



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 33 OF 2016**

**ARNOLD MBAABUH.....PLAINTIFF**

**VERSUS**

**SHEIKH MAHMOUD ABDURAHMAN & 4 OTHERS....DEFENDANTS**

**RULING**

***(Application to extend time in order to file an application for substitution; application dismissed.)***

1. The application before me is that dated 26 July 2019 filed by the plaintiff. The application seeks the following main prayers which are prayers (b) and (c) of the application :-

*(b) Time for purposes of making an application to bring in the legal representative or any other person as a defendant to this suit in place of the deceased 2<sup>nd</sup> defendant be enlarged until such time as the executors of that deceased defendant's last will will have granted probate (sic) on their on going Succession Cause to be able to so apply and to amend their defence to align it with their character as legal representatives of the deceased 2<sup>nd</sup> defendant's estate and/or until such legal representatives/executors of the deceased defendant's will give their consent to the application by any other person or renounce their rights to so apply.*

*(c) That in the event of a consent by the executors of that Defendant's estate to any other person to apply for a special grant of probate of the deceased's last will limited for the purposes of being made a party to this suit in the deceased's place or of those executors renunciation of their rights so to apply, time be further extended for a limited period beyond the set 12 months period to enable any other person to apply to be made a party in place of the deceased 2<sup>nd</sup> defendant.*

2. The application is based on various grounds and is supported by the affidavit of the plaintiff/applicant. The grounds are lengthy and tenuous and I see no need of going into them. What I can however discern is that the 2<sup>nd</sup> defendant died on 28 July 2018 and it is claimed that he died testate with two executors, Nileshkumar Mohalal Shah and Guy Spencer Elms, being named in his will. It is averred that there is a grant of probate pending, filed in Succession Cause No. 1619 of 2018, but the grant is yet to be issued. The applicant thus wants time to be enlarged for purposes of making an application to substitute the deceased 2<sup>nd</sup> defendant with his legal representative or executor.

3. I have considered the application. Although various provisions of the Succession Act, Cap 160, have been cited, in my view, this matter falls squarely within the province of Order 24 of the Civil Procedure Act which gives guidance on what ought to happen when a defendant dies. Indeed, Rule 4 provides as follows;

**4. Procedure in case of death of one of several defendants or of sole defendant [Order 24, rule 4.]**

*(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.*

*(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.*

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

4. It will be seen from the above that where a sole defendant dies, and the suit does not continue against the surviving defendants, an application for substitution of the deceased defendant needs to be made within one year or else the suit against the deceased defendant will

abate.

5. The suit herein was commenced by way of a Constitutional Petition. The applicant as petitioner contended to own the land parcel Kwale/Shimoni/406 but that title was instead issued to the 1<sup>st</sup> respondent who transferred it to the deceased 2<sup>nd</sup> respondent. In the petition the applicant principal order was for the cancellation of the title of the deceased. The title holder was the deceased 2<sup>nd</sup> respondent and that cause of action cannot be continued by the other respondents in the suit without their being a representative of the deceased in the matter. So far, one year of death has lapsed and no application for substitution has been made. In essence this suit has now abated.

6. I have not seen anywhere in Order 24 where the Court can suspend the time for the making the application for substitution or extend time for the abatement of a suit. The rules however do provide for the revival of an abated suit, under Rule 7 which is drawn as follows :-

**7. Effect of abatement or dismissal [Order 24, rule 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.*

7. What the above means is that where one can demonstrate that he could not, through sufficient cause, file an application for substitution within one year of death, he can file an application for substitution beyond the one year period, and apply to revive the abated suit. This to me is the provision that the applicant herein needs to fall back on if he wishes to continue the suit against the estate of the deceased 2<sup>nd</sup> defendant. As mentioned, I have seen no law which provides for the suspension of time for abatement or for time to be enlarged as sought in this application till the time when a grant will be made.

8. I therefore do not find merit in this application and it is hereby dismissed.

9. I however make no orders as to costs since none of the other parties opposed it.

10. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 13<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**IN THE PRESENCE OF:**