



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 517 OF 2017**

**SURINDERPAL SINGH SYAN.....1<sup>ST</sup> PLAINTIFF**

**JASMEER SINGH SYAN.....2<sup>ND</sup> PLAINTIFF**

**SANATUMAR SHATILAL TRIVEDI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**WANYIRI KIHORO.....DEFENDANT**

**AND**

**VANLATA SANATKUMAR TRIVEDI.....APPLICANT**

**RULING**

**Background**

1. Coming up for determination is a Notice of Motion application dated 5<sup>th</sup> May 2021 seeking:

*i. Spent*

*ii. That this Honourable Court be pleased to extend time within which to substitute the 3<sup>rd</sup> plaintiff (deceased) with a legal representative of his estate.*

*iii. That this Honourable Court be pleased to grant the applicant, Vanlata Sanatkumar Trivedi leave to substitute the 3<sup>rd</sup> plaintiff herein, who is since deceased.*

*iv. That the costs of this application be provided for.*

2. This application is supported by the sworn affidavit of Vanlata Sanatkumar Trivedi dated 4<sup>th</sup> May 2021 filed on the grounds that the judgement delivered by Justice Eboso on 5<sup>th</sup> March 2020 was set aside and a retrial ordered through a ruling dated 14<sup>th</sup> January 2021 by the same judge following an application by the defendant. The applicant avers that the 3<sup>rd</sup> plaintiff died on **16<sup>th</sup> March 2019** and the delay in substituting him with his legal representative was occasioned by the fact that the applicant was unaware of the suit at hand. It was deponed that once she learnt of the suit, she moved her advocate to file a grant of letters of administration ad litem.

3. The defendant contested the application through grounds of opposition dated 14<sup>th</sup> May 2021 in which the respondent avers that **Vanlata** (the applicant) was not the wife of deceased 3<sup>rd</sup> plaintiff, that the real wife is one **Varsha**. The defendant also noted that the person named in the **Succession Cause No. E768 of 2021** (Trivedi Sanatkumar Shantilal) was a different person from the 3<sup>rd</sup> plaintiff. He also avers that the grant of administration was obtained falsely since the 3<sup>rd</sup> plaintiff did not die domiciled in Kenya but in the state of Virginia.

4. The respondent added that the deceased representative's affidavit should not be admitted in court since it was sworn out of the Court's jurisdiction in violation of the set statutory requirements for such affidavits. The defendant concluded that the orders sought should not be granted since they were sought 14 months after time for substitution had expired.

5. This application was canvassed orally in a virtual court on 23<sup>rd</sup> September 2021 by the plaintiff and on 28<sup>th</sup> September 2021 by the defendant in open court.

### Applicant's submissions

6. Counsel for the applicant submitted that the 3<sup>rd</sup> plaintiff passed on 11 days after the judgement was entered and only deemed it fit to have the 3<sup>rd</sup> plaintiff substituted following a court order dated 14<sup>th</sup> January 2021 where Justice Eboso set aside the judgement delivered on 5<sup>th</sup> March 2020. Counsel added that the deceased wife was unaware of the case until a retrial was ordered. The letters of administration were granted on 26<sup>th</sup> April 2021 and they filed the current application 7 days later. Counsel submitted that they took 4 months to file the application since court operations had slowed down due to the Covid pandemic.

7. The applicant made reference to the case of Dorothy Mumbua Mutune & another v Design Forte Limited [2021] eKLR in which Chitembwe J. stated that;

***“...In view of the fact that the court is partly to blame for the delay in processing the grant of letters of administration ad litem... The fact that there was a five months delay on the applicant's part before seeking the grant cannot be used as a shield to stop the applicant from joining the proceedings. It is not expected of a legal representative to know all the affairs of a deceased soon after death...”***

8. It was argued that the grounds of opposition raised by the defendant ought to be ventilated in a probate court and this court was not vested with jurisdiction to address those issues raised. Counsel indicated that they were not introducing new persons as claimed by the defendant but there was a spelling error of the names which had not been raised before.

### Defendant's submissions

9. Defendant submitted that the names indicated on the current suit and in the succession case were different, which could be construed to be different persons. He reiterated that deceased's wife was one **Varsha**. The person being introduced in these proceedings is not related to the 3<sup>rd</sup> plaintiff.

10. The defendant also submitted that the sworn affidavit was inadmissible since it was sworn at an unknown place contrary to the law as provided by Section 5 of the Statutory Declaration Act. As such, the application had no legal affidavit. He also indicated that the said applicant was a foreigner and the court had no jurisdiction to entertain her.

11. The defendant concluded by submitting that **Order 24 Rule 3 (2)** of the **Civil Procedure Rules** provided that substitution should be within one year and the applicant had not advanced sufficient reasons as to why it took them 2 years to apply for substitution.

### Analysis and determination

12. This court finds that the issue for determination is:

***Whether this court should extend time to substitute the 3<sup>rd</sup> plaintiff (deceased) with the legal representative of his estate.***

13. The court has considered the grounds of objection raised by the defendant on the point that the applicant is not the true representative of the deceased 3<sup>rd</sup> plaintiff. This court is however in agreement with counsel for the applicant that the court has no jurisdiction to pronounce itself on that issue. The reason being that the issues raised are on matters succession which should be canvassed in a court befitted to address those issues.

14. On the issue of extension of time to substitute deceased parties, **Order 24** of the **Civil Procedure Rules, 2010** provides as follows:

***“Rule 1) The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.***

***Rule 3) (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. (Emphasis mine)”***

15. The applicant (representative of the 3<sup>rd</sup> plaintiff –deceased- estate) in her supporting affidavit stated that there was delay in the process of substitution since she was not aware that there was a case in court. In the submissions, applicant averred that they had not filed for substitution since the 3<sup>rd</sup> plaintiff died after the judgement had been delivered.

16. To ascertain these averments, this court perused the proceedings and noted that the annexed copy of 3<sup>rd</sup> plaintiff's death certificate shows that he died on 16<sup>th</sup> March 2019. The grant availed by applicant dated 26<sup>th</sup> April, 2021 also indicates that 3<sup>rd</sup> plaintiff died on 16<sup>th</sup> March, 2019. In the body of the application, applicants again indicates 16<sup>th</sup> March, 2019 as date of death of 3<sup>rd</sup> plaintiff.

17. On 23<sup>rd</sup> July 2019 Mrs. Akedi and Ms. Ng'ang'a appeared in court for 1<sup>st</sup> – 3<sup>rd</sup> Plaintiffs when the court directed that a hearing notice be served to the defendant through substituted service in the dailies. This court marvels as to why the issue of death of 3<sup>rd</sup> plaintiff was not brought to court's attention at this juncture.

18. It is also noted from the court proceedings that hearing proceeded on 5<sup>th</sup> November 2019 in presence of the 1<sup>st</sup> – 3<sup>rd</sup> plaintiffs advocates and in absence of the defendant where the 1<sup>st</sup> plaintiff - Surinderpal Singh Syan– testified and finally judgement was delivered on 5<sup>th</sup> March 2020 by Justice Eboso in presence of the said advocates, but still, there was no mention of the demise of the 3<sup>rd</sup> plaintiff.

19. Counsel for the applicant in the oral submissions stated that the 3<sup>rd</sup> plaintiff died 11 days after the judgement was delivered, but the court finds that this is not true since it is clear from court’s record that the 3<sup>rd</sup> plaintiff passed on exactly one year before the judgement was delivered and this was only brought to the attention of court on 4<sup>th</sup> May 2021 by Ms. Thongori for the plaintiff after the court had set aside the judgement vide a ruling delivered on 14<sup>th</sup> January 2021. It is clear that counsel for the plaintiffs have been less than candid on this issue.

20. That notwithstanding, it has been settled in law and in jurisprudence that abatement of suits is by operation of the law and not by any doing of the court. Thus, 1 year after the demise of the 3<sup>rd</sup> plaintiff where there was no substitution, the suit automatically abated. For courts to grant extension of time for substitution, it has been held that there should be good reasons presented as set out in the Court of Appeal case of *Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others [2015] eKLR* :

*“But within one year of the death of the Plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit... Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit...*

21. This court is not satisfied by the reasons put forward by the applicant and her advocates because an advocate acts on instructions of the client. Since the client passed away in 2019 when the case was going on, on whose instructions was the counsel acting on? The delay herein has not been explained at all.

22. In conclusion, the court finds that the application dated 5.5.2021 is devoid of merit and the same is dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Ivy Kathungu for the Applicant

Wanyiri Kihoro the Respondent/Defendant

Court Assistant: Eddel Barasa