REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 2459 OF 1997

JUMA MUCHEMI.....PLAINTIFF/APPLICANT

VERSUS

WILLIAMS & KENNEDY LIMITED.....1ST DEFENDANT/RESPONDENT

OFFICIAL RECEIVER & PROVISIONAL LIQUIDATOR RURAL URBAN

CREDIT FINANCE LTD (IN LIQUIDATION)...2ND DEFENDANT/RESPONDENT

RULING

(On the Plaintiff's application dated 16th December, 2019).

1. By a Notice of Motion dated 16th December, 2019, the Plaintiff seeks the following two main orders.

   a) **Spent.**

   b) **That the court be pleased to review and or set aside the orders issued on 16th December, 2019 by the honourable court.**

   c) **That costs of the application be in the cause.**

2. The application is supported by the grounds on the face of it and the affidavit of Richard Mutiso, advocate for the Applicant sworn on 16th December, 2019.

3. The background to the application as averred in the Supporting Affidavit is that on the 16th December, 2019, the matter was scheduled for defence hearing and counsel Mutiso was ready to proceed. He was however held up in an adjacent court before Hon. Justice Nyamweya in a matter that the court issued a date, namely Judicial Review NO.349 of 2019- Peter Mutiso v DPP & Another.

4. Mr. Mutiso instructed two advocates to hold his brief and request that the matter be placed aside as he was briefly held up and the court gives time allocation for the hearing. He later learnt that the matter did not proceed, the court having marked it as abated.

5. According to Mr. Mutiso, it was an error on the face of the record to mark the matter as having abated. This was because, by an application dated 13th September, 2019 and filed on 17th September, 2019, the

Plaintiff sought a substitution of the deceased Plaintiff with the Administrators of his Estate.

6. Counsel went on to state that the court registry declined to issue a hearing date of the application on ground that the suit had already been set down for hearing. He did not anticipate an objection to the application which he was hoping to move the court on, on the date of the hearing.

7. Further, that the application was filed within 1 year period pursuant to Order 24 Ruled 3 (2) of the Civil Procedure Rules, and as such, the suit had not abated.

8. That again, under Order 24 Rule 3(2), the requirement is only to file the application within one year; with the court left to grant the substitution. That the deceased died on 8th December, 2018 whilst the application was filed on 17th September, 2018(should read 2019), hence within the time granted by the law.

9. It is urged that the Applicant has a triable case and in any case the deceased had already testified with the matter only remaining for defence hearing. That therefore, justice would only be served by setting aside the orders marking the matter as abated and reinstating the suit.

10. Both counsel for the 1st and 2nd Defendants were duly served with the application but only the 1st Defendant opposed the same by way of Grounds of Opposition dated 17th January, 2020 and a Replying Affidavit sworn by one Ng'ang'a Gicharu, the Managing Director of the 1st Defendant Company on 17th January, 2020.

11. Under the Grounds of opposition, the 1st defendant alludes that the application is fatally defective in form and substance and incapable of supporting the application. That no application was filed by the Plaintiff under Order 24 Rule 3(2) of the Civil Procedure Rules and as such the suit had abated as at 8th December, 2018. That even if the same had been filed, it was not served upon the Defendant and was not as well prosecuted within time as required by the law.

12. That in any case, justice does not tilt in favour of the Applicant who for the last two decades has severally adjourned the hearing to the detriment of bringing the suit to an end.

13. Finally, that there is no error apparent on the face of the record to warrant a review of the orders of the court.

14. The introductory part of the Replying Affidavit largely deals with the background to the suit which in my view is not relevant to the instant applicant. To further emphasize on the Grounds of Opposition, it is stated that on 21st October, 2019, counsel for the Applicant was granted leave to substitute the Plaintiff within 60 days which he failed to do. That on 30th July, the counsel informed the court that the family of the deceased was in the process of acquiring limited grant of letters of administration. Nevertheless, no application for substitution was subsequently made in court and no leave was sought to extend the time within which to file the application.

15. That therefore, on 16th December, 2019, the court correctly made an order that the suit had abated, as the Plaintiff had not been substituted within 12 months. Accordingly, there is no error apparent on the face of the record to warrant the setting aside of the order of the court issued on 16th December, 2019.

16. It is accordingly urged that the application lacks merit and the same ought to be dismissed.

Submissions

17. The application was canvassed before me on 14th December, 2020 by way of oral submissions. Learned Counsel, Mr. Mutiso appeared for the Applicant whilst learned counsel Mr. Omutiba appeared for the 1st Defendant/Respondent. Upon analysizing the said submissions, it is clear that both counsel

emphasized what is contained in the Supporting affidavit on the one hand and the Grounds of Opposition and Replying Affidavit on the other hand.

18. Additionally, Mr. Mutiso submitted that although the Court on 21st October, 2019 gave directions that the substitution of the Plaintiff be made within 60 days, such directives cannot override the clear provisions of Order 24 Rule 3(2) of the Civil Procedure Rules which provide that the application should be filed within one year. That in any event, on 30th July, 2019 the Curt extended the time within which to substitute.

19. Mr. Mutiso submitted that although the case was old, the delay in its disposal had been caused by many factors including the transfer of judges. He thus urged the court to exercise its discretion in the interest of justice and more so noting that the hearing is at an advanced stage, and allow the application.

20. Mr. Omutiba referred the court to written submissions filed on 13th February, 2020 but the court could only trace a list of authorities filed on 17th January, 2020. He however made detailed oral submissions. In his oral submissions, counsel underscored the assertion that the Applicant had not satisfied the threshold for grant of the orders sought pursuant to Order 45 of the Civil Procedure Rules. He supported this by stating that as at 16th December, 2019, there was no application for substitution of the Plaintiff on record. And furthermore, no such application was served upon the 1st defendant as demonstrated by annexture 1 to the supporting Affidavit.

21. Counsel submitted that an interpretation of Oder 24 Rule 3 is that the substitution and not the application ought to be done within one year. The Applicant had accordingly failed to comply and cannot therefore bury under the excuse that there exists an error on the face of the record. Furthermore, counsel for the Applicant had severally declined to comply with the extensions of time granted to do the substitution. As such, time to do substitution lapsed on 21st July, 2019.

22. Counsel added that the failure to comply with Order 24 Rule 3 (2) cannot be termed a technicality that is curable under Article 159 of the Constitution.

23. Further, counsel submitted that the deceased having died on 8th December, substitution should have been made by 7th December, 2019. No such application was on record as at 16th December, 2019.

24. Also, that the application was defective as it was not brought by the legal representative of the deceased. The same case applies to the purported application for substitution annexed to the instant application.

25. Accordingly, Mr. Omutiba urged the court to dismiss the application

26. In rejoinder, Mr. Mutiso submitted that the fact that the application for substitution was not in the court was a mistake that could not be visited on his client. That the court receipt demonstrated that filing was done within time.

27. Counsel conceded that he sought extension of time within which to file the application, but the same could not be done before limited grant of letters of administration were issued. This did not take place until 3rd September, 2019.

28. As relates to the submission that the application was defective, counsel submitted that the application is supported by two affidavits; one by himself and another by a Wanjiku Juma, hence the application was valid as a deceased cannot make a n application.

29. Finally, counsel submitted that the 1st Defendant had not demonstrated what prejudice it was going to suffer if the application was allowed. After all it is the Defendants' case that is yet to be canvassed. He persuaded the court to apply the Constitution to cure any technicality on the record.

Determination

30. The present application is brought under Orders 45 Rule1(1), 24 Rule 3(2) and 51 Rule 1 of the Civil Procedure Rules. Order 51 Rule 1 merely speaks to the form under which the application should be filed. Order 45 Rule 1(1) provides for the threshold for grant of a relief for review of an order or decree.

31. Order 24 Rue 3(2) reads as follows;

> ***"3.*** **Procedure in case of death of one of several plaintiffs or of sole plaintiff.**
>
> ***(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 shall 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."***

32. My reading of sub rule (2) implies that it must read together with sub rule (1) which provides that:

> ***" (1)Where one or 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."***

33. Order 45 Rule 1(1) on the other hand provides:

> ***"1.(1) Any person considering himself aggrieved-***
>
> ***a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***b) By a decree or order from which no appeal is hereby allowed,***
>
> ***And who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record , or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unnecessary delay."***

34. Before I delve into the merit of the review of the order of 16th December, 2019, I find it prudent to first consider whether the Applicant complied with Order 24 Rule 3(2) of the Civil Procedure Rules. Without duplicating the same, my simple understanding of it is that an application for substitution of a deceased Plaintiff should be made within one year of the death of the deceased Plaintiff.

35. In the present case, the Deceased Plaintiff died on 8th December, 2018.This implies that the application for substitution ought to have been filed on or before 8th December, 2019. Record shows that the application for substitution dated 13th September, 2019 was filed in court on 17th September, 2019. No doubt then the Plaintiff was within time in filing the said application.

36. An argument has been raised that the said application was neither on the file record nor served upon the defendants. Whilst that may be correct, again, record shows that an official receipt for filing the application was duly issued by the court. Once the Applicant paid and a receipt issued was a clear testament that the application had reached the court file. The Applicant may not have had control of the

file thereafter.

37. Further, there is no requirement under Order 24 Rule3(2) that service of the application should be done within an year. Nevertheless, it was incumbent upon the Applicant to serve within good time and fast track the hearing of the application. That is a duty the counsel for the Applicant owed the court; to ensure expeditious disposal of the application as an overriding objective of doing justice.

38. It is definitely not disputed that the court severally granted the Applicant's counsel extension of time within which to file the afore stated application for substitution. It is common knowledge that the filing of the application was dependent on the issuance of the limited grant of letters of administration which was not issued until 3rd September, 2019. Counsel then moved expeditiously and by 17th September, 2019 filed the application.

39. I add again that, the law does not also place mandatory requirement of the hearing of the such an application within 1 year. And this must be for good reason; because an Applicant would not have good control of the court calendar on hearing dates. An Applicant may also not dictate how fast the limited grant of letters of administration may issue.

40. I underscore, from my foregoing observations that, the court directives cannot override clear provisions of the law. In my view, the court correctly gave the directions for time frame of filing the application so as to fast track an already old part- heard matter.

41. I have also clearly analyzed the authorities submitted by counsel for the 1st Defendant. Whilst they relate to revival of cases after orders of abatement and the application of Order 24 Rule 3(2), they are not comparable to the instant suit. Just but to refer to one or two of them, the case of Donald **Mwangi Njoroge v Lucy Wanjiku Karanja (legal representative of the late John Mwangi Karanja) [2017]e KLR,** the court correctly found that the application for substitution had been made in error as it was filed 10 years after the death of the deceased when the suit had long abated. Equally, in the case of **Muriithi Ngwenya v Gikonyo Macharia Mwangi& 2 Others [2018]e KLR,** the court ruled that the application for substitution not having been made in time, the Applicant required to revive the suit before moving the court on substitution.

42. This present case is also distinguishable from the other cited cases namely **Rebecca Mijinde Mungole & Another v Kenya Power and Lighting Company Ltd & 2 Others [2017]e KLR** and **Joseph K. Muli & 9 Othes v Deutche Gassallachrft fur tecnisch Zuasmmenarbeit gmbh, Gtz-International Sevices (Gtz-Is) [2017]e KLR.**

43. Having settled the first issue, I now grapple with the question of whether the review prayer is merited. From the wording of Order 45 Rule 1(1) of the Civil Procedure Rules and the respective submissions made, there are only two issues to settle; one whether there was delay in filing the application and two, whether there was an error apparent on the face of the record to warrant a review of the order issued on 16th December, 2019.

***Whether there was inordinate delay in filing the instant application*.**

44. As herein above noted, the grant of the letters of administration was issued on 3rd September, 2019. The application for substitution was filed on 17th September, 2019. There was therefore a delay of only 14 delays which in every respect cannot be deemed to constitute inordinate delay.

Whether the application by the plaintiff is merited on grounds of error apparent on the face of the record.

45. The Plaintiff submits that the order that the suit had abated was made on the mistaken information that the application for substitution was not made within time as required by Order 24 Rule 3(2). This court has already settled this thorny issue. It now behooves that I look at exactly what transpired in court on the

date the order was made.

46. On this date, Miss Njoroge was holding brief for Mr. Mutiso for the Plaintiff. Mr. Njuguna was on record for the 1st Defendant and Mr. Njogu for the 2nd Defendant. The matter was then coming up for defence hearing when Mr.Njuguna informed the court that he was ready to proceed but notified the court the since the application for substitution had not so far been made, the suit had abated. The sentiments were echoed by Mr. Njogu. Miss Njoroge on her part told the court that indeed an application for substitution had been made but not prosecuted.

47. What is clear is that the court did not further enquire into whether indeed the application was on record or even if it had been filed, had not complied with Order 24 Rule 3(2). It immediately made the following order:

> ***"In that case, the suit has abated and there is no suit to be heard."***

46. In the case of ***Nabiswa Wakenya Moses Vs. The University of Nairobi & 2 Others Misc. Application No. 226 of 2016(2019) e KLR***, the court held that an error apparent on the face of the record must be such an error which it must strike one on mere looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

47. Again, in the case of ***Nyamogo & Nyamogo Vs. Kogo [2001] EA 170*** discussing what constitutes an error on the face of the record the court held:

> ***"An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for appeal."***

48. The facts of the present case do speak for themselves. They are those that do not require a long drawn argument to arrive at a determination. They neither present two opinions. They make a clear case. They are self-evident. This is attested by the fact that the application for substitution was already on record as at 16th December, 2019. It was filed within time as provided by Order 24 Rule 3(2) of the Civil Procedure Rules. Although the court was brought to the attention of the fact that the application was on record, no argument was attended to as to whether it complied with Order 24 Rule 3(2). That is to say that the court was not properly informed on the application of this provision as a result of which it made the order it did in error. As Mr. Mutiso rightly submitted, he had sent a counsel to hold his brief who ably did her work. He also had not anticipated an objection to the application and was otherwise ready to proceed with the defence case.

49. There is no doubt then that it was a clear error to pronounce that the suit had abated when in fact it had not. I find no reason not to find for the Plaintiff as doing the contrary would be to drive him out of the seat of justice when in fact the matter is at an advanced stage of hearing. Thus, this is an application that is merited.

50. Finally, it was submitted by counsel for the 1st Respondent that the application was defective because, it was not brought by the legal representative of the deceased but seems to have been filed by the Plaintiff himself whereas he is already deceased. This an untenable argument. The legal representative of the deceased Plaintiff cannot file a fresh suit. Needless to say is that, until such a time she (legal

representative) is duly substituted, she holds no *locus standi* to canvass the case. The best as in this case can obtain is that she swears the supporting affidavit to the application with a view to stating her legal position in continuing with the suit on behalf of the deceased Plaintiff.

51. This task was ably discharged as limited grant of letters of administration were issued to Mary Wanjiku Juma who swore the Supporting Affidavit to the application for substitution. She shall acquire that *locus standi* to prosecute that suit after the application for substitution is heard and determined. The present application on the other hand is supported by the affidavit of the counsel for Plaintiff. No better person could have sworn the affidavit given the circumstances of the case. He needed, as he did, to explain his absence in court on 16th December,2019 when the suit was ordered abated. The submission by the 1st Respondent is therefore unmeritorious and is not hinged on any law.

52. In the upshot, I find that the application dated 16th December,2019 is merited. I give the following orders:

a) The order issued on 16th December, 2019 declaring the suit abated is hereby reviewed by setting the same aside.

b) The said order of 16th December, 2019 is substituted with an order that the suit herein is reinstated.

c) Taking into account the age of this matter, the Plaintiff's application for substitution dated 13th September, 2019 is hereby fixed for hearing on 7th April. 2021.

d) Parties are at liberty to forthwith take a date for the hearing of the defence case.

e) Each party to bear its own costs of this application.

DATED AND DELIVERED AT NAIROBI THIS 10th March, 20121.

G.W.NGENYE-MACHARIA

JUDGE

DELIVERED THIS 10TH MARCH,2021 BY:

A.MABEYA

JUDGE

In the presence of:

1. ..... *for the Plaintiff/ Applicant.*

2. .....*for the 1st Defendant/Respondent.*