



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 1 OF 2016

NELLIE WANJIKU NJUGUNA.....1ST PLAINTIFF

FRANCIS NJUGUNA2ND PLAINTIFF

VERSUS

KINGS DEVELOPERS LIMITED1ST DEFENDANT

ALISAGER BATANIWALLA.....2ND DEFENDANT

ZOHER TAHERALI DAWOODBHAI.....3RD DEFENDANT

RULING

1. A summary of the background of this case is as follows: -

- *The plaintiffs herein were wife and husband respectively.*
- *The 2nd and 3rd defendants were Directors of the 1st defendant.*
- *The plaintiffs entered into a Joint Venture Agreement with the 1st defendant company to develop, for sale, thirty-two executive apartments.*
- *It is alleged that the 1st defendant proceeded to construct forty apartments in breach of the terms of the Agreement thus leading to the institution of the current suit.*
- *The suit was scheduled for hearing of 13th November, 2017. However, after the 1st plaintiff passed away on 6th July 2017, the hearing was adjourned. It was agreed that the Advocate for the plaintiffs would file an application to substitute the 1st plaintiff.*
- *The 2nd plaintiff was the personal representative of the 1st plaintiff's estate. However, he also passed away on 1st June, 2018 before substitution.*
- *The plaintiff's advocate learnt of the 2nd plaintiff's demise sometime in December, 2018 and managed to trace the 2nd plaintiff's administrators (**Dennis Charles Njuguna, Nicky Njuguna Mucha and Anthony Andrew Njuguna**) in June, 2019, about a year after his passing.*

2. This ruling is in respect to two applications, namely: -

- a) The application dated 25th June 2019 (hereinafter "**1st application**") wherein the defendants seek orders for costs on the basis that the suit has abated and;
- b) The application dated 27th June 2019(hereinafter "**the 2nd application**") wherein the plaintiffs' personal representatives seek orders to substitute the plaintiffs, to revive the suit and for extension of time.

3. The plaintiffs opposed the 1st application through the replying affidavit of one **Macharia G. Kingori** while the defendants filed the replying affidavits of **Zoher Taherali Dawoodbhai**.

4. Parties canvassed the application by way of written submissions which I have considered. The main issues for determination are firstly, whether the plaintiffs have made out a case for the revival of the suit and substitution of the plaintiffs and secondly, whether the defendants application for costs is merited.

5. Before delving into determining the merits of the two applications, it is worthy to note that a determination of the 1st application will depend on the outcome of the 2nd application. This is to say that the 1st application will be spent should the court allow the revival of the plaintiffs' case through the substitution of the deceased plaintiffs by their personal representatives.

6. Conversely, should the 2nd application be disallowed, then it means that the defendants' prayer for costs following the abatement of the suit will sail through. Order 24 Rule 3(1) of the Civil Procedure (CPR) stipulates as follows: -

Procedure in case of death of one of several plaintiffs' or of sole plaintiff.

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.

7. The plaintiffs' case is that following the death of the 1st defendant on 6th July 2017, the cause of action survived through the 2nd plaintiff until the 2nd plaintiff unfortunately died on 1st June 2018 thus necessitating the substitution of the plaintiffs.

8. Order 24 Rule 3(2) of the Civil Procedure Rules on the other hand stipulates that the substitution of a deceased party be made within one-year failure of which the suit abates. In the present case, considering that the 2nd plaintiff died on 1st June 2018, the suit technically abated on 31st May 2019. The 2nd application was filed on 27th June 2019, 26 days after the abatement of the suit and indeed, the plaintiffs concede that the suit had abated.

9. In **Rebecca Mijide Mungole & Another v Kenya Power & Lighting Company Ltd & 2 Others [2017]** the Court of Appeal set out the requirements for an application for substitution of a deceased where the suit has abated as follows: -

"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 legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as 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."

10. My finding is that the 2nd application has met all the requirement for an application for substitution where the suit has abated as the plaintiffs have not only sought for the enlargement of time before the joinder of the legal representatives to the suit but they have also sought for the revival of the suit.

11. I have considered the defendants' argument that the plaintiffs did not file an application to substitute the 1st plaintiff despite having committed to do so by 15th February 2018. My finding is that the failure, by the 1st plaintiff's advocate, to substitute her by 15th February 2018 was not fatal to the plaintiffs' case as it has not been shown that the 1st plaintiff's cause of action did not continue to the surviving plaintiff.

12. For the reasons that I have stated in this ruling, I find that the application dated 27th June 2019 is merited and I therefore allow it.

13. Having allowed the 2nd application and having noted that its outcome would determine whether or not the defendants are entitled to costs following the abatement of the case, it follows that the 1st application is spent and the orders sought incapable of being granted after the revival of the suit. I will however grant the defendants the costs of both applications.

14. It is so ordered.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Musau for Luseno for Defendant

Court Assistant: Sylvia.