argued that the despite the reasons given by the applicants, the court in Misc Appl No. 10 of 2019 had given them 30 days to take steps to

revive the suit but even then they failed to do so until a year later when the court issued the Notice to show cause application seeking to dismiss the suit.

35. I agree with the intended respondents that the applicants were granted time by the court to take steps to revive the suit, which they failed to do. The applicants have not given a good reason for failure to take such steps until when the court issued a notice to show cause to revive the suit. I note that the order by the court was issued in the month of February 2020, yet the application herein was filed in the month of April 2021. There is indeed a delay of one year. The delay, according to this court, is not inordinate considering that the parties had all along been willing to substitute the defendant and had even taken crucial steps to achieve this, but were prevented by the actions and omissions of the successors of the deceased defendant.

36. Accordingly, in view of the special circumstances of this case, I am inclined to exercise the courts inherent powers and allow for revival of the suit herein to ensure that the ends of justice are met.

Whether the intended respondents should be substituted in place of the deceased defendant?

37. As pointed out earlier in the ruling, where a defendant dies and the cause of action survives the defendant, then such deceased person can only be substituted by the legal representative of his estate. In Embu Succession Cause No. 6 of 2017, the intended respondents were issued with letters of administration dated 11th January 2018 to the estate of the defendant. It is therefore not in dispute that they are the legal representatives of the estate of the defendant. It therefore follows that they are the right parties to be substituted in place of the defendant.

38. The upshot of the foregoing is that the application herein has merits and is allowed. I make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 1ST DAY OF FEBRUARY, 2022.

In the presence of the 2nd & 3rd plaintiffs/applicants, 1st & 2nd intended defendants/respondents present and in the absence of the 1st plaintiff/applicant.

CA: Leadys

A.K. KANIARU

JUDGE

01.02.2022