



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC. CASE NO. 186 OF 2017 (FORMERLY HCC NO. 4 OF 2004)**

**CHRISTINE OBULINJI.....PLAINTIFF**

**VERSUS**

**YUSUF GERO AGENGO.....DEFENDANT**

**RULING**

The Plaintiff has brought this application dated 11<sup>th</sup> June 2021 seeking orders that the time within which the application ought to be made for substitution of a deceased party in a suit be and is hereby extended and that Eunice Agengo, being the Nominee and holder of Letters of Administration Ad Litem Limited to representing the deceased Defendant in this suit be and is hereby made a party hereto and the suit herein be and is hereby revived; The costs of this application be provided for.

The application is made on grounds that whereas the law prescribes one year within which an application for substitution of a deceased party should be made, the Estate of the deceased Defendant's inordinate and unwillingness to petition for a grant of letters of administration intestate upon the Defendant's death which occurred on 5<sup>th</sup> February, 2018 compelled the applicant to file Kisumu C.M.C. SUCC. PET. No. 127 of 2019 (herein 'the succession matter') seeking the nomination and issuance of Letters of Administration Ad Litem to EUNICE AGENGO limited for the singular purpose of progressing this suit;

The Succession matter was heard and allowed by the court on the 2<sup>nd</sup> December 2019 albeit the grant issued was erroneously extracted thereby precipitating the filing of a Chamber Summons dated 1<sup>st</sup> March, 2021 seeking rectification and extension thereof. The rectified Grant was issued on 10<sup>th</sup> May, 2021, therefore granting of the orders sought are in the circumstances in the wider interests of justice as it shall facilitate the progression of the suit and the determination of the real question in controversy between the parties.

The application supported by the affidavit of Christine Obulunji who states that she instituted this suit against the Defendant (herein 'deceased') who unfortunately passed on the 5<sup>th</sup> February, 2018. Survivors of the deceased's inordinate delays and unwillingness to petition for a Grant of Letters of Administration intestate of the deceased's estate which would enable the deceased's substitution and eventual progression of this suit stagnated the hearing and determination thereof;

The Plaintiff's efforts to obtain a copy of the deceased's death certificate from the Defendant's family to enable her Advocates to file a motion which would facilitate substitution of the deceased and progression thereof became strenuous.

Sometimes in December, 2019, to her relief, she finally managed to obtain a copy of the death certificate, a document that had evaded her since the demise of the deceased. She immediately had a copy thereof availed to her advocates who prepared a Nomination Petition in Kisumu C.M.C. SUCC. CAUSE. No. 127 of 2019 (herein 'Petition') which was allowed on the 16<sup>th</sup> of December, 2020.

However, there were delays by the Succession Court to extract and issue her Advocates with the Grant and when it eventually did, it indicated her as the person in whose favour the Grant had been issued instead of Eunice Agengo, the Nominee in the Petition and widow of the deceased. On 1<sup>st</sup> March, 2021, the plaintiff's Advocate filed an application under Sections 47 and 54 of the Law of Succession Act seeking rectification of the Grant and extension thereof for a further day from the 1<sup>st</sup> of March, 2021 which was allowed on the 10<sup>th</sup> of May, 2021.

That the inordinate delay and unwillingness of the deceased's survivors to take out a grant, compounded with her inability to obtain a copy of the deceased's death certificate and issuance of an erroneous Grant by the Succession Court, all amount to a sufficient cause prescribed under Order 24 Rule 7 (2) of the Civil Procedure Rules, 2010;

The law does not prescribe the time within which an applicant can apply to court for the revival of an abated suit and that the suit rises critical questions of law and having approached the Honourable Court for redress, it is only fair, just and in the wider interests of Justice that

this application is allowed so she can prosecute her case to its logical conclusions.

The plaintiff believes in the circumstances granting of the orders sought are in the wider interests of justice as they shall facilitate the progression of the suit and the determination of the question in controversy between the parties.

In the replying affidavit sworn by Dickson Anyull Enock, he states that the applicant being an immediate neighbor to the said Yusuf Gero Ageng'o – Deceased knows that the defendant herein died on the 5<sup>th</sup> February 2018. As per the annexure of the applicant's own documents, they obtained Limited Grant way back on 16<sup>th</sup> December 2019. Further to paragraph 3 herein even as at 16<sup>th</sup> December, 2019 the present suit had already abated.

Since the death of the defendant it is now four clean years and the applicant who is an immediate neighbour of the deceased cannot attempt to substitute a party in place of a deceased person for four years after the suit had abated. That this application made in bad faith, it is an abuse of the Court process and same should be dismissed with costs. That the Honourable court lacks jurisdiction to substitute a party in place of a deceased person in a suit which by law has already abated. That in the circumstances the present suit does not exist hence the orders sought in the application cannot be granted.

In the oral submissions, Mr. Mweisigwa argues that the suit abated on 5/2/2019 as the deceased died on 5/2/2018 the estate of deceased commenced succession proceedings later. The petition was filed in December 2019. An order was issued and erroneously extracted. They sought rectification as annexure C.O.4 and COS. The rectification of grant consumed a lot of time. Rectification was made on 10/5/2021. They filed application one month after rectification of grant. It took them a few weeks to file the application because of consultation with their client. No prejudice will be suffered if Eunice Agengo is made a party. The application dated 11/6/2021 should be allowed.

Mr. Anyul argues that the documents before court confirm that the applicant is an immediate neighbor of the deceased and knows the date of death and therefore has no reasons for the delay in coming to court. Moreover, that there was an earlier limited grant given that could have been used for substitution. When the applicant obtained the grant the time for substitution had lapsed by one year 10 months.

I have considered the application in view of the provisions of Order 24 Rule 7 of the Civil Procedure Rules 2010 which provides:

“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.”

I do find that the applicant has explained the reasons for the delay in obtaining letters of Administration ad litem in the estate of the deceased Yusuf Gero Agengo being that there was an error in the grant which was rectified later and that they had a hardship in obtaining the certificate of death. The upshot of the above is that the application is allowed and I do grant orders that the suit herein be and is hereby revived and that the time within which an application ought to be made for substitution of a deceased party in a suit be and is hereby extended and that Eunice Agengo, being the Nominee and holder of Letters of Administration Ad Litem Limited to representing the deceased Defendant in this suit be and is hereby made a party hereto. The costs of this application be in the cause

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 2<sup>nd</sup> DAY OF DECEMBER, 2021**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

**ANTONY OMBWAYO**

**JUDGE**