



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELCA CASE NO. 652 OF 2014

(Formerly NYERI HCC 4 OF 2008)

MATHENGE NGATIA NGARI

(suing for himself and on behalf of his deceased brothers

represented by their wivesPLAINTIFF /DECEASED

VERSUS

CHRISTOPHER WANGOMBE NGATIA DEFENDANT/DECEASED

MARY WANGUI WAIGIAPPLICANT

RULING

1. Before me for determination is the Applicant's Application by way of a Notice of Motion dated the 14th June 2019 wherein she seeks inter alia to revive this suit which abated as against both the Plaintiff and the Defendant who passed away on the 22nd March 2017 and the 23rd October 2014 respectively.
2. The Applicant also seeks to have Mary Wangui Waigi and Jacinta Njeri Wangombe be substituted in place of the original Plaintiff Mathenge Ngatia Ngari and the original Defendant Christopher Wangombe Ngatia (deceased) respectively.
3. The Application is brought under Order 24 Rule 7(2) and Order 51 Rule 1 of the Civil Procedure Rules and is supported on the grounds on the face of it as well as a sworn affidavit of Mary Wangui Waigi the Applicant herein dated the 14th June 2019.
4. The Respondents filed their grounds of opposition dated the dated 14th November, 2019 in which they had stated that there had been inordinate delay in bringing the Application and no explanation had been offered in respect thereof.
5. The Applicant's counsel submitted while relying on the grounds on the face of the application and on the affidavit sworn on the 14th June, 2019, to the effect that the Defendant died on 23rd October, 2014. The family did not take any initiative to substitute him. The Plaintiff went and got the letter *ad litem* which was issued to the wife on 30th September, 2015. That this was within 1 year before the suit abated.
6. That at the time the Plaintiff who was 89 years was unable to file for substitution due to his old age and was sick but when he got better, he applied for revival of the suit in his application dated 27th February, 2017 and amended on 23rd March, 2017. Before the application could be heard, he too passed away. That they now sought for his substitution with his sister in law who will be representing the other family members.
7. They also relied on the decided case of **Elizabeth Wanjiru Njenga and Another vs Margaret Wanjiru Kinyara and 2 Others [2018] eKLR** where the Judges of the Court of Appeal cited with approval the case of **Issa Masudi Mwabumba vs Alice Kaveya Mutunga & 4 Others [2012] eKLR** where the honorable judge had revived the suit after 2 years and 8 months. In reviving the suit, they had applied the oxygen principles and Article 159 (2) (d) of the Constitution.
8. The Applicant thus invited the court to be guided by this authority in allowing their application to revive the suit.
9. Counsel further submitted that their clients were elderly people who were sickly and hence the reason for taking long before substituting

the Plaintiff. They sought that the court do grant them the prayers sought in their Application.

10. In opposition of the said Application, Counsel for the Respondent submitted that they had filed their grounds of opposition dated 14th November, 2019 as well as their authorities in strong opposition of the application dated 14th June, 2019 for reasons that the deceased Plaintiff died in the year 2017, wherein the application was brought in the year 2019. The limited grant of letters of administration were issued on 22nd January, 2019.

11. That the present Application had been brought over a period of 2 years. They relied on the provisions of Order 24 Rule 3 of Civil Procedure Rules to submit that it was worth noting that when the application was brought, the suit had already abated as against the Defendant way before the Plaintiff had died.

12. In the present application, there had been no explanation as to why the Applicant had waited 2 years before filing the present application. That the reason given by the Applicants that they were elderly and sickly persons had not been stated in the application and no medical records had been filed thus the provisions of Order 24 Rule 7 of Civil Procedure Rules came into play.

13. That in opposition of the application, their ground had been that the same was incompetent and bad in law as the application for extension of time to revive the abated suit had not been made before filing the current application. They relied on the case of **Joseph Gachuhi Muthanji -vs- Mary Wambui Njuguna [2014] eKLR** where the Court of Appeal while dismissing the Appellant's claim had noted that they had to have filed an application for extension of time before bringing an application to revive the suit.

14. Counsel relied on their grounds of opposition in submitting that the Applicant had no locus in bringing the application as she was neither a wife, child nor relative to the deceased Plaintiff who had been survived by a wife and children. That if the Applicant was interested in claiming trust, she ought to have applied to be enjoined as a Co-Plaintiff. They sought for the application to be dismissed with costs.

15. In rebuttal Counsel for the Applicant submitted that the Applicant had the locus to bring the application because she was a sister in law to the Plaintiff. That the Plaintiff had filed suit on his behalf and on behalf of his deceased brothers' represented by their wives. That the Applicant was the legal representative of the estate of the deceased Plaintiff and had obtained the letters of administration *ad litem*.

16. That Section 2 of the Civil Procedure Act, defined who a legal representative was. They relied on the decided case of **Gladys Njeri Muhura -vs- Daniel Kariuki [2018] eKLR** where the court had held that a legal representative could bring a suit for substitution and revival of a suit.

17. They reiterated their earlier submissions that the Applicant had the locus to bring the application. That the suit had abated before the Plaintiff died. That before then, the Plaintiff had made attempts to revive the suit through an application amended on 23rd March 2017 before he too passed away. That the Plaintiff had taken the initiative to substitute the Defendant after the Defendants family members showed no interest in pursuing the suit. That the Applicant had sufficient cause on why there was no substitution within the required time. They prayed that the court do revive the suit and substitute the parties therein in the interest of justice.

Determination.

18. I have considered the pleadings and submissions made by the parties herein. The issue is whether the suit that abate after the passing away of both the deceased Plaintiff and defendant respectively should be revived, and if so, whether the deceased Plaintiff and Defendant should be substituted. Order 24 Rule 3 of the Civil Procedure Rules provides for the effect of death of one of several plaintiffs or of sole plaintiff. It states as follows:

(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.

19. Order 24 Rule 4 of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of sole Defendant where it states as follows:

(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.

20. It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of either a Plaintiff or Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the Applicant was prevented by any sufficient cause from continuing the suit. The said provision provides as follows:

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.

21. The Court of Appeal in the case of **The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011** observed as follows as to the meaning of sufficient cause:

“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 251.**

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

22. In the instant application, the intended Plaintiff averred that following the death of the Defendant on 23rd October, 2014, his family did not take any initiative to substitute him wherein the original Plaintiff, now deceased took upon himself and got the letter *ad litem* which was issued to the Defendant’s wife on 30th September, 2015 and thereafter he instituted an application to substitute the deceased Defendant

23. The Plaintiff who was 89 years was unable to file for substitution of the Defendant in good time due to his old age and the fact that he was ailing but when he got better, he applied for revival of the suit vide his application dated the 27th February, 2017 and amended on 23rd March, 2017. Before the application could be heard, he too passed away on the 22nd March 2017 and the amended Application of the 23rd March, 2017 was withdrawn.

24. The Applicant then obtained the letters of administration *ad litem* on the 22nd January 2019 but before they could file the current application, the suit herein was declared abated on the 27th February 2019. The Present application was subsequently filed by way of a Notice of Motion dated the 14th June 2019 wherein the Applicant seeks *inter alia* to revive this suit, which abated as against both the Plaintiff and the Defendant, two years after the Plaintiff’s death.

25. Although the Applicant had not given any explanation for not filing the Application within the time stipulated, yet under the circumstance of the prevailing situation, I feel the need to invoke the provisions of Sections 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya where the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

26. These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

27. While it is true that the application was filed after the expiry of the stipulated period yet in my view and noting from the annexures herein attached, the fact that when the original Plaintiff obtained a grant of letters of administration on behalf of the Defendants and subsequently the Applicant obtained the letters of administration *ad litem* on the 22nd January 2019 and filed this application 14th June 2019 in my humble view is an indication that the Plaintiffs were desirous to have this matter heard and determined.

28. Whether or not to extend time for a legal representative of a deceased party to be made a party to a suit in place of such deceased after the expiry of the prescribed time is a matter that calls for the exercise of the discretion of the court. Order 24 rule 3 (2) of the Civil Procedure Rules provides that the court may extend time for good reason.

29. I am satisfied that the Application in the present instance is good enough to revive the Plaintiff’s suit and also to substitute Mary Wangui Waigi and Jacinta Njeri Wangombe in place of the original Plaintiff Mathenge Ngatia Ngari and the original Defendant Christopher Wangombe Ngatia (deceased) respectively, so as to enable the court to determine the real issues in controversy between the parties.

30. The Applicant having obtained limited grant of letter of administration was a legal representative of the deceased Plaintiff as per the definition in Section 2 of the Civil Procedure Act and therefore could bring a suit for substitution and revival of a suit. Her application is accordingly allowed and it is hereby ordered as follows:

- i. The suit by the Plaintiff against the Defendant be and is hereby revived.
- ii. That the deceased Plaintiff be and is hereby substituted by Mary Wangui Waigi herein as Plaintiff.
- iii. That the deceased Defendant be and is hereby substituted by Jacinta Njeri Wangombe herein as the Defendant.

iv. The Applicant/Plaintiff is granted leave to amend her Plaint accordingly and to file and serve the Amended Plaint within 21 days from today.

v. The costs of the Plaintiff's Notice of Motion dated 14th June 2019 be in cause.

Dated and delivered at Nyeri this 5th day of March 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE