



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CIVIL SUIT NO. 185 OF 2012**

**MM** (*Person of unsound mind suing thro'*

*his father & next friend MMM*).....**PLAINTIFF**

**-VERSUS-**

**PE**.....**DEFENDANT**

**RULING**

1. This ruling determines the Plaintiff's Notice of motion application dated 4<sup>th</sup> August, 2020. The application seeks the following orders;

**a) That the suit herein be revived;**

**b) That PE the Defendant in this suit being deceased, his legal representatives MM be made party in his place and proceed with the suit;**

**c) That the Plaint herein be amended accordingly to include the administrator as a party;**

**d) That the costs of this application be costs to the cause.**

2. The application is premised on three (3) grounds which are;

*a) that the Defendant is dead and the suit abated at no fault of the Plaintiff.*

*b) that the Defendant's relatives failed to take out letters of administration hence the delay.*

*c) that it will be in the best interest of justice to allow the application to ensure justice is done.*

3. The Application is further supported by an affidavit of MM, the Plaintiff. He deponed that after the death of the Defendant, his legal representatives refused to take out letters of administration on his behalf as a result of which he filed citation proceeding in Cause No. 105 of 2020. He was later issued with limited grant of letters of administration and intends to proceed with this suit on the basis of being a Citor. In his view, it will be in the interest of Justice that the Plaint is amended to reflect the changes and for expeditious disposal of the suit.

4. The matter came up for hearing on 1/12/2020 with Mr. Adede appearing for the Applicant whilst Mr. Olwande appeared for the Defendant. Mr. Olwande, counsel for the demised Defendant was of the view that there was need to ascertain that MM was willing to represent the interests of the Deceased/Defendant to avoid condemning the Defendant without first hearing him. In response, Mr. Adede submitted that there was citation cause with regard to this matter and the Cittee, the wife to the deceased Defendant, failed to enter appearance. The Citor was then granted leave to apply for letters of administration and has obliged with those directions.

**The Determination**

5. This is an application where the Applicant is seeking for various reliefs namely; substitution of the deceased Defendant, revival and reinstatement of the case which abated by operation of the law and the extension of time in prosecuting the suit. The issues for determination therefore are, **whether the Applicant has established sufficient grounds for granting of the order for substitution outside the one-year statutory requirement of filing such applications and whether in the circumstances the court can exercise its discretionary power to revive this suit.**

6. It is not in dispute that the Defendant in this suit died on 23/4/2016. On 4/5/2017 the court cited the case against the Defendant as having

abated owing to his demise and parties were directed to take necessary amendments for substitution of the Defendant.

7. **Order 24 Rule 4 of the Civil Procedure Rules** provides as follows:

*“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 subrule (1), the suit shall abate as against the deceased defendant.”*

8. **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:-

*“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.”*

9. It can be gain said that 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.

10. In this case the Applicant has made elaborate explanation as to why there was no substitution of the Defendant in this case. He stated that the Defendant’s relatives failed to take out letters of administration necessitating the filing of the Citation cause and consequently, he was cited as the Administrator of the Defendant for purposes of this suit.

11. The case of **The Honourable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011** was cited in this case for the proposition 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 Blacks Law Dictionary, 9<sup>th</sup> 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.”*

12. Applying the principles in the above case the instant case, there is no doubt in my mind that the Applicant has been truthful with the explanation as to why an application for substitution could not be filed within the stipulated time frame of one year from the death of the Defendant. Most of the delay is attributable to the reluctance by the Deceased’s relatives in applying for letters of administration. The delay therefore cannot be said to have been caused by the Plaintiff but by failure of the citee in failing to apply for letters of administration intestate.

13. I am also of the view that a refusal to grant this application is tantamount to the dismissal of the Plaintiff’s case without hearing it on the merits. This is a draconian act as it would be driving away the Plaintiff from the Judgment seat without being given an opportunity to be heard. In the circumstances before me, I will not punish the Plaintiff/Applicant on account of the failure or reluctance by the Deceased/Defendant’s beneficiaries to participate in this matter.

14. Instead the intrinsic power of this court is invoked as provided for under **Rule 3(8)** of the Practice and Procedure Rules which enjoins the court to make such orders as may be necessary for the ends of justice, as well as the provisions of **Article 159(2) (d) and (e)** of the Constitution 2010, respectively, that obliges a court to administer justice without undue regard to procedural technicalities and to protect and promote the purpose and principles of the Constitution and the application as sought allowed.

15. It is also imperative to note key developments in the lower court since the filing of this case. One of them being that the case claim herein being a road Traffic claim, the same can be heard and determined by the lower court.

16. I therefore order that the case be transferred to the Chief Magistrate’s Court at Mombasa for trial and disposal on **priority basis**. The same to be mentioned before the Chief Magistrate’s Court on a date to be fixed at the registry for allocation before a magistrate competent jurisdiction for hearing and determination.

It is hereby so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 8TH DAY OF FEBRUARY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

**Order**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**JUSTICE D.O. CHEPKWONY**

**JUDGE**