



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC 164 OF 2018

NGOTHO COMMERCIAL AGENCIES.....PLAINTIFF

VERSUS

DAVID KIPRONO SAMBAI (DECEASED).....1ST DEFENDANT

LAND REGISTRAR NAKURU.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

DENNIS KIPNGETICH RONO (AS THE ADMINISTRATOR *AD LITEM* IN THE ESTATE OF

DAVID KIPRONO SAMBAI (DECEASED).....APPLICANT

RULING

Application

1. The applicant moved the court through an amended notice of motion dated **17/3/2021** brought under **Order 24 Rules 1,2,3(2)** and **7(2) Order 50 Rule 5** and **Order 8 Rule 3 Civil Procedure Rules 2010** seeking the following orders:

- (1) That this Honourable court does extend time within which to substitute the 1st defendant in the suit herein with the administrator to his estate.**
- (2) That this Honourable court be pleased to revive the suit that has abated as against the 1st defendant herein.**
- (3) That this Honourable court be pleased to substitute the name of the 1st defendant DAVID KIPRONO SAMBAI (Deceased) with that of the applicant who is the administrator ad litem of his estate.**
- (4) That this Honourable court grants leave to the applicant to proceed with the matter on behalf of the estate of the deceased.**

2. The application is supported by the affidavit of **Dennis Kipngetch Rono** sworn on **17/3/2021** in which he deposed that the plaintiff had instituted a land case against the 1st defendant who filed a defence and counterclaim to the suit to have the title cancelled and the same be re-registered in the 1st defendant's name; that unfortunately the deceased died on **4/11/2019** during the pendency of this suit and this necessitated the initiation of succession proceedings for grant of letters ad litem.

3. He further stated that pursuant to a limited grant *ad litem* dated **9/12/2020**, he was vested with the authority to prosecute and defend the instant suit; that the application for grant of letters *ad litem* was necessitated by the fact that they had made an application for letters of administration but the same had been delayed because of the directions on the Covid-19 pandemic issued by the Chief Justice that suspended physical attendance at the courts and registry; that the application for letters of administration was received on **29/7/2020** after around **2 months** of making efforts of filing and **3 months** later, they received the electronic registration form from the Central registry on **14/10/2020**.

4. He went on to depose that once they noticed that the application for issuance of letters of administration would delay, they tried to secure a mention notice and seek for extension of time within which to file the instant application for substitution in vain as the registry indicated that

the earliest date they could get would be **January 2021**; that he made an application for issuance of the letters administration *ad litem* on **18/11/2020** which the court took long in acknowledging receipt of and assessing and finally after succeeding in filing, there were again challenges in the new system and it took a considerable amount of time before it was placed before the Honourable Judge and the grant was finally issued on **9/12/2020**; that immediately after collecting the same, he prepared the current application on **11/12/2020** and sent it via email for assessment and issuance of a date but again faced delays with the court registry system which sent out the invoice on **18/12/2020**.

5. He finally deposed that if the courts would be operating normally without the new covid-19 protocols then, the application would have been placed before the court and appropriate orders issued without time running out; that it is evident that time lapsed and the suit abated due to the apparent challenges with the new e-filing system and therefore requests for the suit to be revived and be allowed to substitute the deceased in the instant case.

Response

6. Upon perusal of the file, I have found that the only response in the file related to the amended notice of motion is the grounds of opposition filed on **9/3/2021**.

Submissions

7. The applicant filed his skeletal submissions on **4/6/2021** while the 1st respondent filed its submissions on **9/6/2021**.

Determination

8. Two main issues arise for determination, whether it is necessary for the applicant to seek extension of time to file an application for substitution and whether the applicant has shown sufficient cause for the revival of the suit.

9. **Order 24 Rule 4 (2) and (3) of the Civil Procedure Rules** provide as follows:

“2. Procedure where one of several plaintiffs or defendants dies and right to sue survives [Order 24, rule 2.]

Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3. Procedure in case of death of one of several plaintiffs or of sole plaintiff [Order 24, rule 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 plaintiffs alone, 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 subrule (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.

4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 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.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased defendant.”

10. In the instant suit, it is not in dispute that the 1st defendant died on **4/11/2019** and that the suit abated on **4/11/2020**. It is the applicant's evidence that sometime in **2020** together with his mother they made an application to be appointed as administrators to their late father's estate and at the earliest opportune time, he made an application for letters of administration *ad litem* but challenges in the new court filing system occasioned by covid-19 led to delay in the hearing of the instant application.

11. The 1st respondent in its submissions, which reflect the contents of the grounds of opposition filed against the un-amended notice of motion, argued that according to **Order 24 rule 4**, the applicant should follow the laid down procedure without short circuiting it. It submitted that the applicant cannot seek to revive the abated suit and substitute the deceased before the court extends time for making an

application for substitution and that the court has no jurisdiction to order for substitution because the suit already abated.

12. The applicant on the other hand in his skeletal submissions argued that the law allows a party to make an application requesting for all three prayers. He placed reliance on the Court of Appeal case of **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** which held that it was necessary to seek extension of time in order to file an application for substitution but there was nothing objectionable in making an omnibus application for all the three prayers, but it is incompetent to seek for joinder or revival when the prayer for more time has not been granted.

13. I am in agreement with the applicant that it is correct to seek all the three prayers: the extension of time for substitution, revival of the abated suit and substitution of the 1st defendant with that of the applicant as in the instant application.

14. It is also my opinion that **Order 24 Rule 4** that deals with the substitution of a defendant who has died does not provide for an application for extension of time as in the case of an application to substitute a plaintiff where the suit has abated.

15. It is therefore my view that an application of a deceased defendant as in the instant case, where a suit has abated, ought to be considered under the provisions **Order 24 Rule 4(1)** and I must consider it under that rule though the amended notice of motion has not been brought under it as that omission is not fatal to the application.

16. The applicant in his supporting affidavit has explained the challenges he has experienced with the new e-filing system introduced in the courts since commencement of covid-19 and the delays in filing of the letters of administration. He further submitted that his application seeking extension of time was expeditiously made within reasonable time - 45 days - and the reasons given are cogent and not vexatious.

17. In view of the above, it is my opinion that it is indeed a notorious fact that the advent of covid-19 was announced on **March 2020**, and the pandemic brought with it its share of challenges and most if not all operations in government offices came to a standstill at its beginning. The courts also had to close for some time and it was during this time that the e-filing system came into operation which brought some delays in terms of the system being new to the court, litigants as well as the advocates. It is therefore my opinion that indeed the applicant faced difficulties as evidenced from his annexures despite making efforts and thus demonstrating sufficient cause. It is also my opinion that the 1st plaintiff/respondent will not stand to suffer any prejudice if substitution is allowed and the suit revived. In addition, it would be in the interest of justice for the suit to be heard on merit and the matter disposed of judiciously and that can only be achieved if the suit is revived and the 1st defendant substituted by the applicant herein.

18. Consequently, the instant application succeeds. I grant **prayers nos 1, 2, 3, and 4** in the amended notice of motion dated **17/3/2021**. All subsequent documents in this matter shall bear the applicant's name in his capacity as the administrator of the estate of the deceased original 1st defendant. The costs of the motion shall be in the cause.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 28TH DAY OF OCTOBER, 2021.

MWANGI NJORGE

JUDGE, ELC, NAKURU