



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 1458 OF 2005

VIJAY KUMAR MANDAL.....PLAINTIFF

-VERSUS-

RAJINDER KUMAR MANDAL.....DEFENDANT

RULING

The application dated 31st August 2020 seeks the following orders:-

- 1. That this Honourable Court be pleased to revive the Plaintiff's suit by setting aside the Order of 24th April 2018.**
- 2. That the Honourable Court be pleased to substitute the Plaintiff VIJAY KUMAR MANDAL (Deceased) with SAROJ BALA MANDAL the legal representative of the estate of the deceased.**
- 3. That costs of the Application be provided for.**

The application is supported by the affidavit of Saroj Bala Mandal sworn on 31st August, 2020. The respondent filed a Notice of Preliminary Objection dated 6th October 2020 and a replying affidavit sworn by Shammy Rajinder Mandal on the same date. The application was determined by way of Written Submissions.

Counsel for the applicant submitted that the plaintiff died on 5th November 2014. The cause of action however continued to survive. A grant of probate of the deceased's written will was confirmed on 7th November 2019. The suit was dismissed on 4th May 2019 for non-attendance through a notice issued on 24th April, 2018. Under Order 17 rule (2) (1) of the Civil Procedure Rules. By the time the notice for dismissal was issued, the letters of administration were yet to be issued. The deceased's estate has a surviving interest in the suit as the beneficiaries will be greatly prejudiced if the suit is not reinstated.

It is submitted that the suit abated by virtue of Order 24 Rule (3) (2) of the Civil Procedure Act. The court has the discretion to extend time for substitution of parties and revive the suit if sufficient cause is shown. The deceased's personal representative lives in the U.K and did not have ready access to all the issues relating to the estate in Kenya. The challenges posed by the Covid-19 pandemic and restrictions caused the delay in filing the application. Counsel referred to the case of **MATHENGE NGATIA NGARI** (Suing for himself and on behalf of his deceased brothers represented by their wives) –Vs- **CHRISTOPHER WANGOMBE NGATIA & ANOTHER (2020) eKLR** where the court held:-

“Although the Applicant had not given any explanation for not filing the Application within the time stipulated, yet under the circumstance of the prevailing situation, I feel the need to invoke the provisions of Sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya where the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

While it is true that the application was filed after the expiry of the stipulated period yet in my view and noting from the annexures herein attached, the fact that when the original Plaintiff obtained a grant of letters of administration on behalf of the Defendants and subsequently the Applicant obtained the letters of administration ad litem on the 22nd January 2019 and

filed this application 14th June 2019 in my humble view is an indication that the Plaintiffs were desirous to have this matter heard and determined.”

Counsel for the applicant also relies on the case of **JAMES MWANIKI KINUTHIA –V- HEMED IDDI MUKUI & ANOTHER (2019) eKLR** where Justice Kemei stated:-

“I have seen a number of decisions of Courts in this country where suits have been revived outside the one-year period depending on the circumstances of the case. In all these cases the decisions were informed by the Court’s cardinal duty to meet the ends of justice. In the case of Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others [2012] eKLR, Koome, JA invoked those principles when dealing with an application for revival of an appeal “made two years and eight months” after the death of a party. After setting out the principles that guide the Court in the exercise of judicial discretion, the Judge, in allowing the application for revival in that matter stated:

“..... I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle. Stemming from the overarching objectives in the administration of justice the goal is at the end of day, the Court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the thread that kneads through the Constitution of Kenya, 2010 in particular Article 159.”

On the issue as to whether the suit is time barred by virtue of the operation of Section 4(1) of the Limitation of Actions Act, it is submitted that the subject matter of the suit is immovable property and a deed of settlement was entered into on 18th April, 1996. The suit was filed on 6th December 2005 before the expiry of the limitation period.

It is further contended that the defendant also died on 1st July 2018 and a grant of letters of administration was issued to Nirmal Devi Mandal and Shemmy Rajinder Mandal on 7th March, 2019. The two administrators of the defendant’s estate have not been substituted in this suit and have no locus to defend the application. The firm of Gikandi and Co. Advocates represent these two administrators but the firm of Ransley McVicker & Shaw Advocates represented the deceased defendant. Counsel maintain that Ms Gikandi & Co. Advocates are not properly on record. There is Civil Suit No. 48 of 2015(OS) before the Milimani High Court, Family Division but that dispute relates to rent arrears to the deceased’s estate. Counsel urged the court to condemn the respondent to pay costs.

Counsel for the respondent submitted that the administrators of the estate of the defendant were served with the application on 29th September 2020. The plaintiff’s suit was dismissed on 4th May 2018 and the applicants slept on their rights for six years. The petition for Grant of Letters of Administration was filed in 2018 which is four years later after the plaintiff’s death. No reasons have been tendered for the inaction and non-prosecution of the suit that was filed in 2005. The claim is based on contract and is already time barred under Section 4(1) (a) of the Limitation of Actions Act, Cap 22.

It is further submitted that it is only after the time has been extended that the legal representative can have the capacity to apply to be made a party. Once time has been enlarged then the legal representative can bring an application to be joined in the proceedings. The application is incompetent as it seeks the joinder or revival of the suit without a prayer for extension of time. Counsel referred to the case of **REBECCA MIJIDE MUNDOLI & ANOTHER –VS- KENYA POWER & LIGHTING COMPANY LIMITED & 2 OTHERS (2017)eKLR** where the Court of Appeal stated:-

“A prayer for the revival of the suit cannot be allowed as a matter of course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7 (2) ‘sufficient cause has been broadly and liberally defined, in order to advance substantial justice Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.”

The respondents contend that there has been inordinate delay in making the application. Counsel relies on the case of **JOHN MUTAI MWANGI & 26 OTHERS –V- MWENJA NGURE & 4 OTHER; Civil Application No 126 of 2014** where the Court of Appeal stated:-

“That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”

According to the respondents, even if the deceased’s estate has a claim against the defendant, the said estate has a chance of pursuing the claim in Milimani Family Division Suit No. 48 of 2015(OS).

Counsel urged the court to uphold the Preliminary Objection as the suit abated due to the operation of the law. Similarly, counsel urged the court to condemn the applicants to pay costs.

The notice of preliminary objection raises the following issues:-

1. That the claim by Vijay Kumar Mandal, who died on 5th November, 2014 abated on 5th November, 2015. As such, there cannot be substitution for purposes of an abated claim.

2. That as the suit long abated the prayer for setting aside the alleged order of 24th April, 2018 is totally misguided as the said order was superfluous since the Plaintiff's suit had already long abated.

3. That the suit against Rajinder Kumar Mandal, who died on 1st July, 2018 abated on 1st July, 2019. As such, the application dated 31st August, 2020 which seeks to substitute the Plaintiff with Saroj Bala Mandal is ipso-facto a nullity as there is no suit which can be sustained against Rajinder Kumar Mandal (deceased).

Order 24 rule (1) states that the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. Order 24 3(1) and 3(2) states as follows:-

(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.

(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.

The suit was dismissed by the court on its own motion on 4th May 2018. The plaintiff died on 5th November, 2014. The defendant also died on 1st July, 2018. Shortly after the dismissal of the suit in May, 2018, the defendant passed on. The defendant did not make any application for the dismissal of the suit for want of prosecution before he died. The applicant has obtained letters of administration for the plaintiff's estate and would like to be enjoined in the case. On their part, the respondents also obtained letters of administration for the estate of the deceased defendant. They have not applied formally to be substituted in the name of the defendant. The plaint dated 8th April 2005 relates to real property. Paragraph 3 of the plaint states that the two deceased parties are registered as proprietors as tenants-in-common in equal shares in several listed properties. It is evident that if that claim is ultimately proved, the estate of the deceased plaintiff will benefit from the court's findings. The claim survives the deceased's death. Equally, the estate of the deceased defendant shall benefit from the other half of the disputed property should the court find in favour of the plaintiff. It is in the interest of the respondents that they too be enjoined in the case.

The respondents maintain that the applicant ought to have sought enlargement of time first before seeking to have the suit revived. This is the position taken by the Court of Appeal in the case of **REBECCA MUIDE MUNGOLE & ANOTHER –V- KENYA POWER & LIGHTING COMPANY LIMITED & 2 OTHERS (2017) eKLR** where 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. The learned Judge, supported by the authority of *Joseph Gachuhi Muthanji (supra)* was therefore right in dealing with that aspect of the application in the manner he did.

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in *rule 7(2)* “sufficient cause” has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of *bona fides*, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies

exercising judicial discretion in favour of the applicant.”

Similarly the Court of Appeal in the case of SAID SWAILEM GHEITHAN SAANUM –V- COMMISSIONER OF LANDS (Being sued through the Attorney General & 5 OTHERS) Malindi C.A Civil Appeal No 16 of 2015), stated as follows:-

“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. 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.

Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.

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. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, 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.”

The law allows for revival of suits which have abated. The applicant could not have applied to be enjoined before the grant of letters of administration was issued to him. The initial letters of administration were issued on 14th August 2018 and confirmed on 7th October, 2019. The applicant lives in the United Kingdom. The plaintiff also used to live in the U.K. and died there. It is true that the application has been brought after a long period but the interest of justice calls for the granting of the orders being sought. If the deceased’s estate is lawfully entitled to what the deceased was claiming from the defendant, justice demands that the claim be pursued to its utmost end.

In my view, one need not file a separate application for extension of time and wait for the court to render its ruling before seeking to be enjoined in the case. The prayer for enlargement of time can as well be made in the same application. The current suit is quite unique in that both the plaintiff and the defendant are deceased. The defence dated 16th February, 2006 raises a counterclaim. The defendant died on 1st July, 2018. The counter-claim equally abated after the expiry of one year. If the suit is not revived, the court will be telling the administrators of the two estates to go away and sort out their problems elsewhere.

The respondents contend that the defendant is equally deceased and therefore no claim can be made against him. The normal procedure would have been to cite one of the deceased defendant's family members to apply for letters of administration. The respondents have already taken letters of administration. The applicants herein can apply and have the respondent to be enjoined in the matter. It is true that before being enjoined, the respondents are not parties to the suit. However, I will not strike out the replying affidavit or notice of preliminary objection as it is the applicants who served them. Further, the respondents are the administrators of the defendant's estate and have a claim on the properties which are the subject of the suit. In my view, this matter ought to have been agreed upon so that both parties can take over the positions of the deceased plaintiff and defendant so that the dispute can be determined on merit. The claim was filed in April, 2005 and refers to an agreement entered in April, 1996. The claim is not time barred as it involves land.

I do find that there are good reasons to set aside the order dismissing the plaintiff’s suit as the plaintiff was already dead by the time the case was dismissed. The suit had already abated when it was dismissed. Now that the plaintiff is dead and the applicant has obtained letters of administration, I do hereby enlarge the time for filing of the current application by the same period which has lapsed considering the circumstances of this case. I do find that the application dated 31st August, 2020 is merited and the same is hereby granted as prayed. Costs shall follow.

DATED AND SIGNED AT NAIROBI THIS 4TH DAY OF MARCH, 2021

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S. CHITEMBWE

JUDGE