



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 252 OF 2012

BETWEEN

PETER KIMANI NENE.....PLAINTIFF

AND

NATION NEWSPAPERS LIMITED.....DEFENDANT

RULING NO. 2

1. The Applicant, Jane Nduta Kimani, has moved the court by the Notice of Motion dated 12th November 2020 brought under **sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Order 24 Rule 3(2)** and **7(2)**, **Order 51 Rule 1** of the *Civil Procedure Rules* seeking the following orders:

- i. THAT the Honourable Court be pleased to extend the time within which the Applicants may be joined in the proceedings herein pursuant to Order 24 Rule 3(2) of the Civil Procedure Rules, 2010.
- ii. THAT the Honourable Court be pleased to admit into these proceedings and substitute the name of the Applicant; JANE NDUTA KIMANI as Plaintiff in the above matter in place of the name of PETER KIMANI NENE Deceased pursuant to “Authority to Act” issued by other administrators; JOHN KARIUKI KIMANI & LILIAN WAIRIMU KARIUKI.
- iii. THAT the Honourable Court be pleased to revive the suit herein that abated on 12th of February, 2018 pursuant to the provisions of Order 24 Rule 7(2) of the Civil Procedure Rules, 2010.
- iv. THAT the Costs of this application be provided for.

2. The application is supported by the Applicant’s affidavit sworn on 12th November 2020. It is opposed by the Defendant/Respondent through Grounds of Objection dated 11th January 2021.

3. The Applicant is a daughter of the Plaintiff (“the deceased”) who died on 12th February 2017. During his lifetime, he was a distributor of the defendant’s newspapers. He claimed damages for breach of contract. After his death, the deceased’s survivors applied for grant of letters of administration in ***Kiambu HC Succession Cause No. 9 of 2018***. The grant of letters of administration intestate was issued to the petitioners therein on 16th October 2018. By that time, the suit had abated on 12th February 2018 pursuant to **Order 24 rule 3(2)** of the **Rules**.

4. The Applicant now seeks an order extending time within which to be joined in these proceedings, being substituted in place of the deceased and revival of the suit. She explains that the delay in filing this application after the delivery of the Ruling dated 12th February, 2020 was as a result of restrictions brought about by the impact of *COVID-19* in the court processes as a whole. She avers that in the event the orders sought herein are not granted, she together with the administrators and other dependants of the deceased as well as the entire estate of the deceased will suffer prejudice.

5. The Applicant states that she been authorized by her siblings and co-administrators **JOHN KARIUKI KIMANI** and **LILIAN WAIRIMU KARIUKI** to make and prosecute the application herein and obtain leave of this Court to subsequently proceed with the

prosecution of the matter above on behalf of the deceased's estate.

6. The Defendant contends that the application is res judicata and an abuse of the process of this Court and therefore ought to be struck out with costs and that the Applicant lacks locus to seek the orders on the face of the said application. The Defendant adds that the application offends the provisions of the **Civil Procedure Rules** and the **Law of Succession Act**.

7. The present application is similar to the one filed by the Applicant and which I struck out by the ruling dated 12th February 2020. The principal reason for striking out the application was that the Applicant lacked capacity to prosecute the application in her own name and on behalf of the Plaintiff as the grant of letters of administration intestate for his estate dated 16th October 2018 was issued to **JOHN KARIUKI KIMANI, JANE NDUTA KIMANI** and **LILIAN WAIRIMU KARIUKI**. Further, that the application was incompetent for the reason that the applicant had failed to apply for extension of time before applying for substitution.

8. The Defendant attacks the application on the ground that the application is res judicata. The principal of res judicata finds statutory basis in **section 7** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides as follows;

7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court

9. The Court of Appeal in **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR** held as follows:

The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

10. Therefore, the Defendant must prove all the above elements conjunctively for the court to conclude that the instant application is res judicata. In this case though I struck out the application as opposed to dismissing it. The essence of the doctrine of res judicata is that the court dealt with the matter on its merits. In **Erick Kirao Muhangi v Hamid Abdalla Mbarak MLD ELC No. 58 of 2012 [2013] eKLR**, Angote J., dealt with this issue as follows;

[19] The words “dismissed” and struck out” are terms of art and are not supposed to be used interchangeably in a Ruling or Judgment. However, more often than not, the terms are used interchangeably by the litigants and the courts.

[20] It is therefore incumbent that when the court is called upon, like in this case, to determine whether a party can file a fresh suit after the first one has been dismissed or struck court, the court should look at the circumstances of each case to arrive at a decision. The mere fact that the trial court uses the words “dismissed” does not expressly mean that a fresh suit cannot be filed if indeed the court meant that the suit should have been “struck out” so as to allow a party to file a fresh suit.

[21] For me to determine if the current suit is res judicata, the only question that I have to ask myself is whether the issues which were before the lower court between the Plaintiff and the Defendant herein were determined by the court. [Emphasis mine]

11. Having struck out the application on the ground that the application was incompetent, it cannot be said that this application is res-judicata as the court did not express itself on the merits of whether the Applicant has made out a case for revival of the suit in the previous application. In the circumstances, I do not agree with the Defendant that the application is res judicata.

12. The remaining issue is whether the application is competent. In the ruling striking out the earlier application, I stated that, “*Only the duly appointed legal representative(s) of the deceased's estate can agitate a cause of action on behalf of the estate.*” I also pointed out that under **section 82(a)** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** it is only the personal representative who can agitate a suit on behalf of the deceased's estate. It provides as follows:

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

- (a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

13. I therefore concluded that:

It follows that the personal representatives, that is, administrators or executors, must act together since it is the grant of representation that gives them authority to sue and do all things in the name of the estate. In this case, the grant of letters of administration intestate for the deceased's estate dated 16th October 2018 was issued to **JOHN KARIUKI KIMANI, JANE NDUTA KIMANI** and **LILIAN WAIRIMU KARIUKI**. I find and hold that the applicant lacks capacity on her own and in her own name to prosecute the application and the suit on behalf of the deceased's estate.

14. In the present application, the Applicant seeks to be substituted as, "*the Plaintiff on behalf of the Deceased's Estate*" on the ground that she, "*[H]as been authorized by the co-administrators to prosecute the application and upon obtaining leave to proceed with prosecution of the suit on behalf of the Deceased's Estate*" [Emphasis mine]. The Applicant has attached to her deposition an undated letter of authority from the co-administrators, JOHN KARIUKI KIMANI and LILIAN WAIRIMU KARIUKI to prosecute the application and suit on behalf of the estate.

15. As I stated in my previous ruling, the power conferred on the administrators is to act jointly in terms of the instrument of appointment, in this case the grant of representation. Further, **section 82(a)** of the **Law of Succession Act** expressly confers on the power to sue on the personal representatives. Such power cannot be delegated to third parties or a single administrator. As I understand, the Applicant wishes to sue, "*on behalf of the administrators of the Estate of Peter Kimani.*" This is impermissible. In **Rebecca Njeri Muturi v Violet Wambui Muturi NRB CA Civil Appeal No. 178 of 2016 [2019] eKLR**, the court cited with approval the following **Musyoka W. M., Law of Succession, Law Africa** at Page. 246

The extent to which personal representatives can delegate their duties is the same as for trustees and is governed by the Trustee Act. Under the said Act, personal representatives may employ an agent to transact any business or do any act in the administration of the estate and may remunerate such agent out of the estate.

Under Section 24 of the Trustee Act, the personal representative can engage an advocate or a bank to arrange the collection of the assets of the estate, discharge of debts and other liabilities, and distribution of the estate. It can also be used to employ an estate agent to sell land forming part of the estate, or to engage a stockbroker to value or sell shares. The provision does not allow personal representatives to delegate any discretion in matters relating to the administration of the estate. The decision making power of the estate remains with the personal representatives and not the appointed agent. The creation of a power of attorney may lead to a delegation of decision making power.

It is clear from the above that the law does not allow personal representatives to delegate any discretion in matters relating to the administration of estates. The power of attorney donated by the Administrators herein to the Respondent has led to the delegation of decision making power.

16. For the avoidance of doubt, the power to sue is imposed on the administrators of the estate by statute. That power cannot be delegated to a third party or to a single administrator. For the reasons I have set out, I am constrained to strike out the application dated 12th november 2020 with costs to the defendant.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2021.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Mr Munene instructed by Akide and Company Advocates for the plaintiff/applicant.

Ms Kemunto instructed by Archer and Wilcock Advocates for the defendant.