



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 980 OF 2015

HANNAH W. MWANGI.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF NAIROBI

(formerly CITY COUNCIL OF NAIROBI)1ST DEFENDANT

CHIEF LAND REGISTRAR2ND DEFENDANT

SINOHYDRO TIANJIN ENGINEERING COMPANY LTD.....3RD DEFNDANT

RULING

1. The Application dated 3/07/2020 filed under Order 1 Rule 10, Order 8 Rule 3 and 4, Order 24 Rules 3(1) & 7(2) of Civil Procedure Rules, Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling legal provisions seeks the following Orders: -

1. THAT this honourable court be pleased to revive this suit that abated one year after the death of the Plaintiff now that there is a confirmation of the duly appointed legal representative of the Plaintiff's estate.

2. THAT following revival of this suit, one PAUL MWAURA MWANGI, the duly appointed legal representative of the deceased Plaintiff's estate, be made a party to this suit as a substitute for the Plaintiff now deceased so as to continue representing the deceased's interest in the matter.

3. THAT upon revival and substitution of the deceased in this matter with her legal representative, this honourable court be pleased to grant leave to the deceased's legal representative to amend its Plaint accordingly to reflect the substitution and be at liberty to incorporate any new facts if necessary and as shall be directed.

4. THAT the Defendants to be at liberty to amend their Defence if necessary, following the substitution and amendment as the court shall direct.

5. THAT costs of this application be provided for.

2. The 3rd Defendant herein opposed this application vide a Grounds of Opposition dated 1st November 2021 seeking the court to dismiss the Application with costs.

The Applicant's Case

3. The grounds of the Application are cited at the foot of the Application, and it is further grounded on the Supporting Affidavit sworn by Paul Mwaura Mwangi, on 3rd July 2020.

4. The Applicant avers that the Plaintiff in this suit passed on some time on 12th March 2018 during the subsistence of this suit. That the Plaintiff (now deceased) is the Applicant's mother who died intestate on the 12th March 2018 and letters of administration issued to him by this Honourable Court on the 7th December 2018 and confirmed on the 24th February 2020.

5. It is the Applicant's contention that it was not until 7th December 2018 that a grant was issued to him, and confirmation thereof done on the 24th February 2020 by the court.
6. He avers that by the time the Grant was being confirmed, it was more than one year following the death of the plaintiff which meant that this suit by dint of the law had abated.
7. The duly appointed legal representative of the Plaintiff's estate is intent on pursuing the deceased's interest in this matter.
8. The Applicant states that his mother, the plaintiff, instituted this suit against the defendants herein seeking orders enumerated in her amended plaint herein but before the suit was heard and finally determined she passed on.
9. The Grant of letters of Administration intestate was duly issued to the Applicant on 7th December 2018, but he wanted the same to be confirmed prior to making this application just in case there was an objection to the Applicant being confirmed as the legal representative of the estate of the Applicant's mother.
10. The confirmation and a certificate thereof were made on the 24th February 2020, more than 1 year since the death of the Plaintiff and the Applicant moved to promptly make this application for revival of the suit and substitution as sought in this application.
11. At the time the Grant was being confirmed, the suit had by dint of law abated and now wish to pursue the late plaintiff's interest as her duly confirmed legal representative of her estate.
12. The Applicant seeks to have his names substituted in place of his late mother in this suit and amend it accordingly to reflect and capture the current situation as far as the parties are concerned and the subject matter on the ground.
13. The Applicant avers that it is imperative that the suit be revived, substitution and amendment be done to capture the prevailing status as far as the subject matter is concerned.

The Defendant's case

14. The 1st and 2nd Defendants have not filed a response to this Application.
15. The 3rd Defendant has opposed this Application seeking that the suit be dismissed with costs on the following grounds: -
 - i. *The Applicants have not demonstrated sufficient cause of grounds upon which the Court can grant the orders sought.*
 - ii. *The Applicants have not met the legal threshold for grant of the reliefs being sought.*
 - iii. *That the suit was filed in the year 2015 and since then, the matter has never proceeded for hearing. It is more than a year since the Plaintiff died in the year 2018 on 12th of March 2018. The more than one-year delay is in contravention of Order 24 Rule 3 (1) of the Civil Procedure Rules, 2010 and the Applicant has not sought for the extension of time for filing the instant application.*
 - iv. *That the Applicant's Advocate has attended court severally between the year 2018 and 2020 and has never disclosed to the Court that the Plaintiff was deceased.*
 - v. *That there is no reasonable explanation for the inordinate delay in substituting the Plaintiff, since there are other mechanisms such as obtaining the grant of letters of administration ad litem which has not been sought.*
 - vi. *That the directions of this Honorable Court should only be exercised in favour of a diligent party and not the indolent.*
 - vii. *The Application is incompetent, bad in law and an abuse of the Court process.*

Submissions

16. The parties' advocates did not file any written submissions, but a Ruling date was reserved.

Issues for determination

17. Having considered the Application, the Supporting Affidavit, the 3rd Defendant's Grounds of Opposition, I find that there is only one issue coming up as the issue for determination before this court:-

a. Whether the applicant established sufficient cause for failing to continue with the suit after the death of the deceased plaintiff.

A. Analysis and Determination

a. Whether the applicant established sufficient cause for failing to continue with the suit after the death of the deceased plaintiff.

18. In the case of Mehta vs Shah [1965] EA 321 the court found that:-

“The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand and on the other hand to protect a defendant after he has lost the evidence of his defence from being disturbed after a long lapse of time.”

19. In M’Mboroki M’arangacha Vs Land Adjudication Officer Nyambene & 2 others [2005] eKLR, in referring to an application for substitution of a party by a Legal Representative, the court stated as follows: -

“But it is clear that such an application seeking that a legal representative be made party in the place of the deceased Plaintiff, must be made within one year. In default of bringing the said application as I understand the rule, the surviving suit shall abate so far as the deceased Plaintiff is concerned. The language used by the legislature is mandatory as the words used are “the suit shall abate.” It is my understanding and view therefore the abatement of the suit is automatic and does not... need an order of the court to abate the suit.”

20. Additionally, an application must be made within one year in default of which the suit shall abate as against the deceased Defendant. In Kenya Farmers’ Cooperative Union Ltd. Vs. Charles Murgor (deceased) t/a Kiptabei Coffee Estate (2005) eKLR, the Court held that a Court of law has no jurisdiction to Order for substitution where the suit has already abated by operation of law nor to hear and determine a suit that has already abated by operation of law.

21. In this case before me, no substitution was made within one year of the death of the Plaintiff. The suit by operation of a statute was mandatorily to abate on expiration of one year after the death of the plaintiff Hannah W. Mwangi. That abatement mandatorily took place on or about 12th March 2019 a year after her death. It took place automatically as a matter of law and because the law says so. It did not require a declaratory order by court to abate. Every day thereafter until the applicant herein filed the application dated 3rd July 2020, the suit did not exist because it had abated.

22. It is however not lost on the Applicant that as a party can apply for leave under Order 24 rule 7(2) to revive a suit which has abated and if he proves to the Court that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit upon such terms as to costs or otherwise as it thinks fit. There must be a revival of suit after abatement before substitution. An Order for substitution without revival would be a nullity in law and of no effect.

23. **Order 24 Rule 7 (2)** of the Civil Procedure Rules gives the court discretionary power to revive a suit that has abated. That section of the law provides as follows: *“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.”*

24. For the court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the Applicant was prevented by a sufficient cause from continuing the suit. In this regard I will refer to the cases of Janet Wangari Mwangi v. James Muchoki Kariuki & Bidco Oil refineries Ltd (2004) eKLR and Rukwaro Waweru v. Kinyutho Ritho & another (2015) eKLR. In the Rukwaro Waweru case, this court held: -

“... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. See H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd – versus- Kassam [1982] K.L.R. 458.

25. In the case of Soni –versus- Mohan Dairy [1958] E. A. 58, it was held that:-

for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period....”.

26. In the case of the Honourable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011 the court held that: *“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, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events.”*

27. In the case at hand, the applicant has explained that he waited for the final grant of letters of administration because he did not want the award challenged in court. The 3rd Defendant submitted that the suit abated by virtue of Order 24 Rule (3) (2) of the Civil Procedure Act.

28. Despite the provisions of Order 24 Rule 3 (2) the court has the discretion to extend time for substitution of parties and revive the suit if sufficient cause is shown. In the case of MATHENGE NGATIA NGARI (Suing for himself and on behalf of his deceased brothers represented by their wives) –Vs- CHRISTOPHER WANGOMBE NGATIA & ANOTHER (2020) eKLR the court held: -

“Although the Applicant had not given any explanation for not filing the Application within the time stipulated, yet under the circumstance of the prevailing situation, I feel the need to invoke the provisions of Sections 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 parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

While it is true that the application was filed after the expiry of the stipulated period yet in my view and noting from the annexures herein attached, the fact that when the original Plaintiff obtained a grant of letters of administration on behalf of the Defendants and subsequently the Applicant obtained the letters of administration ad litem on the 22nd January 2019 and filed this application 14th June 2019 in my humble view is an indication that the Plaintiffs were desirous to have this matter heard and determined.”

29. In the present suit, the limited letters of administration were issued on 7/12/2018 and confirmed on the 24/02/2020. The Plaintiff in this suit passed on some time on 12th March 2018. The Applicant filed this suit on 3/07/2020. Whereas this was a long and inordinate delay the reason advanced for waiting for grant of letters for administration is a process that was not in the control of the Applicant.

30. The Court has power, for good reasons to extend time for substituting the deceased. See generally, *Leo Sila Mutiso v Rose Mwangi, Court of Appeal, Nairobi, Civil Application 251 of 1997 (unreported), Issa Mwabumba v Alice Mutunga & 4 others, Mombasa, Court of Appeal, Civil Appeal 287 of 2006 [2012] eKLR.*

31. This court is now enjoined by article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. *Harit Sheth Advocate v Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR, *Stephen Boro Gittha v Family Finance Bank & 3 others.* Nairobi, Court of Appeal, Civ. Appl. 263 of 2009 (UR 183/09) [2009] eKLR. In a synopsis, the present legal regime frowns upon technical justice.

32. In the case of *JAMES MWANIKI KINUTHIA –V- HEMED IDDI MUKUI & ANOTHER (2019) eKLR* Justice Kemei stated: -

“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. In the case of Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR, Koome, JA invoked those principles when dealing with an application for revival of an appeal “made two years and eight months” after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

“..... 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 objectives 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.”

33. The applicant contends that if substitution is not allowed then the ends of justice will be defeated. Further that whereas the 3rd Defendant may be prejudiced, the prejudice can be remedied in costs.

34. I will accordingly exercise my discretion in fairness to the applicant. But I will place some conditions to ensure the applicant does not go to sleep; and to assuage the Defendants.

35. I therefore make the following orders:-

i) I order that the substitution be and is hereby allowed. The plaintiff herein shall be substituted by the applicant one PAUL MWAURA MWANGI. This order is conditional upon the applicant setting down the suit for directions or hearing within the next sixty days of today’s date. If the applicant fails to meet this condition within the set time, the suit shall stand dismissed.

ii) Leave is granted to Paul Mwaura Mwangi who is the deceased’s legal representative to amend its Plaintiff accordingly to reflect the substitution and be at liberty to incorporate any new facts if necessary and as shall be directed.

iii) THAT the Defendants are at liberty to amend their Defence if necessary, following the substitution and amendment as the court shall direct.

iv) THAT costs of this application shall be in the cause.

It is so ordered

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF NOVEMBER, 2021.

.....

MOGENI J

JUDGE

In the Presence of:

MR. ALBERT KULOBA FOR THE PLAINTIFF

N/A FOR THE 1ST & 3RD DEFENDANTS

MR. CHRISTOPHER OCHIENG FOR THE 2ND DEFENDANT

MR. VINCENT OWUOR - COURT ASSISTANT