



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCA NO. 004 OF 2020

CHARTERHOUSE BANK LIMITED.....APPELLANT

-VERSUS-

VIJAY KUMAR RATILAL KANTI SHAH1ST RESPONDENT

THE STATUTORY MANAGER OF CHARTERHOUSE BANK LIMITED.....2ND RESPONDENT

(Being an Appeal from the Ruling and for Order of the Chief Magistrate's Court Milimani Commercial Court, Nairobi by Honourable Mrs. L. Gicheha delivered on 21st June 2019)

IN

IN THE CHIEF MAGISTRATE'S COURT

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 9874 OF 2018

VIJAY KUMAR RATILAL KANTI SHAH.....PLAINTIFF

-VERSUS-

CHARTERHOUSE BANK LIMITED(Under Statutory Management).....1ST DEFENDANT

THE STATUTORY MANAGER OF CHARTERHOUSE BANK LIMITED.....2ND DEFENDANT

JUDGMENT

1. Vijay Kumar Shah (the Deceased Plaintiff) died on 3rd December 2017. On appeal is the decision of Hon. Mrs L. Gicheha delivered on 21st June 2019 substituting the deceased Plaintiff with Karishma Shah - Tanna and Dilesh Somchand Bid as Plaintiffs.

2. The impugned decision was in answer to the Plaintiff's application of 15th April 2019. Karishma Shah - Tanna was on 14th November 2018 issued with the certificate of confirmation of grant to the estate of the deceased Plaintiff. It was explained that she was not conversant with the claim and is domiciled in London.

3. In an affidavit filed by Counsel Lipwop Sharon Chepkurui she avers that before his death the deceased and Dilesh Somchand Bid were long business partners and was well versed with facts surrounding the case. Hence the need to be co-joined as Plaintiff.

4. In allowing the Motion the learned Magistrate held:-

“It is not in dispute that the deceased passed on, on the 3rd day of December 2017 and thus any substitution to be done ought to have been sought within one year as provided under Order 24 Rule 3 of the Civil Procedure Rules. Failure of which the said stands as abated.

The issue is whether the Court may enlarge time where the suit had already abated. Under Order 24 Rule 3(2) of the Civil Procedure Rules the Court may extend time for a good reason.

The reason sworn by the Plaintiff is that they had to rectify the grant to include Dilesh Somchand Bid.”

5. The 1st Defendant is dissatisfied with the decision and challenges it on the following grounds:-

1. The learned Magistrate erred in failing to appreciate sufficiently or at all that the 1st Respondent had not shown good cause for the application for extension of time to join the Plaintiff’s legal representative to the suit.

2. The learned Magistrate erred in failing to consider the fact that the grant of representation for the estate of the deceased Plaintiff having been confirmed on the 14th day of November 2018 in any event within the time prescribed under Order 24 rule 3 of the Civil Procedure Rules, no good reason had been established.

3. In holding, without any evidence that the purported rectification of the Grant issued on the 14th day of November 2018 to enjoin Dilesh Somachand Bid, constituted good reason for the delay in making the application for substitution, the Learned Magistrate essentially considered extraneous considerations.

4. The learned Magistrate misdirected herself on the law by substituting the deceased Plaintiff with Dilesh Somachand Bid, a person who had not been appointed the legal representative of the deceased.

5. Having on the one hand rightly concluded that the suit had abated since no Application for substitution had been filed within one year from the date the deceased passed away on the 3rd day of December 2017, on the other hand, the Learned Magistrate fell into grave error by failing to appreciate that in the circumstances, in the absence of an Application for revival of the abated suit under Order 24 rule 7 of the Civil Procedure Rules, the order of substitution is a nullity and of no legal effect.

6. The learned Magistrate erred in law and in fact in failing to take into consideration the submissions of the Appellant.

7. The learned Magistrate erred in law and in fact in arriving at unjustified conclusions and erroneous inferences that the grant of the orders would not occasion the Appellant prejudice.

8. The learned Magistrate completely misdirected herself on the legal principles obtaining to substitution of the deceased Plaintiff and enlargement of time thereby arriving at a wrong decision.”

6. The Statutory Manager of Charterhouse Bank Limited (the 2nd Defendant) supports the Appeal.

7. This Court has taken into account the submissions of counsel and identifies the following to be the issues for determination:-

i. Was the order for substitution ineffectual for failure of the Applicant to specifically seek an order for revival?

ii. Could Bid, who was not an administrator of the estate of the deceased Plaintiff, be properly joined as a Plaintiff in the manner done?

iii. Did the learned magistrate properly exercise her discretion to extend time?

8. Order 24 Rule 3 provides as follows:-

“Procedure in case of death of one of several plaintiffs’ or of sole plaintiff;

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue 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 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. In this matter, the suit had abated by the time of the application (see order 24 Rule 1). In the decision of Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR the Court of Appeal comprehensively discusses the manner in which substitution of a deceased party can be made where the suit has abated. The Court stated:-

“The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to rule 3(2) the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in Said Sweilam (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted.”

10. It is a three stepped process. Time is enlarged. The legal representative joined. Lastly, the legal representative can apply for revival. All three can be sought and allowed in the application. In the alternative, the application for revival can be filed separately.

11. The prayers in the Notice of Motion dated 15th April 2019 are as follows:-

1. THAT the Honourable Court do extend the time for filling this application.
2. THAT Karishma Shah -Tanna and Dilesh Somchand Bid Being the administrator of the estate of Vijay Kumar Shah (deceased) the Plaintiff herein be substituted as the Plaintiffs.

12. The Applicants never sought for revival of the suit and no order in that regard was made. But as I understand the procedure, once the substitution is permitted then it is open for the legal representative to seek revival of the suit. Revival comes after the order for substitution and not vice versa and so the argument by the Appellant that the order for substitution is a nullity because there was no application for revival (and therefore no order in that respect) is without merit.

13. It is common ground that Karishma Shah –Tanna is the personal representative to the Deceased’s estate. As to why Bid needed to be joined as a Co-plaintiff, it was deposed:-

“[3] THAT although the suit is still pending, the Plaintiff’s Administrator Karishma Shah –Tanna is currently domiciled in London.

[4] THAT prior to the Plaintiff’s demise, he and Dilesh Somchand Bid were long standing business partner thus he is well versed with facts surrounding the case and should be substituted in the claim to assist in the prosecution of this case on my behalf.

[5] THAT by a letter dated 5th March 2018 Dilesh Somchand Bid confirmed that he is not opposed to the substitution. Now annexed and marked as “LSC – 1” are a true copies of letter dated 5th March 2018 and email dated 8th November 2018 confirming the same.”

14. At the Appeal the lawyer for the 1st Respondent argues that Karishma Shah –Tanna assigned the prosecution of the suit to Bid. Counsel cites Order 24 Rule 8 which reads:-

“Procedure in case of assignment before final order in suit;

8. (1) In other cases of an assignment, creation, or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of subrule (1).”

15. The Appellant argues, and in the view of this Court correctly, that the personal representative neither invoked the provisions of Order 24 Rule 8 nor sought leave of the Court for the suit to be continued by Bid as an alleged assignee. In addition, the Court could not have granted the leave envisaged under Order 24 Rule 8(if it had been sought) as the suit had not been revived.

16. I now turn to the question whether the Court exercised its discretion judiciously in extending time for the substitution of the personal representative. In considering this issue, I take the approach set out by the Court of Appeal in Mbogo & Another – v- Shah, [1968] EA 93:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

17. The Appellant argues that the Trial Court erred in failing to appreciate that the Applicants had not shown good cause to warrant the grant of the orders for extension of time.

18. The Appellant submits that the personal representative took out letters within the one year statutory period but failed to timeously move Court for substitution. Further, that the reasons given for the delay in filing the application are not plausible. In paragraph 6 counsel Chepkurui had deposed:-

“THAT the delay in filing this application for substitution was not intentional since I had to file an application to rectify the letters of Administration to capture the intention of Dilesh Bid in assisting in prosecution of this case.”

19. In granting the extension of time, the Trial Chief Magistrate reasoned:-

“In the case of Nicholas Salat Vs. IEBC & 7 Others (2014) eKLR, principal of enlargement of time were set out. It was stated that the party who seeks to extend time must lay basis to the satisfaction of the Court. Secondly, whether there will be prejudice occasioned to the Respondent and thirdly whether the Application was brought without undue delay.

I have considered the Application before me I note that the Deceased passed on, on the 3rd day of December 2017, the confirmation of grant was issued on the 14th day of November 2018 when the administrator stated he was not conversant with the claim. They decided to join the said Dilesh Bid, who accepted in the 5th day of March, 2018.”

They then had to rectify the grant and it was issued on 14th day of November 2018. I therefore, note the Applicants made an effort to ensure the Application was made on time and they have therefore given good reason to warrant the granting the Application. I have also considered the Respondent and I find that they will suffer no prejudice by this substitution. The application dated 15th day of April 2019 has merit and is allowed as prayed.”

20. I have to agree with the Appellant that there was no evidence that the grant was rectified to capture the intention of Bid join in the prosecution of the suit. The purported rectified Letters of Administration were not shown to Court. What was shown to Court was the certificate of confirmation of grant issued to Karishma on 14th November 2018 which was within 1 year of the date of death of the deceased. It is also curious that even the date when the rectification was effected is not given. In the absence of proof that there was actual rectification of grant then there may have been no basis for the learned Trial Magistrate Court to attribute the delay to the rectification. That conclusion was on a misapprehension of the fact.

21. Yet it has to be said that the application for extension was made 5 months after the time had lapsed. This delay may not be inordinate, indeed the Appellant does not say it was. Second, the Appellant chose to oppose the application by way of grounds of opposition. Not once does the Appellant state that an order of extension will prejudice it.

22. For the reasons that the delay in bringing the application was not inordinate and the Appellant would not suffer prejudice, this Court would still have come to the same conclusion as the lower Court to extend time for Karishma to be substituted as Plaintiff in place of the deceased Plaintiff.

23. The Appeal succeeds in part. The order allowing Dilesh Somchand Bid to be a Plaintiff is hereby set aside. The Court upholds the decision of the learned trial magistrate allowing substitution of Karishma Shah –Tanna as Plaintiff in place of Vijay Kumar Ratilal Kanti Shah. I also set aside the order of costs made by the lower Court. Each party shall bear its own costs on the Notice of Motion of 15th April 2019 and on this Appeal.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 1ST DAY OF MARCH 2021

F. TUIYOTT

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 17TH April 2020, this Judgment has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Miss Migiro for the Appellant.

Miss Lipwop for the 1st Respondent.

Mr Kivindyo for the 2nd Respondent.