



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 668 OF 2001**

**LATIMER RUGUARU GACANJA (Suing as Trading as**

**ZOE A TRANSPORTERS LIMITED.....PLAINTIFF**

**VERSUS**

**THE TRUSTEES OF THE LUTHERAN**

**WORLD FEDERATION.....DEFENDANT**

**AND**

**1. PAUL KANG'ORI**

**2. BEN NGUMBA GACANJA.....APPLICANTS**

**RULING**

1) This court is faced with two applications dated 1<sup>st</sup> October, 2018 (*hereinafter referred as '1<sup>st</sup> Application'*) and another dated 11th October, 2018 (*hereinafter referred to as '2<sup>nd</sup> Application'*) brought by plaintiff/applicant. The first application is seeking to substitute the Plaintiff herein whereas the second application is seeking for an extension of time within which to bring the 1st application.

2) I will address the 2<sup>nd</sup> application first since it will determine whether the 1st application will be entertained.

3) The second application is seeking for the following orders *inter alia*;

***i. Spent***

***ii. This honorable court be pleased to extend the time to file the application to substitute the plaintiff from the late Latimer Ruguaru Gacanja (now deceased) to be the administrators of the estate of the Late Latimer Ruguaru Gacanja namely, PAUL KANG'ORI and BEN NGUMBA GACANJA***

***iii. This honorable court on granting prayer no. ii above, to proceed to hear and determine the plaintiff's application dated 1<sup>st</sup> October, 2018 and filed on 2<sup>nd</sup> October, 2018 that seeks the court to substitute the plaintiff with the applicants who are the administrators of the estate of the late Latimer Ruguaru Gacanja, to be deemed to have been filed on time.***

***iv. The costs of this application be provided for.***

4) This application is premised on the grounds that the suit is at the risk of abating by operation of law as the plaintiff died on 21st of September 2017.

5) It is said that the applicants faced logistical challenges in obtaining documents and information necessary to petition for issuance of grant ad litem which they have since been granted.

6) The applicants also stated that their efforts to file an application for substitution were thwarted by the fact that the court file was missing and was only traced on 27th of September, 2018 which prompted the applicants to file the said application on the 1st of October, 2018.

7) It is the applicants' contention that the delay is not inordinate hence excusable and as such should not be visited on the deceased's estate and its beneficiaries.

8) This application was canvassed by way of written submissions which I have considered. The respondent did not put in any response to this application but chose to rely entirely on its grounds of opposition to the 1st application and the submissions therein.

9) The power of court on extension of time is discretionary and is provided for under Order 50 Rule 6 of the Civil Procedure rules as follows;

*“[Order 50, rule 6.] Power to enlarge time.*

*6. Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the Court, the Court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:*

*Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the Court orders otherwise.”*

10) The provision of Order 24 Rule 3 on substitution of the plaintiff also allows the court to extend such time in bringing in an application for substitution and states;

*(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.*

11) Order 24 is further explained in the case of **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 Others Civil Appeal No.16 of 2015 [2015] eKLR** inter alia as follows;

*i. 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.*

*ii. 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.*

*iii. 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. “*

12) Similarly, the grounds for the grant of extension of time were well restated in the case of **Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR** as follows:

*“As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:*

*“... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court*

*to exercise its discretion in favour of the applicant.*

*“... we derive the following as the underlying principles that a Court should consider in exercising such discretion:*

*i. “extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;*

*ii. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;*

*iii. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;*

*iv. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;*

*v. whether there will be any prejudice suffered by the respondents, if extension is granted;*

*vi. whether the application has been brought without undue delay; and.....”*

13) The instant application was filed on the 18<sup>th</sup> of December, 2018. The time for filing the 1st application for substituting the plaintiff expired on the 20<sup>th</sup> of September, 2018. It is barely three months from the date the 1st application should have been instituted.

14) The applicants submitted that the reason the 1<sup>st</sup> application was not filed in time was due to the challenge in tracing the court file. The letter dated 20<sup>th</sup> September, 2018 and that of 26<sup>th</sup> September, 2018 to the Deputy Registrar seeking intervention in tracing the court file is proof enough in support of the assertion that the file was missing. Were it not for that reason, this application would not be here today. I find this to be a reasonable cause for the delay. In my view, the delay is not inordinate and as such excusable. There is no prejudice that will be occasioned to the defendant/respondent in allowing this application.

15) It follows that the 2<sup>nd</sup> application dated 11<sup>th</sup> October, 2018 succeeds with each party bearing its own costs. On granting the order for enlargement of time I hereby order that the application dated 1st of October, 2018 be deemed as properly filed in time and that the court should proceed to hear and determine the aforesaid application.

16) The first application relates to substitution of the plaintiff by the applicants who have a limited grant ad litem. The grounds in support of this application are similar to those of the second application whereof the applicants aver that there were logistical challenges in getting information for purposes of petitioning for letters of administration and that at the time of filing the instant application, the court file was missing.

17) The defendant/respondent on the other hand opposes the said application on grounds that the plaintiff is incapable of substitution by virtue of its description in the main plaint as a limited liability company and the testimony of the deceased during hearing that the plaintiff was his firm and that he was the director who sat in the board of directors with his wife. The defendant contends that the plaintiff being described as a limited liability company is a legal person incapable of being substituted.

18) The defendant/respondent further contends that the suit has already abated by operation of law and as such the application is incompetent and time barred. The defendant further submitted that the suit abated after the 20<sup>th</sup> of September, 2018 when the application had not been instituted.

19) The 1<sup>st</sup> application as well was canvassed by way of written submissions filed by both parties. I have considered the application, the affidavits in support plus the rival submissions made by both parties.

20) Two issues arise out of this application. One being whether the plaintiff is incapable of substitution and, secondly being whether the suit has already abated hence cannot be resurrected.

21) The first issue on the legal capacity of the plaintiff in my view does not stand for the reason that an amended plaint exists which describes the plaintiff as being an adult of sound mind suing as a business man trading under Zoea Limited. The said amendment was done in 2009 which then changed the position from the original

plaint. The amended complaint carries the day.

22) Further that the legal capacity as described by the original complaint is not sufficient proof unless a certificate of incorporation is produced to prove the same. Parties are bound by their pleadings and in this case the amended pleadings. It would be of no sense to amend by discarding some content if the same would be used against a party amending.

23) The second issue relates to whether the suit has already abated by operation of law and as such it cannot be resurrected. This has been overtaken by events as the application for extension of time within which to bring this application has been allowed pursuant to the proviso to Order 24 Rule 3 of the Civil Procedure Rules.

24) The upshot of the foregoing is that the 1<sup>st</sup> and 2<sup>nd</sup> Applications dated 1st October, 2018 and 11th October, 2018 respectively are allowed giving rise to issuance of the following orders;

**i. That the time to file the application to substitute the plaintiff, the late Latimer Ruguaru Gacanja (now deceased) with the administrators of his estate namely, PAUL KANG'ORI and BEN NGUMBA GACANJA is hereby extended**

**ii. That the applicants herein, PAUL KANG'ORI and BEN NGUMBA GACANJA are hereby admitted as plaintiffs thus substituting the late Latimer Ruguaru Gacanja**

**iii. Each party to bear his or her own costs.**

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 13TH DAY OF MAY, 2021.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant