



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC SUIT NO. 52 OF 1998**

**PETER KILEMI M'ITIMITU (legal representative of the estate of**

**M'ITIMITU M'MWITHIA – deceased).....PLAINTIFF**

**VERSUS**

**DIOCESE OF MERU.....1<sup>ST</sup> RESPONDENT**

**TERESSA KAARI KOBIA (legal representative of**

**ROMAN KOBIA LINYIRU –deceased).....2<sup>ND</sup> RESPONDENT/APPLICANT**

**RULING**

1. Before me is a notice of motion dated 14/11/2013 brought pursuant to Order 24 rule 1, 2 & 3(2) of the Civil Procedure Rules, seeking orders that the court do grant the applicant leave within which to file the present application outside the statutory period and that Teressa Kaari Kobia be appointed as the legal representative of Romano Kobia M'Linyiru alias Romano Kobia (Deceased).

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant, who avers that her late husband Romano Kobia Linyiru was the 2<sup>nd</sup> defendant herein who died on 7/9/2012. She applied for limited grant letters of administration which were issued to her on 24/9/2013 which is outside the statutory 12 months period.

3. The applicant submitted that this matter was concluded and judgment delivered while the 2<sup>nd</sup> defendant was still alive and thus the suit cannot be said to have abated against him. That the only issue pending is execution proceedings. There is no limitation provided in the Civil Procedure Rules for substitution where the suit has already been determined and the Limitation of Actions Act Section 4(4) provides for a 12 year period for actions based on judgment. The applicant wishes to be enjoined in this suit as the legal representative for continuation of the pending execution proceedings.

4. In support of her case, the applicant relied on the cases of **Dhulla Harichad vs, Gulam Mohu-Udin and Aziz Din s/o Gulam Mohu Udin (1940) KLR Vol XIX** and **Agnes Wanjiku Wang'ondu vs, Uchumi Supermarket Ltd (2008)eKLR.**

5. The 1<sup>st</sup> defendant opposed the application vide a replying affidavit dated 06/03/2021 sworn by its advocate Christine Murithi. She avers the 2<sup>nd</sup> defendant's claim abated long ago and they did not seek to revive it. The said application has remained un-prosecuted for 7 years and she is guilty of inordinate delay. That equity aids the vigilant and not the indolent as the applicant herein.

6. That despite the abatement after the death of the 2<sup>nd</sup> defendant, his bill of costs is dated 15/10/2015 and taxed on 23/01/2020 many years later and if applicant intends to execute on the taxed costs, this would be unprocedural. The present application lacks merit and should fail for the reason that it's an afterthought, lacks jurisdiction and merit, is incompetent and fatally defective and is a classical abuse of court process and a waste of judicial time thus the court should dismiss the application with costs.

7. It was submitted for the 1<sup>st</sup> defendant that the applicant is seeking a discretionary order to extend time yet she has not given any reason why she deserves such discretion. Further, the application was dormant for 12 years without being prosecuted and the applicant has not given a reason for this delay. It is not clear under whose instructions the bill of costs was drawn. The 1<sup>st</sup> defendant has relied on the case of; **Kestem Company Ltd V Ndala Shop Limited & 2 others [2018]eKLR.**

8. The plaintiff is not opposing the application.

9. I have keenly perused the application, both affidavits in support and in opposition as well as the rival submissions. It is not in dispute that

the 2<sup>nd</sup> defendant died on 7/09/2012, and the applicant obtained letters of administration in respect of his estate on 24/9/2013. Further, judgment in the High Court was delivered on 30/10/2009 when the 2<sup>nd</sup> defendant was alive.

10. Under the provisions of **Order 24 Rule 10** of the Civil Procedure Rules, it is provided that the substitution or causing the legal representative of the deceased to be made a party to the suit shall not be effected in the execution of a decree or order. Under the said provision, it reads;

*‘Nothing in rules 3, 4 and 7 shall apply to proceedings in execution of a decree or order’.*

11. What is pending in the present matter is the execution process. In such proceedings, the provisions of Order 24 Rules 3, 4 & 7 are precluded, and the Plaintiff, or Defendant or any other party as the case may be, is entitled to proceed with execution proceedings without substituting or making a party to the execution the legal representative of the deceased.

12. This court has previously held in **Fatuma Mohamud Mohammed Mire v Japhet Nteere Mwendwa [2021] eKLR** that;

*“In Agnes Wanjiku Wang’ondy V Uchumi Supermarket Ltd [2008] eKLR, the Court in its analysis of the provisions of Order 24 and Order 31 of the Civil Procedure Rules held that the requirement for substitution does not apply to proceedings in execution of an order. That while Order 30 Rule 1 (now Order 31 Rule 1) states that it shall not ordinarily be necessary to make them parties to the suit, it does not say that they cannot be made parties to the suit. So, in appropriate circumstances, the personal representative can and should be allowed to be enjoined in the suit”*

Also see - **Mueni Kiamba v Mbithi Kimeu Kimolo [2017] eKLR.**

13. From the above, it is quite clear that where a matter has been finalized and a judgment has been rendered, there is no requirement that the legal personal representative of a deceased, decree holder, is required to be appointed and substituted or made a party to the suit or proceedings within 12 months of the death of the relevant party to be able to execute the decree or order. The rationale is that once a judgment/decreed or order has been given, the court has determined the rights and/or interest of the parties and has made a decision and all that remains is the execution of the decree or order.

14. The court has also taken into account that around the time the 2<sup>nd</sup> defendant was passing on, the matter was headed for the Court of Appeal (**case on 228 of 2012**) and remained there until it was finalized on 31.7.2015.

15. I find that the dispute herein is over 20 years old, and in the interest of justice, the application ought to be and is hereby allowed. Each party to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2021**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this Ruling was given to the advocates for the parties through a notice issued on 3.9.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**