



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO.652 OF 2011**

**BILHA NJERI GACHANJA.....PLAINTIFF**

**VERSUS**

**MWANGI KAHARA.....DEFENDANT**

**MUNICIPAL COUNCIL OF THIKA.....THIRD PARTY**

**RULING**

1. This is the Notice of Motion dated 6<sup>th</sup> July 2020. It seeks orders:-

*(i) That this honourable court be pleased to enlarge and extend time within which the deceased plaintiff is to be substituted by the administrator of her estate.*

*(ii) That this honourable court be pleased to allow the substitution of the plaintiff with the administrator Paul Kinuthia Gachanja as the legal representative of the plaintiff's estate.*

2. The grounds are on the face of the application. The application is supported by the affidavit of Paul Kinuthia Gachanja, sworn on the 6<sup>th</sup> July 2020 and a further affidavit sworn on the 28<sup>th</sup> September 2020.

3. The application is opposed. There is a replying affidavit sworn by Julius Mwangi Kahara, the 1<sup>st</sup> defendant/respondent sworn on the 28<sup>th</sup> August 2020.

4. The court, with the consent of the parties directed that the notice of motion be canvassed by way of written submissions.

5. The Plaintiff's/Applicant's submissions are dated 10<sup>th</sup> November 2020 while the 1<sup>st</sup> Defendant's/Respondent's, are dated 9<sup>th</sup> November 2020.

6. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether the time for substitution should be extended.

7. It is not in dispute that the plaintiff passed away on 5<sup>th</sup> March 2016. The Applicant told the court that there was a delay in obtaining letters of administration to the estate of the, (deceased) plaintiff. The Applicant stated that he obtained the said letters of administration on 2<sup>nd</sup> June 2017.

8. **Order 24 rule 3(2)** of the Civil procedure Rules provides that:-

*“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”*

9. **Rule 7(2)** provides that

***“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.”***

10. I have gone through the affidavit in support of the application. I find that the Applicant has failed to demonstrate sufficient cause to warrant the suit to be reviewed.

11. In paragraph 3 of the further affidavit, the Applicant depones:-

***“That it is a fact the high court at Nairobi issue me with a limited grant for purposes of tiling, prosecuting/and or defending this case on 2<sup>nd</sup> June 2017 which was already beyond one (1) year period prescribed under the law for substitution of the plaintiff who passed away on 5<sup>th</sup> March 2016.”***

***In Paragraph 4 he depones***

***“That I am aware the firm of Onyancha Bwomote & Co. Advocates were instructed to take over the conduct of this matter on behalf of the deceased plaintiff and they filed their notice of change of advocates on 22<sup>nd</sup> March 2018. Annexed hereto and marked “PKG 4” is a copy of the notice”***

12. It is clear from the above averments that the Applicant did nothing after obtaining the Grant of Letters of Administration on 2<sup>nd</sup> June 2017. I find that this application has been brought after an inordinate delay.

13. It is not in dispute that the plaintiff was not substituted within one (1) year of death.

14. The applicant has failed to demonstrate sufficient cause as to why this court should revive the suit. In the case of **Rebecca Mijide Mungole & Another vs Kenya Power & Lighting Co. Ltd & 2 Others [2017] eKLR** The Court of Appeal stated thus:-

***“When the delay in account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant....”***

15. I am also guided by the case of **Kenya Farmers Cooperative Union Ltd vs Charles Murgor t/a Kaptabei Coffee Estate [2005] eKLR**, where Judge H. P. G. Waweru held that:-

***“.....But it is really a matter that goes to the jurisdiction of the court. Does the court have jurisdiction to order substitution (except in an application to revive the suit?) Where the suit has already abated by operation of the law, obviously not. Does the court have jurisdiction to hear and determine a suit that has already abated by operations of the law? Certainly not. If a suit has abated it has ceased to exist. There is no suit upon which a trial can be conducted and judgment pronounced. Purporting to hear and determine a suit that has abated is really an exercise in futility. It is a grave error on the face of the record. It is an error of jurisdiction. It can be raised at any time”.***

16. In conclusion, I find that the Applicant has not demonstrated sufficient cause to warrant this court to exercise discretion in his favour to extend time for substitution.

17. I find no merit in this application and the same is dismissed with no orders as to costs.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 21<sup>st</sup> day of October 2021.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Waruta for the Defendant

No appearance for the Plaintiff

No appearance for the 3<sup>rd</sup> party

Steve - Court Assistant