



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1142 OF 2016

SUCHAN INVESTMENTS LIMITED.....PLAINTIFF/ APPLICANT

VERSUS

DUPA PULLING.....DEFENDANT/ RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion application dated 12<sup>th</sup> March 2021 in which the plaintiff seeks the following orders;

**i. THAT an order do issue reviving this suit which has since abated for hearing and determination.**

**ii. THAT an order do issue substituting the legal representatives of the deceased Defendant/Respondent, one Minar Katherine Holroyd, Suneina Leonora Pulling and Laura Sushila Pulling with Defendant/Respondent.**

**iii. THAT the Applicant be granted leave to amend the plaint in consonance with the aforesaid substitution.**

**iv. THAT the Respondent be condemned to pay the costs for this Application.**

2. The application is supported by the affidavit dated 12.3.2021 sworn by Kamal Chandulal Shah who is a Director of the applicant. He avers that this suit had been fixed for hearing on 12<sup>th</sup> February 2019, but could not proceed due to the demise of the Defendant. The administration of the estate of the respondent took longer than 1 year to conclude which led the suit to abate and the file was marked as closed by the court on 15<sup>th</sup> June 2020.

3. The applicant states that the grant of representation of the estate of the deceased was issued to **Minar Katherine Holroyd, Suneina Leonora Pulling** and **Laura Sushila Pulling** by the High Court of Justice England and Wales on 12<sup>th</sup> February 2020 which was resealed by the High Court Family Division of Kenya on 15<sup>th</sup> December 2020. The applicant was then furnished with a copy of the said grant on 3<sup>rd</sup> March 2021 necessitating the filing of the current application. The Applicant depones that the length of time taken to obtain the grant of representation was due to jurisdictional challenges and prays that the suit be revived for hearing and determination since the cause of action survived the death of the respondent.

4. The application is opposed vide the replying affidavit dated 23<sup>rd</sup> July 2021 sworn by Minar Katherin Holroyd a co-administratrix of the estate of the deceased (intended respondent). She contends that the application is fatally incompetent on the grounds that the applicant did not file an application to seek extension of time to substitute the deceased with her legal representatives to revive the suit as per **Order 24** of the **Civil Procedure Rules 2010**. She added that the application was *res judicata* since the issue had been settled on 21<sup>st</sup> November 2019 in **ELC No. 200 of 2008**. The respondent also filed a Notice of Preliminary Objection dated the same date as the replying affidavit and capturing similar content.

5. In response to the above mentioned replying affidavit by Minar Katherin Holroyd and the Preliminary Objection, the applicant filed his own Notice of Preliminary Objection dated 16<sup>th</sup> August 2021 stating that the respondents' replying affidavit dated 23<sup>rd</sup> July 2021 was incurably and fatally defective contravening the provisions of the Oaths and Statutory Declarations Act, that it lacked substance and ought to be struck out. The applicant also filed a supplementary affidavit sworn by Kamal Chandulal Shah where he gave an account of litigation in some cases namely **Nairobi HCCC 200 of 2008, JR 129 of 2009, Court of Appeal case No. 46 of 2012**.

#### Submissions

6. The applicant did not file submissions as directed by the court on 13.10.2021, where the said submissions were to be filed by 27<sup>th</sup> October

2021.

7. The respondents filed their written submissions dated 5<sup>th</sup> October 2021, raising the following three issues:

**1. Whether the Plaintiff's Notice of Motion dated 12<sup>th</sup> March 2021 is barred under the Doctrine of Res Judicata?**

**2. Whether the Plaintiff's Notice of Motion dated 12<sup>th</sup> March 2021 is meritorious?**

**3. Whether the Plaintiff's Preliminary Objection dated 16<sup>th</sup> August 2021 is meritorious?**

8. It was submitted that the application was fatally incompetent as the applicant had failed to seek an extension of time to substitute the deceased with her legal representatives and revive the suit before it abated as required by **Order 24** of the **Civil Procedure Rules**.

9. It was further submitted that the application was *res judicata* to **ELC 200 of 2008** where a Judgment has been delivered. That the said suit addressed the same issues raised in the current suit and the judgement is still in force outlining the following similarities in the suits: the parties to the suits are the same; the issues raised in the suits are the same as they pertain to plaintiff's claim for rent, mesne profits and general damages relating to the property; and the matters have already been heard and determined by a competent court.

10. In support of their arguments, the respondents relied on the cases of; **E.T vs. Attorney General & Another (2012) eKLR** , **Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd [1989] eKLR**, **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 Others (2017) eKLR**, **Regina Waithira Mwangi Gitau vs. Boniface Nthenge [2015] eKLR** and **Esther Wambui Kanyi & 2 others vs. Njeri Ngoru & Another [2016] eKLR**.

#### **Analysis and determination**

11. This court has considered the application, affidavits and submissions together with the relevant legal framework and the prevailing jurisprudence. It is noted that on 29.6.2021, prayer (b) of the current application (*relating to substitution of the defendant*) was allowed, as counsel for the respondents had no objection to the same. The issues for determination are:

**i. Whether the suit is res judicata**

**ii. Whether the court should revive this suit**

#### **Res- Judicata**

12. The intended defendants in their submissions have argued at length that this suit is *res judicata* since the same issues had been determined in **ELC 200 of 2008** by Justice Okong'o. I however find that the plea of *res judicata* cannot be argued in a none existent suit. The arguments of the respondents cannot be sustained as they were made when the suit had abated. In that regard, the court declines to consider the said arguments at this stage. The parties are however at liberty to move the court accordingly in the event that the suit becomes active.

#### **Abatement**

13. **Order 24** of the **Civil Procedure Rules, 2010** comprehensively outlines what ought to happen if a party or parties to a suit dies; **Order 24, rule 4** provides for procedure in case of death of one of several defendants or of sole defendant as follows:

**"4. (1) Where one of 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.**

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

14. **Order 24, rule 7** provides for effect of abatement or dismissal of the suit as follows;

**"7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**

**2) 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".**

15. **Order 24 Rule 7(2)** of the **Civil Procedure Rules** gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit. The applicant has given a step by step account as to how the respondents became the legal representatives of the defendant. This is captured in paragraph 11 to 13 of the affidavit of Kamal Chandulal Shah. There in, it is stated that the Grant of Letters of Administration for the estate of the Defendant was issued in England on **12.2.2020**. Then an application was made on **16.6.2020** for the Resealing of the Grant in the High Court of Kenya. In order to facilitate and fast track the

process of the re-sealing of the Grant, the Applicant wrote to the Deputy Registrar High Court Family Division on **5.11.2020** requesting her to urgently re-seal the grant. The Grant was re-sealed on **15.12.2020**, but the applicant only came to learn about these developments on **24.2.2021** through the advocates of the respondent.

16. The respondents have not rebutted these averments. If anything, they have availed documents which clearly confirm that the process of getting legal representatives of the estate of defendant was complex as it was happening in far away lands. To this end, I do note that annexure “**MKH1**” attached to the replying affidavit of the respondent, is a death certificate of the defendant indicating that he died on **25.12.2018** in the area known as London Borough Enfield. The subsequent document, “**MKH2**” shows that deceased died in a hospital known as **NORTH MIDDLESEX HOSPITAL** on **25.12.2018**. The grant of Letters of Administration was issued by the High Court of Justice ENGLAND AND WALES, WINCHESTER DISTRICT, PROBATE REGISTRY on 12.2.2020.

17. What I discern is that the Defendant died in a far flung land, to be precise, England and the process of appointment of his legal representative was also undertaken in this foreign land. The applicant cannot be faulted for the processes that were being undertaken from 25.12.2018 when Defendant passed on upto 15.12.2020 when the grant was resealed. The applicant apparently obtained a copy of the resealed grant on 3.3.2021 and he filed this application nine days later on 12.3.2021. This is a mark of vigilance on his part. I find that the Applicant has given sufficient reasons which prevented him from continuing with the suit.

18. In the case of **Mbaya Nzulwa v Kenya Power & Lighting Co. Ltd [2018] eKLR**, the court held thus;

**“I hold the view that under the proviso to Rule 3(2) the court has a discretion to extend time even where the application for substitution is not made within one year but an abated suit need revival under Rule 7(2). The proper way to proceed is to seek in the same application for substitution that the suit which has abated be revived. That to me is what the applicant and counsel ought to have done here but they have not done. I will not seek to punish the Applicant and the beneficiaries to the estate for failure by delay as well as failure to seek revival of the suit. Rather I will adopt the courts duty to sustain claims for purposes of them being heard on the merits. I invite the intrinsic power of the court to administer justice devoid of technicalities as well as the overriding objective of the court and understand the applicant to plead that the suit be heard on the merits. I accede to that plea”.**

19. In light of the foregoing analysis, and in light of the circumstances appertaining to the acquisition of the letters of administration of defendant’s estate, I am inclined to allow prayer (a) and (c) in the **application dated 12.3.2021**. The applicant is to file and serve the amended plaint within 14 days and the respondents are at liberty to file an amended defence if any within 14 days thereafter. Each party to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Birwe h/b for A.G.N Kamau for the Applicant

N/A for the Respondents

Court Assistant: Eddel