



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.559 OF 2018

DOROTHY MUMBUA MUTUNE.....APPELLANT

LEONARD MUINDE MUTUNE.....PROPOSED APPELLANT/APPLICANT

VERSUS

DESIGN FORTE LIMITED..... RESPONDENT

RULING

The application dated 2nd November 2020 and amended on 5th March, 2021 seeks the following orders:-

- 1. THAT this Honourable Court be pleased to grant an extension and/or enlargement of time to file an Application to join the Applicant herein LENARD MUINDE MUTUNE the legal representative of the Appellant herein DOROTHY MUMBUA MUTUNE.**
- 2. THAT the Applicant herein LENARD MUINDE MUTUNE be joined as the legal representative of the Appellant herein DOROTHY MUMBUA MUTUNE.**
- 3. THAT this Honourable Court be pleased to grant the revival of the Appeal.**
- 4. THAT costs of the Application be provided for.**

The applicant's affidavit sworn on 5th March, 2021 supports the application. The respondent filed grounds of opposition dated 11th March, 2021. The application was determined by way of written submissions.

Counsel for the applicant submitted that a memorandum of appeal was filed on 22nd November, 2018 and the record of appeal was subsequently filed on 15th April, 2019. The original appellant passed on 5th August, 2019 due to natural causes. The applicant sought grant of letters of Administration ad litem on 27th January, 2020 but due to delays in the court attributed to the Covid-19 pandemic, a grant was issued on 8th October, 2020 after the one year period. Under the law has lapsed. The applicant soon thereafter filed the application on 2nd November, 2020. The applicant is the deceased's beneficiary and the cause of action survives. Counsel contend that the application is brought under Order 24 of the Civil Procedure Rules. It only took four (4) days after receiving the grant when the current application was filed.

Counsel for the applicant relies on the case of **PETER WANJOHI THUMBI –V- NJOKI KANYURU (2020) eKLR** Oundo J. allowed a similar application and stated:-

“ 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 applicant obtained a grant of letters of administration on the 21st May, 2020 and filed this application on the 21 July, 2020, in my humble view is an indication that she was desirous to have this matter heard and determined.

Order 24 rule 3 (2) of the Civil Procedure Rules provides that the Court may extend time for good reason and as such, whether or not to extend time for a legal representative of the deceased Plaintiff to be made a party to a suit in place of such deceased after the expiry of the prescribed time is a matter that calls for the exercise of the discretion of the Court.

Reference was also made to the case of **REBECCA MIJIDE MUNGOLE & ANOTHER –V- KENYA POWER & LIGHTING COMPANY LTD & 2 OTHERS (2017) eKLR** where the Court of Appeal stated the following:-

"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."

It is submitted further by counsel for the applicant that the applicant should be joined as a legal representative of the deceased appellant and the appeal be revived as provided under Order 24(7) (2) of the Civil Procedure Rules. Reliance is also made to the case of **SAID SWEILEM GHEITHAN SAANNUM -V- COMMISSIONER OF LANDS & 5 OTHERS (2015) eKLR** where the Court of Appeal in Malindi 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 application is vehemently opposed. The respondent's submission covered the grounds of objection filed against the application. Counsel for the respondent contend that the appellant died on 5th August, 2019 and five months later the applicant sought the Grant of Letters of Administration. No reason has been advanced for the delay. The current application was filed on 5th March, 2021 when the appeal had already abated. There is no substantive explanation as to why the court should enlarge the time for enjoining the applicant as the legal representative of the appellant. The applicant has not demonstrated any sense of urgency in substituting the appellant. The laxity on the part of the applicant led to the abatement of the suit. It is urged that the applicant is guilty of laches. Counsel referred to the case of **Said Sweilem(supra)** that was referred to by the applicant. Counsel also relies on **the case of MURIITHI NGWENYA –V- GIKONYO MACHARIA MWANGI & 2 OTHERS (2018) eKLR** where Justice J.G. Kemei declined a similar application after a period of two years.

ANALYSIS AND DETERMINATION

The appellant is said to have died on 5th August, 2019. The applicant is seeking to reinstate the appeal which has abated and substitute himself with the deceased appellant. The record shows that the applicant petitioned for grant of letters of administration *ad litem* on 27th January 2020 and a grant was issued on 8th October, 2020. The application is made pursuant to the provisions of order 24 which states as follows:-

"1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

2. Where there are more plaintiffs or defendants than one, and any one of them dies, and where the cause of action survives or continues to the surviving plaintiff or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

3(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.

7(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.

(2)) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of a bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of

dismissal; and, if it is proved that he was prevented by any sufficient cause from continuing the suit, the court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit.

The plaint before the trial court is dated 11th January, 2017. It seeks payment of several liquidated claims including Kshs.2,692,912 being over payment by the deceased to the defendant, Kshs.9 million being damages for loss of earnings due to breach of contract among other prayers. It is evident that the claim survives the appellant's death as any favourable decision will make the deceased's estate benefit and in turn the beneficiaries who include the applicant will receive their respective shares out of the decree.

The grant was issued on 8th October, 2020. It took over eight months for the court to process the grant which is not a contested matter. Counsel for the respondent contends that the applicant is guilty of laches and that it took over five (5) months for the applicant to seek the grant. In my view, in an ideal situation the petition for a some grant *ad litem* should not have taken that long. The remaining seven (7) months from the date the petition was lodged were sufficient to process it and have the application for substitution made within the one-year period. The prevalence of Covid 19 pandemic cannot be an excuse for the court's failure to process the applicant's petition.

The applicant filed the current application was on 2nd November 2020. It is the applicant's contention that although the grant is dated 8th October 2020, he received it on 28/10/2020 and immediately on 2nd November, 2020 the current application was filed. It is established that the case abated on 19th August, 2020 while the applicant was still pursuing the grant of letters of administration *ad litem*.

Order 24 of the Civil Procedure Rules state that the death of a plaintiff does not cause a suit to abate if the cause of action survive. Similarly, even if the suit abate, that is one year after the plaintiff's death, the same can be revived by the legal representative of the deceased party so long as sufficient reasons are given.

In view of the fact that the court is partly to blame for the delay in processing the grant of letters of administration ad litem, I do find that the applicant has provided sufficient reasons that can trigger the court's discretion to allow his request to extend the time to allow the applicant join the proceedings and also have the appeal revived. The fact that there was a five months delay on the applicant's part before seeking the grant cannot be used as a shield to stop the applicant from joining the proceedings. It is not expected of a legal representative to know all the affairs of a deceased soon after death. I do find that there was no inordinate delay on the part of the applicant in filing the petition for letters of administration. The suit abated on 18th August, 2020 and less than two months later an application for its revival was filed on 2nd November, 2020.

The upshot is that that application dated 5th March, 2020 is merited and is hereby allowed as prayed. Costs shall follow the outcome of the Appeal.

Dated and Signed at Nairobi this 1st day of **July**, 2021.

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S. CHITEMBWE

JUDGE