



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 261 OF 2015 (O.S)**

**VERONICA WANGECI THEURI.....PLAINTIFF**

**VERSUS**

**ANASTACIA NYANJUI GIKONYO (Sued as the administrator of the  
estate of JOHN N. GIKONYO (deceased) .....DEFENDANT**

**RULING**

1. This ruling is in respect of Amended Notice of Motion dated 24<sup>th</sup> May 2019 filed by John Theuri (applicant). He seeks an order that this suit be revived and upon revival the plaintiff who is now deceased be substituted with himself. The application is supported by an affidavit sworn by the applicant in which he deposed that the plaintiff passed away on 27<sup>th</sup> August 2017 and that he obtained Limited Grant *Ad Litem* in respect of her estate on 9<sup>th</sup> February 2018 to enable him prosecute this case.

2. The defendant opposed the application through her replying affidavit sworn on 29<sup>th</sup> May 2019. She deposed that the application is incurably defective and the orders sought cannot be granted in view of the nature of the case before the court.

3. The application was canvassed through written submissions. It was argued on behalf of the applicant that application has been brought without delay and that the defendant's argument that the application is incurably defective and the orders sought cannot be granted in view of the nature of the case before the court is vague.

4. For the defendant, it was argued that the present application was filed close to 3 years since the plaintiff passed away and that no reason has been given why no application for revival was filed within reasonable time. It was further argued that the applicant has only a limited grant and that if the suit were to succeed the court would not issue a substantive order to the applicant under prayer (b) of the originating summons.

5. I have considered the application, the affidavits and the submissions. There is no dispute that the plaintiff herein passed away on 27<sup>th</sup> August 2017 and that the applicant obtained Limited Grant *Ad Litem* in respect of her estate on 9<sup>th</sup> February 2018 limited for the purpose of prosecuting this case as is manifest from the certificate of death and limited grant exhibited by the applicant.

**6. Order 24 rule 3 of the Civil Procedure Rules provides:**

**(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.**

7. The record herein shows that the applicant filed Notice of Motion dated 18<sup>th</sup> May 2018 seeking substitution. The application was filed on 18<sup>th</sup> May 2018 by which time the suit had not abated. The suit abated on 27<sup>th</sup> August 2018 during the pendency of the application. It seems that was the development that informed the decision to amend the application to seek revival.

8. Order 24 rule 7(2) of the Civil Procedure Rules provides:

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.

9. By virtue of the Limited Grant *Ad Litem* in respect of the plaintiff's estate issued to the applicant on 9<sup>th</sup> February 2018, the applicant is a legal representative of the deceased plaintiff as contemplated by **Order 24 rules 3 (1) and 7(2)**. Further, I note that the initial application dated 18<sup>th</sup> May 2018 was filed about 3 months after letters of administration were obtained. I do not consider that delay to be unreasonable.

10. The defendant also argued that the orders sought should not be granted since the applicant has only a limited grant and not a full grant and that if the suit were to succeed the court would not issue a substantive order to the applicant under prayer (b) of the originating summons. The relevant provisions of **Order 24** do not require the court to enquire into the merits of the plaintiff's case. That is the province of the trial court. Whether or not prayer (b) of the originating summons can be granted to the applicant will be determined in due course. Needless to state, the applicant may very well have in his possession a full grant at the time of trial or judgment. There would be no basis for shutting him out at this stage yet he has met the requirements under the rules.

11. In view of the foregoing, I make the following orders:

a. This suit is hereby revived.

b. The plaintiff Veronica Wangeci Theuri is hereby substituted with John Theuri.

c. The new plaintiff to file and serve an amended plaint to reflect the substitution within 14 days of delivery of this ruling.

d. The defendant to file and serve amended defence, if need be, within 14 days of service of the amended plaint.

e. Costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nakuru this 12<sup>th</sup> day of March 2020.

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Wangari for the applicant

Ms Kipruto holding brief for Mrs Omwenyo for the defendant/respondent

Court Assistants: Beatrice & Lotkomoi