



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 177 OF 2013.**

**ALFRED WANJALA EKIDAPA - (deceased) ..... PLAINTIFF**

**VERSUS**

**PATRICK SITATI WALUKHUCHI .....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**DAVID MAELO BIKETI .....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**DAUDI SITATI WALUKHUCHI.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**MZEE SITATI .....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**AGNES OKWAKU WANJALA ..... APPLICANT**

**RULING**

What calls for my determination is the application by **AGNES OKWAKAU WANJALA** (the Applicant herein) dated 16<sup>th</sup> June 2021 in which she seeks the following orders: -

- 1. Spent**
- 2. That this Honourable Court be pleased to extend time to apply for joinder of the legal representatives of the plaintiff to continue this suit and proceed with execution of the decree.**
- 3. That this Honourable Court be pleased to order that the plaintiff ALFRED WANJALA EKIDAPA (deceased) be substituted with AGNES OKWAKU WANJALA.**
- 4. That the suit be revived.**
- 5. Costs of this application be provided for.**

The application is supported by the Applicant's affidavit also dated 16<sup>th</sup> June 2021 and is also predicated on the grounds set out therein.

The brief facts of the matter are that Judgment was delivered in favour of the plaintiff on 11<sup>th</sup> May 2016 and execution of the decree is pending. That the defendants preferred an interlocutory appeal in the Court of Appeal which is pending. Meanwhile the plaintiff (**ALFRED WANJALA EKIDAPA – now deceased**) died on 27<sup>th</sup> February 2019 but the Applicant did not know about this case until October 2020 when the Respondents' called the deceased's telephone number. It was then that her Counsel advised her that it was necessary to obtain a grant of Letters of Administration so that she could apply for substitution of the deceased. She therefore approached the Chief **NAMUBILA LOCATION** in **BUNGOMA WEST SUB – COUNTY** for a Letter of Identification but he declined. She nonetheless filed for a grant of Letters of Administration on 31<sup>st</sup> October 2019 without the Chief's letter which application was also declined. It was not until 12<sup>th</sup> June 2020 that the Chief issued her with the letter and she obtained the Limited Grant on 12<sup>th</sup> August 2020. That the delay in obtaining the Grant within one year of the plaintiff's death was largely occasioned by her Chief and the Court. It is therefore necessary that she is granted the orders sought for the advancement of justice in this matter.

Annexed to her affidavit are the following documents: -

1. Certificate of Death in respect of the deceased.

2. Letter from KRAIDO ADVOCATE addressed to the SENIOR RESIDENT MAGISTRATE SIRISIA dated 11<sup>th</sup> August 2020.

3. E-mail from COURT OF APPEAL KISUMU addressed Counsel.

4. Letter from the Chief NAMUBILA SUB – LOCATION and addressed to the CHIEF MAGISTRATE BUNGOMA dated 12<sup>th</sup> June 2020.

5. Limited Grant of Letters of Administration issued by PRINCIPAL MAGISTRATE’S COURT SIRISIA to AGNES OKWAKU WANJALA on 12<sup>th</sup> August 2020.

The application is opposed and **PATRICK SITATI WALUKHUCHI** (the 1<sup>st</sup> Respondent) has, with the consent of the other Respondents, averred that the suit herein was filed via a plaint dated 26<sup>th</sup> April 2014 and the Respondents filed a defence. That a Judgment was delivered against them but they filed at the **COURT OF APPEAL KISUMU, CIVIL APPEAL No 106 of 2016** and parties were invited by the Deputy Registrar to file submissions. However, it did not proceed because on 19<sup>th</sup> October 2019, Counsel for the plaintiff wrote to the Deputy Registrar advising that the plaintiff had passed away on 27<sup>th</sup> February 2019 and that he was in the process of having the deceased plaintiff substituted. Despite that undertaking, Counsel for the plaintiff did nothing until 26<sup>th</sup> May 2021 when Counsel for the Respondents was notified by the Deputy Registrar about a ruling that was due for delivery in the Court of Appeal on 24<sup>th</sup> June 2021. Counsel for the Respondents filed an application dated 7<sup>th</sup> June 2021 seeking various orders among them that this suit had abated and therefore the plaintiff’s bill of costs was irregular and unlawful. That application was served upon Counsel for the plaintiff but instead of responding to it, Counsel has filed this application.

That there are no convincing reasons as to why the Applicant did not apply for the limited grant to enable her substitute the deceased plaintiff. That the receipt issued on 31<sup>st</sup> October 2019 shows that the application was filed before the suit had abated. That there is nothing annexed to show that the Magistrate declined to issue the Grant and the Applicant has not explained why she did not file this application immediately she obtained the Grant on 12<sup>th</sup> August 2020. To – date, the Applicant has not even responded to the Respondent’s application dated 7<sup>th</sup> June 2021 questioning the plaintiff’s capacity to file a bill of costs. That the appeal filed at the **COURT OF APPEAL KISUMU** abated on 27<sup>th</sup> February 2020 and the Applicant has not approached this Court with clean hands and equity assists the vigilant and not the indolent. That despite assurances given to the **COURT OF APPEAL KISUMU**, Counsel for the applicant has not moved that Court and granting these orders will be prejudicial to the Respondents. This application is therefore frivolous, vexatious and an abuse of the due process of this Court and should be dismissed with costs.

With the consent of the parties, the application has been canvassed by way of written submissions. These have been filed both by **MR KRAIDO** instructed by the firm of **KRAIDO AND COMPANY ADVOCATES** for the Applicant and by **MR BW’ONCHIRI** instructed by the firm of **OMUNDI BW’ONCHIRI ADVOCATES** for the Respondents.

I have considered the application, the rival submissions and the annexures thereto as well as the submissions by Counsel.

The orders sought by the Applicant are; extension of time for joinder of the Applicant as legal representative of the deceased plaintiff to enable her continue with this case, substitution of the deceased plaintiff by the applicant and the revival of the abated suit.

**Order 24** of the **Civil Procedure Rules** provides for the procedure to be adopted in the case of the death of one or several plaintiffs or of a sole plaintiff. For purposes of this ruling, the relevant provisions are 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.*

2           .....

*3(1) Where one of two or plaintiffs dies and the cause of action does not survive or continues 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 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 that the Court may, for good reason on application extend the time.*

4           -

5           -

7(1) *Where a suit abates or is dismissed under this order, no fresh suit shall be brought on the same cause of action.*

7(2) *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.*” Emphasis mine.

The Applicant herein has made an omnibus application for enlargement of time, joinder and revival of an abated suit. There is nothing wrong with that but first however, the order for extension of time has to be allowed before the other prayers are considered. Therefore, if the prayer for an order of extension of time is denied, that will be the end of the matter.

It is common ground that the plaintiff herein died on 27<sup>th</sup> February 2019 as evidenced by the Death Certificate. This suit therefore abated on 28<sup>th</sup> February 2020. However, as is clear from the provisions of **Order 24 Rule 3(2)** of the **Civil Procedure Rules**, **the Court may, for good reason**, extend the time for the legal representative of the deceased to apply for joinder to be made a party in the proceedings and thereby apply for the revival of an abated suit.

Has the Applicant herein demonstrated good reason why time should be extended? From the circumstances of this case, I am not persuaded that she has done so. While this Court is prepared to accept the reasons why it took the Applicant upto 12<sup>th</sup> August 2020 to obtain the Limited Grant of Letter of Administration ad litem, no reason at all has been offered as to why it took her upto 1<sup>st</sup> June 2021, a period of ten (10) months to file this application. In his submissions, her Counsel has stated as follows: -

*“The Applicant has demonstrated to this Honourable (sic) that she has been vigilant to continue this suit however the delay in obtaining grant and consequent delay in filing the application for extension and substitution was largely occasioned by the Applicant’s local Chief and the Court which refused to issue grant ad litem in the absence of letter of Chief.”*

Ideally, the Applicant ought to have demonstrated good faith by availing the proceedings of the Magistrate’s Court showing that indeed there was a refusal to issue the grant without the Chief’s letter. However, as I have already stated above, I will excuse the delay in obtaining the Grant. What the Applicant has failed to surmount is to explain the delay of ten (10) months in filing this application after she obtained the Grant.

Counsel for the Applicant has also cited the cases of **PHILIP ONGOM .V. CATHERINE OWOTA SCCA 14/2001 2003 KALR** and **BELINDA MURAI & OTHERS .V. AMOS WAINAINA 1979 eKLR** for the proposition that a litigant should not be penalized for the mistakes of his Counsel. That is a correct proposition of the law. However, I do not see any affidavit from Counsel for the Applicant owning up to have committed any error or mistake in filing the application ten (10) months after the Grant was issued. Neither has the Applicant averred the same. This issue has only been raised in submissions. He ought to have filed an affidavit averring to that fact. Submissions are not evidence on which a Court can base a decision – **DANIEL TOROITICH arap MOI .V. MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR** and also **ERASTUS WADE OPANDE .V. KENYA REVENUE AUTHORITY & ANOTHER KISUMU H.C.C.A No 46 of 2007**. In her supporting affidavit, the Applicant has maintained a studious silence as to what happened between 12<sup>th</sup> August 2020 and 1<sup>st</sup> June 2021. It is clear from the law that for the Court to consider whether or not to extend time, there must be **“good reason.”** The Applicant has simply concentrated on what caused the delay in obtaining the grant which explanation I have accepted.

Counsel for the Applicant has also quoted the decision by **KEMEI J** in **JAMES KINUTHIA .V. HEMED MUKUI 2019 eKLR** where the Judge said: -

*“I have seen a number of decisions of Courts in this country where suits have been revived outside the one – year period depending on the circumstances of the case. In all these cases, the decisions were informed by the Court’s cardinal duty to meet the ends of justice.”* Emphasis added.

Counsel also cited the case of **ISSA MWABUMBA .V. ALICE KAVENYA MUTUNGA & OTHERS 2012 eKLR** where **KOOME J.A** (as she then was) invoking the oxygen principles said: -

*“..... I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objective in the administration of justice the goal is at the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya 2010 in particular Article 159.”* Emphasis added.

Reliance was also placed on the decision by **OUNDO J** in the case of **MATHENGE NGATIA NGARI .V. CHRISTOPHER WANGOMBE NGATIA & ANOTHER 2020 eKLR** where the Judge said: -

*“Although the Applicant had not given any explanation for not filing the application within the time stipulated, yet under the circumstances of the prevailing situation, I feel the need to invoke the provisions of Section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya where the Court is enjoined to foster and facilitate the overriding objective of the Act to render justice to the parties in all civil proceedings in a just, expeditious proportionate and affordable cost to the parties.”*

It is clear from all those cases that the Judges were satisfied from the circumstances of each case, that the applications for joinder and revival of the suits were merited. No doubt the Court has a discretion to extend time. But that can only be on **good reason or cause**. The discretion is not at large nor can the order be granted as a matter of course. There must be good reasons or sufficient cause upon which the Court can exercise its discretion. In the case of **THE HON – ATTORNEY GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPEAL No 133 of 2011**, the Court of Appeal observed as follows: -

**“Sufficient cause or good cause in law means: -**

**‘The burden placed on a litigant (usually by Court rule or order) to show why a request should be granted, or an action excused’ see BLACK’S LAW DICTIONARY 9<sup>TH</sup> EDITION page 251.**

**Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.** Emphasis added.

The usual caveat when it comes to the exercise of discretion by a Court is that it must be exercised judiciously, without caprice or whim and on sound reasoning. The onus is therefore always on the party who has approached the Court to exercise its discretion in his favour to place before it sufficient material on which it can exercise such discretion. Evidence is the food on which discretion feeds. Therefore, without evidence, discretion is starved and cannot flourish. All the cases that counsel for the Applicant has referred to have been determined on their own peculiar circumstances. The circumstances of this case are that between 12<sup>th</sup> August 2020 when she obtained the Grant and 1<sup>st</sup> June 2021 when she filed this application, nothing has been placed before me in the form of evidence to explain what prevented the Applicant from approaching this Court for the orders which she now seeks. In the case of **REBECCA MIJIDE MUNGOLE & ANOTHER .V. KENYA POWER & LIGHTING COMPANY LTD 2017 eKLR** which has been cited by Counsel for the Respondents, the Court of Appeal stated thus: -

**“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.”**

In the circumstances of this case, it is not about the Applicant’s explanation not being **“reasonable and plausible.”** It is about there being no explanation at all by the Applicant as to what she was doing during the ten (10) months from 12<sup>th</sup> August 2020 to 1<sup>st</sup> June 2021. In terms of **Order 24 Rule 3(2) of the Civil Procedure Rules**, not only is there no **“good reason”** to warrant the exercise of my discretion in her favour. There is no reason at all which has been offered. In the circumstances, it will be a travesty of justice to grant any of the orders sought.

The up – shot of all the above is that the Notice of Motion dated 16<sup>th</sup> June 2021 is devoid of merit. It is accordingly dismissed with costs.

**BOAZ N. OLAO.**

**J U D G E**

**30TH NOVEMBER 2021.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF NOVEMBER 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**BOAZ N. OLAO.**

**J U D G E**

**30TH NOVEMBER 2021.**

**Explanatory Notes: -**

The ruling was first due on 29<sup>th</sup> July 2021 but the Court Assistant who was on duty on 21<sup>st</sup> June 2021 erroneously captured the matter’s next activity in the CTS as coming up for hearing on 23<sup>rd</sup> August 2021 before the Deputy Registrar. A new ruling date was then given as 18<sup>th</sup> October 2021 but I was un – well and out of the station.

The delay is regretted.

**BOAZ N. OLAO.**

**J U D G E**

30TH NOVEMBER 2021.