



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 252 OF 2012

BETWEEN

PETER KIMANI NENEPLAINTIFF

AND

NATION NEWSPAPERS LIMITED.....DEFENDANT

RULING

1. The application for consideration is the Notice of Motion dated 19th November 2018 in which the applicant, Jane Nduta Kimani, has moved the court under **sections 1A, 1B and 3A** of the *Civil Procedure Act* and **Order 51 rule 1** of the *Civil Procedure Rules* (“the **Rules**”) for the following orders:

1. THAT the Honourable Court be pleased to reinstate the suit that has abated on 12th February 2018 pursuant to **Order 24 rule 3(2)** of the **Civil Procedure Rules, 2010**.
2. THAT the Honourable Court be pleased to substitute the name of the applicant JANE NDUTA KIMANI as Plaintiff in the above matter in place of PETER KIMANI NENE – Deceased.
3. THAT costs of the application be provided for.

2. The application is supported by the facts on the face of the motion and the affidavit of Jane Nduta Kimani sworn on 19th November 2018. The applicant is a daughter of the plaintiff (“the deceased”) who died on 12th February 2017. During his lifetime, he was a distributor of the defendant’s newspapers. He claimed damages for breach of contract. After his death, the deceased’s survivors applied for grant of letters of administration in ***Kiambu HC Succession Cause No. 9 of 2018***. The grant of letters of administration intestate were issued to the petitioners therein on 16th October 2018. By that time, the suit had abated on 12th February 2018 pursuant to **Order 24 rules 3(2)** of the **Rules**. The applicant therefore applies for reinstatement of the suit to enable her prosecute the suit to its conclusion.

3. The defendant opposed the application through the grounds of objection and the replying affidavit of Sekou Owino sworn on 9th July 2019. Mr Owino pointed out that this suit was dismissed for want of prosecution on 19th June 2015 and was only reinstated by consent of the parties on 3rd March 2016. The matter was then fixed for hearing on 7th March 2016 but could not proceed as the plaintiff died. Thereafter the court listed the matter for dismissal on 29th May 2018 whereupon the plaintiff’s advocate sought time to file the application for substitution as the suit had abated. The applicant filed application for substitution on 13th June 2018 but withdrew it on 9th July 2019 when it came up for hearing. He pointed that the present application was filed 8 months after the grant of letters of administration for the deceased’s estate was issued on 16th October 2018. Based on those facts, the defendant contended that there was inordinate delay in filing the application of substitution which has not been explained. Mr Owino further deponed that the continued existence of the suit is prejudicial to it as the claim is still a liability in its accounts.

4. Counsel for the both parties made brief oral submissions to support their respective positions set out in the filed depositions. The key issue in this matter concerns the exercise of discretion as it is common ground that this suit has abated under **Order 24 rule 3** of the **Rules**. **Order 24 rule 7** of the **Rules** invoked by the applicant provides as follows:

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. [Emphasis mine]

5. I note from the application, the applicant did not invoke **Order 24 rule 7(2)** of the **Rules** but I do not think this is necessarily fatal. From the respective positions taken by the parties, they were clear that the applicant was seeking to revive the suit despite using the term, “reinstated”. I do not discern any prejudice on the defendant’s part and I am guided by the provisions of **Order 51 Rule 10** of the **Rules** which provides:

10.(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

6. Counsel for the defendant also submitted that the application was incompetent since the applicant did not apply for extension of time before lodging the application for revival or reinstatement of the suit. This submission has considerable merit as it is supported by several decisions of the Court of Appeal. In **Rebecca Mijide Mungole and Another v Kenya Power and Lighting Company Ltd NRB CA Civil Appeal No. 283 of 2015 [2017] eKLR**, the Court of Appeal dealt with the necessity of applying for extension of time to lodge the application for substitute as follows:

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. **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. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. [Emphasis mine]

7. In **Said Sweilam Gheithan v Commissioner of Land (sued through the Attorney General) and 5 Others MLD CA Civil Appeal No. 16 of 2015 [2015]**, the Court of Appeal, after summarizing the provisions of **Order 24** of the **Rules**, observed that:

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. [Emphasis mine]

8. The same position was affirmed by the Court of Appeal in **Joseph Gachuhi Muthanji v Mary Wambui Njunguna NYR CA Civil Appeal No. 34 of 2014 [2014] eKLR**. Following the decisions of the Court of Appeal aforesaid which are binding on this court, it is clear that the applicant has failed to apply for extension of time before applying for substitution or at any rate applying for extension of time in the same application. I therefore find and hold that the application is incompetent.

9. Although the issue was not raised, the application must fail on the fundamental basis that the applicant lacks capacity to agitate the application. Only the duly appointed legal representative(s) of the deceased’s estate can agitate a cause of action on behalf of the estate. This position is supported by **section 82(a)** of the **Law of Succession Act (Chapter 160 of the Laws of Kenya)** which provides that:

82. Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers-

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

10. It follows that the personal representatives, that is, administrators or executors, must act together since it is the grant of representation that gives them authority to sue and do all things in the name of the estate. In this case, the grant of letters of administration intestate for the deceased’s estate dated 16th October 2018 was issued to **JOHN KARIUKI KIMANI, JANE NDUTA KIMANI and LILIAN WAIRIMU KARIUKI**. I find and hold that the applicant lacks capacity on her own and in her own name to prosecute the application and the suit on behalf of the deceased’s estate.

11. For the reasons I have set out, I strike out the application dated 19th November 2018 with costs to the defendant.

DATED and DELIVERED at NAIROBI this 12th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango.

Ms Mwakio instructed by Akide and Company Advocates for the plaintiff/applicant.

Ms Janmohamed instructed by Archer and Wilcock Advocates for the defendant.