



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 31 OF 2011

LA MARINA LIMITED.....PLAINTIFF

VERSUS

RIZIKI CHARO KAMBI.....1ST DEFENDANT

GIDEON MAINA MURIUKI.....2ND DEFENDANT

SHADRACK NDUNDI.....3RD DEFENDANT

AND

ROBERT PHILIP ASHWORTH.....INTERESTED PARTY

RULING

1. By this Notice of Motion dated 29th January 2019 but filed herein on 21st October 2020, the Interested Party/Applicant prays for orders: -
 - 1. That leave be granted to Susan Ashworth to substitute the Interested Party herein who is now deceased;***
 - 2. That the said Susan Ashworth be allowed to represent and carry on the claim made by the said Robert Philip Ashworth in this suit; and***
 - 3. That costs of this application be in the cause.***
2. The application which is supported by an affidavit sworn by the said Susan Ashworth is premised on the grounds: -
 - i) That the Interested Party in the present suit is dead and his claim survives him; and***
 - ii) That the said Susan Ashworth is the widow and personal representative of the deceased.***
3. The application is opposed. By their Grounds of Opposition dated and filed herein on 18th January 2021, La Marina Ltd (the Plaintiff) opposes the application on the grounds: -
 - 1. That the Applicant's motion offends the provisions of Order 24 (of the) Civil Procedure Rules, the Interested Party's claim having abated;***
 - 2. That the cause of action in question expired on the dismissal of the suit on 5/2/2019 and the application is thus without a substratum;***
 - 3. That the Applicant has shown no sufficient cause to allow the Honourable Court exercise its inherent power to revive the claim and join the Estate of the Interested Party; and***
 - 4. That the Application is an abuse of the Court process and for dismissal with costs.***

4. Similarly opposed to the application is Riziki Charo Kambiti (the 1st Defendant). In a Replying Affidavit sworn on her behalf by her Advocate on record Kokebe Kevin and filed herein on 10th November 2020, the 1st Defendant avers that the application has been brought some three (3) years after the demise of the Interested Party and asserts that the actions are not only lackadaisical but reek of laches.

5. The 1st Defendant further avers that no sufficient reason has been put forth for the inordinate delay to warrant this Court's intervention. The 1st Defendant further asserts that Order 24 of the Civil Procedure Rules provides for a time line within which such substitution can be preferred failure to which an application to extend time must be made.

6. I have perused and considered the Motion and the response thereto. I have equally considered the submissions and authorities placed before me by the Learned Advocates for the parties.

7. The Applicant herein prays for leave to have her name substituted with that of the Interested Party herein. From a perusal of the death certificate annexed to the application, Robert Philip Ashworth who was the Interested Party herein passed away on 25th February 2017 at Karen in Nairobi. The Applicant who is the deceased's widow and personal representative avers that the Interested Party's claim survives him and that as the legal representative she has the mandate to take over and follow up the claim on behalf of the estate of the deceased.

8. Both the Plaintiff and the 1st Defendant are however opposed to the application. While they do not contest the fact that the claim could have survived the Interested Party they assert that the suit had abated and that hence the Applicant cannot come to Court in the manner she did before reviving the suit.

9. The issue before me is therefore essentially whether in seeking to be substituted in place of the Interested Party, the Applicant must, in the first place seek an extension of time within which to revive the suit. The said Order 24 of the Civil Procedure Rules provides in the pertinent part of the provision as follows: -

“24. 1. The death of a Plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

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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 Plaintiff alone, or a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues, the Court on 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 sub-rule (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's Plaintiff.

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

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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 the 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.”

10. That being the case, what should happen in case of the death of a Plaintiff and the cause of action survives or continues is rather plain. By operation of the law generally speaking, the suit will automatically abate where a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. Under rule 3 (2) of Order 24, the Defendant is only required in such an instance to bring notice of the fact of abatement and to apply for an award of costs which he may have incurred in defending the suit to be recovered from the estate of the deceased Plaintiff.

11. Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form in which it was originally presented. As was stated by the Court of Appeal in ***Rebecca Mijide Mungole & Another –vs- Kenya Power & Lighting Company Ltd & 2 Others (2017) eKLR***: -

“Because the suit will only abate, where, within one year of the death of the Plaintiff no application is made to cause the legal representative of the deceased Plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased Plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed

without short circuiting it. The proviso to rule 3(2) to the effect that the Court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings....”

(Emphasis mine).

12. From a perusal of the Supporting Affidavit to the application before me, it is apparent that the Interested Party passed away some three (3) years and eight (8) months before the application was filed. The Applicant has neither applied for enlargement of time nor for the revival of the suit.

13. Applying my mind to the facts and the law as analyzed above, it is clear to me that the Applicant cannot purport to continue with a claim which was extinguished by operation of the law more than three (3) years before she came to Court.

14. In the premises, the application before me is clearly misconceived and without any basis. It is dismissed with costs.

Dated, signed and delivered at Malindi this 30th day of July, 2021.

J.O. OLOLA

JUDGE