



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**(Coram: Odunga, J)**

**MISCELLANEOUS APPLICATION NO. 234 OF 2013**

**MADAN MOHAN SINGH VARMA.....1<sup>ST</sup> APPLICANT**

**SUNIT SHER VARMA.....2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**ATHI STORES LIMITED.....RESPONDENT**

**AND**

**REENA VARMA.....APPLICANT**

**RULING**

1. By a Notice of Motion dated 7<sup>th</sup> November, 2018, the Applicant herein substantially seeks orders that she be granted leave to proceed with the matter on behalf of the estate of the 1<sup>st</sup> applicant (**Madan Mohan Varma**) who is now deceased. She also sought that she be substituted in place of the 1<sup>st</sup> applicant **Madan Mohan Varma** (deceased) on behalf of the Estate. There was also a prayer that each party bears own costs of the application.

2. The application was supported by an affidavit sworn by **Reena Varma**, the widow of the deceased. According to the applicant, the deceased passed away on the 5<sup>th</sup> July 2017 and he was one of the directors of the Respondent herein. Since he conducted himself diligently and always acted in the best interest of the company, he instituted these proceedings in order to extricate himself from any liability as one of the directors of the said company against the Respondents. It was disclosed that the said deceased had 12.5% shareholding in the said company.

3. The deponent therefore averred that she intended to replace the deceased in this suit and continue protecting his interest since she had the consent of the executors to do so.

4. The application was however opposed by the Respondent based on the following grounds of opposition:

1. The application is incompetent misconceived and bad in law for having been filed out of time and without the leave of the Court.
2. That the duties of an executor cannot be delegated/donated to someone else since such powers attach personally to the executors appointed by Court.
3. That the cause of action does not survive the deceased and has therefore abated for want of substitution within one year.
4. That the application therefore ought to be dismissed with costs to the Respondent.

5. Apart for the said grounds the Respondent also filed a replying affidavit sworn by its director **Shamit Niranjandass Ghai**, who averred that based on legal advice, an application for substitution should have been made within one year from the death of the 1<sup>st</sup> applicant. Since the 1<sup>st</sup> applicant dies on 5<sup>th</sup> July, 2017, the said application should have been filed by 5<sup>th</sup> July, 2018. However, this application was made 4 months after the time had lapsed and no reason was given why the same was not made within the time prescribed.

6. It was further averred that since the duties of an executor attach personally to the executors appointed by the Court, the same cannot be delegated/donated to someone else. It was further deposed that no party can be substituted in place of a deceased litigant unless the party

seeking to be substituted holds a grant of letters of administration or probate of the estate of the deceased litigant.

7. It was therefore contended that this application has no legal basis and further that the cause of action herein does not survive the deceased and has therefore abated for want of substitution within one year hence the application ought to be dismissed with costs.

#### **Determination**

8. I have considered the application, the affidavits both in support of and in opposition to the application as well as the grounds of opposition.

9. Under section 2 of the *Civil Procedure Act*, “suit” is defined as meaning:

*all civil proceedings commenced in any manner prescribed.*

10. In *Mansion House Ltd vs. John Stansbury Wilkinson Civil Appeal No. 46 of 1953*, the Eastern Court of Appeal held that:

**“In section 2 of the Ordinance “suit” is defined to mean “all civil proceedings commenced in any manner prescribed”. This does not mean prescribed by any written law since “prescribed” is defined by the same rules as “prescribed by the rules” and “rules” are defined to mean “rules and forms made by the Rules Committee to regulate the procedure of Courts”. The Rules Committee is clearly that created by section 81 of the Ordinance. Accordingly a “suit” is any civil proceeding commenced in any manner prescribed by the rules and forms made by the Rules Committee to regulate the procedure of Courts under section 81 of the Ordinance.”**

11. Similarly, in *Salim vs. Boyd and Another [1970] EA 550*, it was held that:

**“Under section 2 of the Civil Procedure Act, a ‘suit’ is defined as ‘all civil proceedings commenced in the manner prescribed’ and prescribed means prescribed by the Civil Procedure (Revised) Rules, 1948. By section 89 ‘the procedure provided in this Act in regard to suits shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction’.”**

12. In *Josephat Kipchirchir Sigilai vs. Gotab Sanik Enterprises Ltd & Others Civil Appeal No. 98 of 2003*, it was held by the Court of Appeal that:

**“The Civil Procedure Act, and rules made thereunder, set out the manner of instituting suits. Order 4, rule 1 provides that every suit shall be instituted by presenting a plaint to the court, or “in such other manner as may be prescribed”. The manner prescribed in those rules include, Summons, Originating Summons, or Motion.”**

13. From the foregoing, it is clear that what is before me is a suit. Accordingly, the *Civil Procedure Rules* apply to these proceedings.

14. Order 24 rule 3 of the *Civil Procedure Rules* provides as follows:

**3. (1) 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) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:**

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

15. In this application, the applicant averred that the deceased applicant passed away on 5<sup>th</sup> July, 2017. The application for substitution, therefore, ought to have been made by latest, 4<sup>th</sup> July, 2018. It was not so made until 8<sup>th</sup> November, 2018. It follows that by operation of law, this suit abated on 5<sup>th</sup> July, 2018. However, the Court has the power to extend time. In my understanding the time which the court is empowered to extend, is the time within which an application under subrule (1) aforesaid may be made. Order 50 rule 6 of the *Civil Procedure Rules* however provides that:

**Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.**

16. It follows that the instant application can only be entertained if the Court extends the time for filing the same. No such prayer has been sought before me. Instead the applicant seeks “leave” to proceed with the matter. In my view what is contemplated is that the Court if properly moved and if so minded to do, will extend the time and after doing so proceed to consider whether the application for substitution is merited. Leave to proceed with the suit must therefore necessarily follow extension of time otherwise without the time being extended the application for leave to continue with the suit is stillborn.

17. However, the decision whether or not to extend time is an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. As to the principles to be considered in exercising the discretion whether or not to enlarge time in **First American Bank of Kenya Ltd vs. Gulab P Shah & 2 Others [2002] 1 EA 65** the Court set out the factors to be considered in deciding whether or not to grant such an application and these are (i). the explanation if any for the delay; (ii). the merits of the contemplated action, whether the matter is arguable one deserving a day in court or whether it is a frivolous one which would only result in the delay of the course of justice; (iii). Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favourable exercise of discretion in favour of the applicant.

18. In this case as rightly observed by the Respondent, there completely no attempt made at explaining the reason why the application was not made within the prescribed time. Therefore, even if I was minded to deem the application as one seeking extension of time, there is no material upon which this Court would exercise its discretion in favour of the applicant herein. It was therefore held in **Dhanesvar V Mehta vs. Manilal M Shah [1965] EA 321** that:

**“The two questions that have to be considered, however, are first, whether the death of the deceased caused the suit to abate, in which case, there would have been no jurisdiction thereafter to make an order of substitution, and, secondly, if there is jurisdiction, an order ought to be made having regard both to the delay in making application and to the effect which such an order would have in avoiding limitation.”**

19. Again it is admitted that the applicant is not the legal representative of the deceased. The term “legal representative” is defined in section 2 of the **Civil Procedure Act** as meaning:

**a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.**

20. According to **Byamugisha, J** in **Khalid Walusimbi vs. Jamil Kaaya and Attorney General Kampala HCCS No. 526 of 1989 [1993] I KALR 20:**

**“Section 2 of the Civil Procedure Act (Cap 65) defines the words “legal representative” as meaning “a person who in law represents the estates of a deceased person and where a party sues or is sued in a representative character, a person on whom the estate devolves on the death of the party”. In order to acquire a representative character of suing or being sued, the legal representative has to be either an administrator of the estate, executor or personal representative as defined under the Succession Act. Section 3 of the Succession Act (Cap 139) as amended by Decree 22 of 1972 defines personal representative as “the person appointed by law to administer the estate or any part thereof of a deceased person”.”**

21. In **Trouistik Union International and Anor. vs. Mrs. Jane Mbeyu and Anor [1993] KLR 230**, the Court of Appeal extensively addressed itself on this issue and expressed itself as hereunder:

**“The common law is that “action personalis moritur cum persona”, that is, a personal action dies with the person. This rule was, however, to a large extent, supplanted by the Law Reform Act, which Act keeps alive, with few exceptions, causes of action which vest in a person since deceased. Accordingly, to determine who is empowered to enforce that chose in action, for what purposes, and when in point of time, one must look at that Act and allied relevant legislation. One such enactment is the Law of Succession Act, Cap 160. Section 2 of that Act provides in mandatory terms, that unless any other written law provides otherwise, the provisions of the Act “shall constitute the law in Kenya in respect of and shall have universal application to all cases of intestate or testamentary succession to the estates of deceased persons dying after the commencement of the Act”. The Act came into force on the 1<sup>st</sup> July, 1981 and the person whose death gave rise to this suit died on 10<sup>th</sup> April 1984..To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82(a) of the Law of Succession Act, which confers that power on personal representatives and on them alone. As to who are the personal representatives within the contemplation of the Act, Section 3, the interpretative section provides an all inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case did not die testate and therefore, the only person who can answer the description of a personal representative is the administrator of the estate of the deceased. The next inquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? Section 3 says “administrator means a person to whom grant of letters of administration has been made under this Act” ...It is not in doubt that the two respondents who invoked the aid of the court to agitate the cause of action which survived the deceased, were not persons to “whom a grant of letters of administration have been made under the Act” i.e. the Law of Succession Act and they did not even pretend to be such. The only capacity, in which they sought to enforce the deceased's chose in action, was as dependants. At common law, death by itself automatically divests the deceased of his chose in action and the reason for this is because in law, the dead have no rights. But no legal right is without an owner so it must be vested in a person or entity...Our Law of Succession Act, Cap 160, did not provide for the vesting of an intestate's property between the date of death and the grant of letters in any entity. So the suggestion that it will be vested in the courts conforms with the common law notions of the transmission of an intestate's right or estate. It ought to be remembered that all these temporary custodians of an intestate's rights are bare trustees only. But as soon as a grant is obtained, the right or estate vests automatically and by force of the grant in the administrator...We find no warrant for Chesoni, JA's statement that in Kenya an intestate's property is transmissible by the fact of death to his personal representatives whom he equates with his next of kin. Neither do we find any authority in law for his somewhat contradictory statement that the child's property was, on his death, transmitted to and not vested in his father. This statement, with respect, shows some confusion of thought. If death by itself transmitted the estate to his father, why did it not vest it in him? If the chose in action was not vested in him and as it was not his own chose, then what standing did he have to enforce it by action? Clearly, he would not have done it under the Law of Succession Act,**

**Cap 160, or even the *Indian Succession Act*...If letters of administration vest all rights of an intestate in the administrator at the moment of death, what right would the father have left to agitate his son's preserved chose-in-action if some other person than himself, were granted letters of administration? Personal representatives, as known in this branch of the law, are persons who obtain probate or letters of administration and not blood relatives however close. Had the learned Judge in this case applied the clear provisions of the Law of Succession Act, he would have been obliged to reach the conclusion that the deceased's chose in action cannot properly be vested in or be agitated in court by wives qua wives."**

22. In this case the applicant states that she is the widow of the deceased. That may be so. However, without letters of administration or probate, she has no capacity to litigate on behalf of the deceased or his estate simply because she is his wife. She however, contends that she has been authorised by the executors of the deceased's estate to do so. With due respect, only the Court has the power, through issuance of grant of letters of administration or probate to authorise a person to step into the shoes of a deceased person. That power cannot be delegated to the executors. Accordingly, the executors themselves cannot lawfully delegate their power to administer the estate of a deceased person to a third party however close that third party is to the deceased. It follows that this application is devoid of merit. It is hereby dismissed but with no order as to costs.

23. It is so ordered.

**Read, signed and delivered in open Court at Machakos this 7<sup>th</sup> day of March, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Eyasi for Mr Mohochi for the Applicant**

**CA Geoffrey**