



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL SUIT NO. 227 OF 2011**

**NZAU MULEVU (Suing as Legal Representative and Administrator of the estate of  
FRANICS WAMBUA NZAU).....PLAINTIFF/APPLICANT**

**VERSUS**

**DODHIA MOTORS LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ISAACK WANDERI WAWERU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**SUPER BARGAINS.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

This is an application dated 6<sup>th</sup> June, 2019 by way of Notice of Motion under Order 24 Rules 3 (1) and 7 (2) of the Civil Procedure Rules seeking the following orders,

- a. That time be extended for the applicant to apply to substitute the plaintiff.
- b. That the suit be revived.
- c. That the applicant Cyprian Muema Nzau be substituted as the plaintiff.
- d. That the applicant be allowed to amend the plaint in terms of the draft amended plaint and finally,
- e. That costs be in the cause.

The application is supported by grounds set out on the face of the application and an affidavit sworn by Cyprian Muema Nzau. After the filing of the application, the firm of Aquino Advocates came onto record on behalf of the 3<sup>rd</sup> defendant and filed a defence to the proposed amended plaint.

The parties have filed their respective submissions the bottom line being that, the 1<sup>st</sup> and 3<sup>rd</sup> defendants are opposed to the application brought by the applicant herein. I have gone through the entire record with the view to addressing the orders sought by the applicant.

Order 24 rules 3 (1) and 7(2) of the Civil Procedure Rules provide as follows,

**“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).....**

**Provided the court may, for good reason on application, extend the time.**

**7 (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.**

From the spirit and content of the above provisions, it is clear that the orders sought by the applicant herein are dependent on the discretion of the court. Most importantly however, the key words under the said provisions are, “**for good reason**” and “**any sufficient cause**”.

It is generally accepted that the policy of courts is to maintain suits rather than dismissing the same. However, in the present case the suit had abated by way of operation of the law. The court therefore has to address the issue of prejudice that may be occasioned upon the defendants, in the event the suit is revived by way of the orders sought by the applicants herein. The extension of time sought, the revival of the suit, the substitution of the plaintiff and leave to amend the plaint are all intertwined and depend on the discretion of the court.

The applicant Cyprian Muema Nzau has given a chronology of steps he took from the time the plaintiff died, to the time he became aware of the position of the case, and his application to obtain letters of administration.

I observe that, once the advocate for the 3<sup>rd</sup> defendant lodged application to come onto record, a statement of defence was filed alongside that prayer. The 3<sup>rd</sup> defendant may only file a defence after the amended plaint has been accepted by the court. The filing of the defence was in itself an indication that, notwithstanding the suit had abated, the court had jurisdiction to deal with the same.

From the material presented, the applicant has shown ‘**sufficient cause**’ that prevented him from seeking substitution of the plaintiff within the required time – see **Sony vs. Mohan Dairy (1958) EA 58.** The applicant has also shown that he exercised due diligence by moving to apply for letters of administration immediately he became aware that the plaintiff had died. – See **HCCC No. 1661 of 1985 Titus Kirago vs. Jackson Mugo Mathai (2015) e KLR.**

The advocate in this matter cannot be blamed for the circumstances that led to delay in filing the present application. In any case, the explanation offered by the applicant is plausible and cannot be blamed on him.

I have also looked at the nature of the cause of action and the degree of prejudice if any, that may be visited upon the defendants. In my view, this is a case where the merits of the plaintiff’s case and the defence offered by the defendants should be placed before a court for adjudication.

In view of the foregoing, the application succeeds. To avoid any further applications, the orders that commend themselves are as follows;

- a. The suit is hereby revived, time extended to apply and the applicant substituted as the plaintiff herein.
- b. The amended plaint shall be filed within 30 days from the date of this ruling and served upon the defendants in this cause, who shall file their respective defences within 15 days from the date of service.
- c. The costs shall be in the cause.

***Dated, signed and delivered at Nairobi this 7<sup>th</sup> day of May, 2020.***

**A. MBOGHOLI MSAGHA**

**JUDGE**