



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 219 OF 2017**

1. HARVEX GAMBO CHIPANDE
2. CONSTANCE KWEKWE CHIPANDE
3. BENNET CHIPANDE CHIRAO
4. PRISCILLAR MOSE
5. DOROTHY MUKARYE CHIPANDE
6. NICOLUS CHIPANDE MWANGATA
7. CAROLINE MPENZWE CHIPANDE
8. CHIPANDE CHIRAO HOROME
9. PAHE CHIPANDE
10. KANZE CHIPANDE.....PLAINTIFFS

**VERSUS**

1. VALE LIMITED
2. GASPER C. CHIPANDE
3. SABASTIAN GAMBO
4. HUMPHREY D. MWAKALAMA.....DEFENDANTS

**RULING**

1. By their Notice of Motion application dated 12<sup>th</sup> December 2019, the ten (10) Plaintiffs herein pray for an order that this Court be pleased to grant them leave to amend their Plaintiff. The application which is supported by the 4<sup>th</sup> Plaintiff Priscillar Mose Chipande is premised on the grounds: -

*a) That the Plaintiffs are the bonafide owners of the suit property and are claiming interest as the administrators of the estate of Chipande Chirao Choromwe (the 8<sup>th</sup> Plaintiff);*

*b) That the 8<sup>th</sup> Plaintiff passed away on 20<sup>th</sup> April 2018 and the Plaintiffs have obtained a grant of letters of administration to enable them proceed with the suit;*

*c) That the amended Plaintiff shall not cause any prejudice to the Defendants in any way but shall help the Court to know the capacity in which the Plaintiffs are proceeding with the suit.*

2. The 1<sup>st</sup> Defendant- Vale Ltd is opposed to the application. In a Replying Affidavit sworn by its director Guido Bertoni and filed herein on 4<sup>th</sup> March 2020, the 1<sup>st</sup> Defendant avers that the 8<sup>th</sup> Plaintiff passed away on 20<sup>th</sup> April 2018 and that the suit abated as no application for substitution was made within one year as prescribed by law.
3. The 1<sup>st</sup> Defendant further avers that the application herein is hinged on Order 8 Rule (3) sub-rule (3) of the Civil Procedure Rules which provides for amendment of pleadings which seek to correct the name of a party arising from a genuine mistake which is not the case in the circumstances herein.
4. The 1<sup>st</sup> Defendant further avers that the Applicant herein has not sought the reinstatement of the claim by the 8<sup>th</sup> Plaintiff and the same therefore remains abated. The attached draft copy of the Amended Plaintiff does not also indicate the amendments which the applicants want to be allowed and the 1<sup>st</sup> Defendant prays that the application be dismissed with costs.
5. I have perused and considered the application as well as the response thereto. I have similarly considered the written submissions as filed by the Plaintiffs. The 1<sup>st</sup> Defendant did not file any submissions.
6. The Plaintiffs have brought this application under Order 8 Rule 3, 4 and 5 of the Civil Procedure Rules seeking to amend their Plaintiff. The amendments sought to be made are however not shown on the draft of the amended Plaintiff annexed to the application and it is evident that the application was poorly drafted as stated by the 1<sup>st</sup> Defendant.
7. From a perusal of the Supporting Affidavit, what the Plaintiffs seek to do is a substitution of the 8<sup>th</sup> Plaintiff who according to the Certificate of Death attached to the application passed away on 20<sup>th</sup> April 2018. The Plaintiffs did not get a Grant of Letters of Administration until 19<sup>th</sup> November 2019 by which time the claim in so far as the 8<sup>th</sup> Plaintiff was concerned had clearly abated.
8. The law governing such a situation cannot be the provisions of Order 8 Rule 3, 4 and 5 as cited by the Plaintiffs but as correctly stated by the 1<sup>st</sup> Defendant Order 24 Rule 3 of the Civil Procedure Rules which provides thus: -

***“3(1) Where one of two or more Plaintiffs dies and the cause of action does not survive or continues to the surviving Plaintiff or Plaintiffs, 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 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 Plaintiff.***

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

9. In the matter before me, it cannot be denied that the claim in so far as the 8<sup>th</sup> Plaintiff is concerned has abated. An abated suit is non-existent prior to its being revived. For a suit to be revived an appropriate application ought to be presented to the Court and the Court then has a duty to consider it based on the facts and justification disclosed to have led to the delay and abatement.
10. Under Rule 3(2) of Order 24, the Court has discretion to extend time even where the application for substitution is not made within one year. I agree in this respect with the 1<sup>st</sup> Defendant that the prudent thing to do was for the Plaintiffs to apply in the same application for substitution that the suit which has abated be revived.
11. That indeed is what the Plaintiffs and their Counsel ought to have done in this matter but they appear to be completely oblivious of that requirement. Considering the circumstances of this case however, I will not punish the Plaintiffs and the beneficiaries of the estate for the failure to seek the revival of the suit. It is evident that they have made an effort to obtain a grant for the estate of the deceased even though the same was not done in good time.
12. In light of the overriding objective of the Court to ensure an efficacious and speedy disposal of suits, I invoke the intrinsic power of this Court to administer justice devoid of technicalities and understand the Plaintiffs to plead that their Plaintiff be amended to reflect the death of the 8<sup>th</sup> Plaintiff and that the suit be heard on merits.
13. In answer to that plea, I hereby order that the claim in so far as it relates to the 8<sup>th</sup> Plaintiff be revived and that the Plaintiff be amended accordingly. The Plaintiffs have Fourteen (14) days to file and serve the amended Plaintiff.
14. The costs of this application shall be in the cause.

**Dated, signed and delivered at Malindi this 16<sup>th</sup> day of July, 2021.**

**J.O. OLOLA**

**JUDGE**