



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 79 OF 2014

DOMIJIC GATHECHA KINYANJUI.....1ST PLAINTIFF

MARY GATHECHA.....2ND PLAINTIFF

-VERSUS-

NATIONAL INDUSTRIAL CREDIT BANK LTD.....1ST DEFENDANT

KIANGAI MACHARIA MWANGI.....2ND DEFENDANT

ANTONY NGUGI NJENGA.....3RD DEFENDANT

MACMILLAN KARANU NYAKIO T/A

TWO BY TWO ENTERPRISES.....4TH DEFENDANT

HANNAH WANJIRU NGUGI.....5TH DEFENDANT

RULING

1) The legal representatives of the estate of **Dominic Gathecha Kinyanjui**, deceased, took out the motion dated 3rd March 2020 whereof they sought for the following orders:

i. That this honourable court be pleased to enlarge time within which to file the application for substitution of the 1st plaintiff.

*ii. That this honourable court be pleased to substitute the 1st plaintiff with the joint administrators of his estate namely **NJAMBI ANGELA GATHECHA, GACHUI KINYANJUI GATHECHA & DOMINIC GATHECHA KINYUA**.*

iii. That costs of this application be provided for.

2) The motion is supported by the affidavit jointly sworn by the four administrators. The quartet further filed a supplementary affidavit they jointly swore also in support of the application.

3) When served with the application, the defendants filed the replying affidavit sworn by Stephen Atenya to oppose the same.

4) When the motion came up for interpartes hearing this court gave directions to have the same disposed of by written submissions.

5) I have considered the grounds set out on the face of the motion and the facts deponed in the rival affidavits plus the written submissions. The applicants averred that they were issued with letters of administration in respect of the estate of Dominic Gathecha Kinyanjui, deceased, on 17th September 2018 which grant was confirmed on or about 23rd July 2019.

6) The applicants also aver that they learnt of the existence of this suit while carrying out their duties as administrators of the deceased's estate.

7) They further aver that the suit survived the deceased and that is why they filed the current application. It is stated by the applicants that

the period within which to substitute the deceased has lapsed hence the prayer for enlargement of time within which to apply for substitution in accordance with the proviso to order 24 rule 3(2) of the Civil Procedure Rules.

8) The applicants further aver that the delay in filing the application for substitution was not intentional. The applicants have stated that they are keen in prosecuting the suit if allowed to substitute the deceased.

9) The 1st, 2nd and 3rd defendants opposed the application arguing that the orders sought cannot be issued because the suit has already abated thus rendering the proposed substitution nugatory.

10) The defendants have also accused the applicants of inordinate delay in filing the application for substitution.

11) Having considered the rival submissions and the material placed before this court, it is not in dispute that the deceased (the 1st plaintiff) passed away on 19th October 2015.

12) It is also not disputed that the no legal representative of the deceased's estate was appointed to substitute him within the stipulated period of one year. The question is whether the court should grant an order for enlargement of time?

13) Under Order 24 rule 2 of the Civil Procedure Rules, a suit shall abate if no application to substitute the deceased party within a year from the date of death. The proviso to Order 24 rule 3 (2) gives the court with unfettered discretion to extend time for a party to apply to be enjoined to the suit to substitute the deceased party for good reasons.

14) It would appear from the aforesaid provision that, though the suit automatically abates if no application for substitution is made within a year, the court has the discretion to enlarge time for a party to make the application so long as such a party provides a good reason. In this case the applicants have stated that they only came to know of this suit after the lapse of the period they were required to make the application for substitution. The defendants did not controvert the assertion by the applicants that they had no knowledge of the existence of the suit until the time given to substitute lapsed.

15) I find the reason advanced by the applicants to be plausible.

The defendants have argued that enlargement of time cannot be granted because the suit has abated.

16) The defendants have further argued that the applicants must first apply to have the suit revived after which they can seek to be enjoined.

17) I think the defendants have misapprehended the point. The applicants must first be enjoined to the abated suit after which they can seek to have the same to be revived. I am convinced that the applicants deserve to be granted an enlargement of time.

18) In the end, I find the motion to be meritorious. It is allowed as prayed. In the circumstances of this suit, I think, a fair order on costs is to order, which I hereby do, that each party meets its own costs.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF JUNE, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendants