



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 1721 OF 1999

SIRAJ ENTERPRISES LIMITED1ST PLAINTIFF

AHMED YASSIN H.A. AWALE

(The Administrator of the Estate of the

Late HUSSEIN A. AWALE)2ND PLAINTIFF

VERSUS

NDERITU WACHIRA

(RECEIVER & MANAGER OF BULLEY'S

TANNERIES LIMITED (Under Receivership)1ST DEFENDANT

BULLEY'S TRADING (1988) CO. LTD2ND DEFENDANT

DANCAN NDERITU NDEGWA3RD DEFENDANT

JAMES NJENGA KARUME4TH DEFENDANT

RULING

1. This ruling relates to a notice of motion application dated 10th August 2018, brought under the provisions of; Article 159(e) of the Constitution of Kenya 2010, Section 1A and 1B of the Civil Procedure Act, Order 24, Rule 7(2) of the Civil Procedure Rules, and all enabling provisions of law.

2. The Applicant is seeking for orders; that the Honourable court grant an order to revive this suit in relation to the 2nd Plaintiff and the costs of this application be provided for. The application is premised on the grounds on the face of it and an affidavit dated 10th August 2018, sworn by Ahmed Yassin H.A. Awale.

3. He deponed that, he is the biological son and the legal representative to the estate of; the deceased Hussein, A. Awale, and director of the 1st Plaintiff, who passed on 6th August 2013 while domiciled in Kenya. That subsequently he applied for letters of limited grant vide, High Court Probate and Administration Cause Number 2897 of 2014, to take over this matter on behalf of the deceased's estate. The High Court granted him the limited grant ad litem on 17th February 2015. By that time the suit as against the deceased had abated before substitution application was made.

4. He then filed an application to substitute the deceased herein. The application was granted on the 19th October 2017. However he cannot proceed with this suit since it has abated. Therefore it is only just that the suit be revived, as he is keen and desirous of pursuing and prosecuting it to its logical conclusion. He averred that the defendants will not suffer any loss as the suit has not been determined, as it was awaiting the determination of Civil Appeal Number 17 of 2007 which was determined on 8th July 2016.

5. However the application was opposed vide grounds of opposition dated 20th November 2018, whereby the Respondent argued that the application is frivolous, vexatious and an abuse of the court process. That the delay in filing the application is inordinate, inexcusable and indicative of the Applicant's general failure to diligently prosecute the suit.

6. The Respondent argued that the orders sought by the Applicant for revival of the suit are res-judicata having been sought for vide an application dated 20th September 2016 and the court vide its Ruling of 19th October 2017 declined to allow it. Further the application discloses no grounds for exercise of the Honourable court's discretion in favour of the Applicants.

7. The application was disposed of through the filing of submissions. The Applicants submitted that the last application was filed erroneously seeking for leave of the court to revive the abated suit under Order 24 Rule 1, 2 & 3, instead of seeking for a court order under Order 24 Rule 7(2) to revive the abated suit. Therefore, that application dated 20th September 2016 was dismissed due to the error thus prompting the filing of the current application.

8. In considering the facts on record and the evidence provided, the issues before the Honourable court for determination is firstly whether, this application is res-judicata. In that regard the Applicants submitted that the matter at hand is not res-judicata for the reasons stated above.

9. The applicant relied section 7 of the Civil Procedure Act and the case of; Henderson vs Henderson (1843-60) LL E.R. 378, where the court held that;

"...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time"

10. It was submitted that, the doctrine of res judicata was affirmed in the case of; Anthony Raymond Cordeiro & 2 Others vs Adrian Noel Carvalho & 5 others (2014) eKLR, where the court stated that:-

".....the rule then is that, once an issue has been raised and distinctively determined between the parties, then, as a general rule, neither party can be allowed to fight the issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances."

11. As regards the issue of delay the Applicants submitted that they have given the reasons for the delay which include the delay in procuring limited grant ad litem. Further under Order 24 Rule 7 of the Civil Procedure Rules, an abated suit can be revived as long as sufficient reason is shown, therefore the court should grant the order that the suit herein be revived and be heard and determined on its merit.

12. Finally the Applicants relied on the cases of; Bhavesh Tribhovan Voralia (Administrator of the Estate of the late Laujuruda Davlji Raja Voralia & Korsan Dewshivs John'son Kamau Macharia & 15 others (2015) eKLR and Billey Oluoch Okun Orinda vs Ayub Muthee M'igweta & 2 others (2014) eKLR, where the court allowed an application for revival of abated suits having considered the reasons espoused by the Applicants.

13. However the Respondent submit that the power of the court to revive an abated suit, though discretionary, is anchored on Order 24 rule 7(2) of the Civil Procedure Rules, 2010, which requires the Applicant to demonstrate that he was prevented by any "sufficient cause" from continuing the suit.

14. That the court of Appeal in the case of; Attorney General vs Law Society of Kenya & Another (2013) eKLR, stated that;

"sufficient cause or good cause in law means: the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused. (see Black's Law Dictionary 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events."

15. That the averments made by the Applicants in the application do not reveal, "sufficient cause" but only demonstrate laxity on the part of the Applicants in that the 2nd Plaintiff's suit abated way back on 6th August 2014. The Applicant's application to substitute was allowed on 19th October 2017, whereas the instant application was filed on 23rd August 2018. Therefore it is evident that the delay in bringing the instant application by the Applicants is inordinate, inexcusable.

16. The Defendants submitted that the Applicants are barred by operation of law from seeking and/or litigating on the nature of the orders sought herein as they were conclusively determined by a competent court. Reliance was placed on the case of; Anders Bruel v/a Queenscross Aviation vs Nyambura Musyimi & 2 Others (2014) eKLR, where the court held that, "the phrase 'directly and substantially in issue' encompasses all matters which ought to have been pleaded in the declined case but were never pleaded"

17. That as well settled by judicial precedent, judicial power must be exercised judiciously and not on caprice, whim, likes or dislikes. The Respondents relied on the pronouncements by the U.S. Chief Justice John Marshall (as he then was) in the case of; Osborn V. Bank of the United States, 22 U.S. 738 (1824) cited by the court in the case of; Patriotic Guards Ltd vs James Kipchirchir Sambu (2018) eKLR that;

“Judicial power, as contra distinguished from the power of the laws, has no existence. courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the Judge, always for the purpose of giving effect to the will of the legislature; or, in other words, to the will of the law.”

18. Therefore the court should decline to exercise its discretion in favour of the Applicants as they have failed to discharge the burden set out in the case of; Attorney General vs Law Society of Kenya & Another (supra).

19. I have considered the application in the light of the arguments advanced and the submission filed and I find that the first issue to deal with is whether this application is res judicata. This issue is governed by Section 7 of the Civil Procedure Act which provides as follows:-

“no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

20. Thus for the issue of res judicata to arise, the matter in issue must be similar to the previous matter determined on merit by a court of competent jurisdiction and involving the same parties and issues. In the application dated 20th September 2016, the Applicant sought for the following orders;

(i) Leave be granted to the Applicant Ahmed Yassin H.A. Awale the Administrator of the Estate of the 2nd Plaintiff Deceased’s estate be substituted as the 2nd Plaintiff herein.

(ii) This Honourable Court do grant leave to revive this suit.

(iii) The costs of this application be proved for.

21. After hearing the application, the court made reference to the provisions of order 24 rule 7(2) which states as follows:-

(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.”

22. Based on these provisions, the court found that, although it has the discretion to order for the revival of the suit but noted as follows; “however, I note that in the instant matter, the Applicant has asked for leave to revive the suit and not an order of the Court to revive the abated suit. The court cannot grant what has not been sought for.” It therefore follows that, the prayers sought for herein that the court do grant an order to revive the suit, as against 2nd Plaintiff was not sought for in the previous application and therefore it cannot be said to be a subject of the doctrine of res judicata.

23. The Respondents have also raised the issue of delay in filing this application and Applicant’s failure to explain the same. I note from the ruling delivered herein on 19th October 2017, this issue was raised by the Respondents in the replying affidavit filed by Mr. Nderitu Wachira dated 25th October 2016. It was considered and the court found that, the Applicants had offered a reasonable explanation for the delay. This is borne by the findings under paragraph 19 and 20 of the ruling delivered on 19th October 2017 where the court stated as follows;

“(19) the question is this: Has the Applicant offered a reasonable explanation for the delay. I have considered the reasons advanced as outlined herein in the Applicant’s submissions and I find that they have merit. It is deposed that on 27th November 2016, the Plaintiffs were given leave to amend their pleadings and an Appeal lodged by the Defendant herein in November 2007. It was determined on 8th July 2016 and the 2nd Plaintiff passed on during the pendency of the Appeal. Further the Applicant was securing letters of Ad litem therefore I note that, the matter was active in the Court of Appeal.

(20) Taking into account the Appeal filed by the Defendants proceeded during the two years of delay would have had an impact on the matter pending before this Court, I find the explanation offered by the Applicant for the delay is reasonable.”

25. Based on the above findings, the issue raised in relation with delay is res judicata. The court has already allowed the substitution of the 2nd Plaintiff (deceased). It will therefore only be fair and equitable in the interest of justice to grant an order that the suit herein be revived as prayed. However, in view of any inconvenience that may be caused to the Respondents, I shall grant the Respondents the costs of this application. Further, to expedite the hearing of this matter, I order that, the case management conference should be held within twenty (21) days of the date of this order and the suit be set down for hearing within forty five (45) days of the date of this order. If these conditions are not complied with, the suit shall stand dismissed for want of prosecution under order 17 rule 2 of the Civil Procedure Rules without further reference to the parties.

26. Those then are the orders of the court.

Dated, delivered and signed in an open court this 7th day of June 2019.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Rege for the Applicants

Ms. Cheptoo for Mburu for the Respondent

DennisCourt Assistant