



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 467 OF 2016

MOSES SINDUU KIVINDU.....APPELLANT

VERSUS

JONATHAN M TELE.....RESPONDENT

AND

JOSTINA MAITHYA KITHOME

ALEX MUEMA MWANGANGI.....APPLICANTS

RULING

INTRODUCTION

1. The Applicants' Notice of Motion application dated 25th October 2019 and filed on 28th April 2019 was filed pursuant to the provisions of Order 51 Rule 1, Order 24 Rule (3)(1) of the Civil Procedure Rules and Sections 95, 1A, IB & 3A of the Civil Procedure Act. It sought the following orders:-

1. THAT this Honourable court be pleased to enlarge time within which to substitute one JOSTINA MAITHYA KITHOME and ALEX MUEMA MWANGANGI as the Respondents/Cross-Appellants herein in place of JONATHAN M TELE (deceased).

2. THAT this Honourable court be pleased to cause one JOSTINA MAITHYA KITHOME and ALEX MUEMA MWANGANGI as the Respondents/Cross-Appellants herein in place of JONATHAN M TELE (deceased).

3. THAT the costs of this Application be provided for.

2. Despite having been served, the Appellant did not file any response in opposition to the present application and/or file any Written Submissions. The Applicants' Written Submissions were dated and filed on 28th October 2019.

3. The Ruling herein is therefore based on the said Written Submissions which the Applicants relied upon in their entirety.

THE APPLICANTS' CASE

4. The Applicants' present application was supported by the Affidavit of the 1st Applicant herein who averred that she was one of the Legal Representatives of the estate of the Respondent (deceased) who passed away on 1st August 2017.

5. The Applicants contended that the deceased was personally following Succession Cause No 1107 of 2018 and that he never involved them. They did not have his advocates' contacts and as a result, they were not able to inform them that the Respondent had passed away to enable them file the requisite application to have him substituted in the Appeal herein.

6. They averred that since the cause of action succeeded the deceased, they could be joined at the Respondent/Cross-Appellants in the Appeal herein so that they could proceed with the Appeal herein.

7. It was their contention that the Appellant would not suffer any prejudice if the application was allowed and thus urged this court to allow the same.

LEGAL ANALYSIS

8. The Applicants relied on the provisions of Order 24 of the Civil Procedure Rules that provides that the death of a plaintiff shall not cause the suit to abate and that where a suit has abated, a plaintiff may apply for an order to revive the suit that has abated or if an order for dismissal has been made if it can be shown that his representative was prevented by sufficient cause from continuing with the suit.

9. They submitted that they had provided good reason why they did not proceed with the Appeal herein. They placed reliance on the case of **Moses Nyachiro Abner vs Peter Bosire Monyenye [2014] eKLR** in this regard.

10. Notably, where no application is made to substitute a defendant who has died within a year of his death, then the suit against such a deceased defendant abates. The said provision of the law is contained in Order 24 Rule 4 of the Civil Procedure Rule, 2010 that provides as follows:-

“Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant”.

11. It is clear from the said Order 24 Rule 7 of the Civil Procedure Rules that a suit that has abated can be revived. The said provision states as follows:-

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.

12. In the view of this court, an appellant or a cross-appellant stands in the same position as a plaintiff. As the present application was not contested, this court was satisfied that the Applicants had not shown that they were prevented from continuing with the Respondent's Cross-appeal against the Appellant herein. In this regard, this court had due regard to the cases of **Leonard Mutua Muteru vs Benson Katela Ole Kantai & Another [2014] eKLR**, **Phillips, Harrison & Crossfield Ltd vs Kassam [19820] EA** and **Charles Mugunda Gacheru vs The Attorney General & Another [2014] eKLR** where the common thread was that a court can allow an application for revival of an abated suit but that such application can be denied if there has been inordinate delay in bringing the said application or if the applicant does not show that he had been prevented by sufficient cause to apply for substitution of a legal representative within a year for the reason that such revival has the potential of unnecessarily prolonging litigation.

13. Accordingly, having considered the affidavit evidence, the Applicants' Written Submissions and the case law that they relied upon, this court came to the firm conclusion that the Applicants had demonstrated that they were entitled to the orders that they had sought. From the time the Respondent died to the time the present application was filed, about two (2) years had passed. This court did not consider the same to have been too inordinate bearing in mind that the Applicants took some time before they could trace the Respondent's advocates who filed the present application.

DISPOSITION

14. For the reasons foregoing, the upshot of this court's Ruling was that the Applicants' Notice of Motion application dated 25th October 2019 and filed on 28th October 2019 was merited and the same is hereby allowed in terms of Prayer Nos (1) and (2) therein. Costs of the application will be in the cause.

15. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF FEBRUARY 2020

J. KAMAU

JUDGE