



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**(Coram: Odunga, J)**

**CIVIL SUIT NO. 67 OF 2011**

**ELIZABETH MUTUKU & NZIOKA MUTUKU**

**(Applying as the Administrators ad litem of the**

**Estate of JOSEPH MUTUKU MWANTHI).....1<sup>ST</sup> PLAINTIFF**

**JAMES MWANTHI MUTUKU.....2<sup>ND</sup> PLAINTIFF**

**JOSEPH MUINDE MUTUKU..... 3<sup>RD</sup> PLAINTIFF**

**ELIZABETH MUTUKU.....4<sup>TH</sup> PLAINTIFF**

**DAVID KIOKO MUTUKU.....5<sup>TH</sup> PLAINTIFF**

**NZIOKA MUTUKU..... 6<sup>TH</sup> PLAINTIFF**

**ESTHER MUKULU MUTUKU.....7<sup>TH</sup> PLAINTIFF**

**VERSUS**

**AIMI MA KILUNGU COMPANY LTD.....DEFENDANT**

**RULING**

1. By a Notice of Motion dated 19<sup>th</sup> October, 2018 the Plaintiffs herein seek the following orders:

- a) That this Honourable Court be pleased to revive the Applicant's suit in Machakos HCCC No. 67of 2011 – Joseph Mutuku Mwanthi & 6 others v Aimi ma Kilungu.
- b) This Honourable Court be pleased to extend time within which the 1<sup>st</sup> Applicant should have been substituted.
- c) The 1<sup>st</sup> Applicant (deceased) be substituted with the 4<sup>th</sup> and 6<sup>th</sup> applicants, Elizabeth Mutuku and Nzioka Mutuku respectively.
- d) That the costs of this application be in the cause

2. According to the applicants, the 1<sup>st</sup> plaintiff herein, **Joseph Mutuku Mwanthi**, their father died on 2<sup>nd</sup> January, 2014 and while the 2<sup>nd</sup> to 5<sup>th</sup> Plaintiffs are their siblings, the 7<sup>th</sup> Plaintiff is their mother. Following the death of the 1<sup>st</sup> Plaintiff, the 4<sup>th</sup> and 6<sup>th</sup> Plaintiffs petitioned for limited letter of administration to enable them continue prosecuting this suit. However, due to the absence from the country of the 7<sup>th</sup> plaintiff, hurdles arose in the said proceedings and it was not until 14<sup>th</sup> March, 2015 that the said letters were issued. An application was then made dated 21<sup>st</sup> October, 2015 for substitution of the 1<sup>st</sup> Plaintiff with the said 4<sup>th</sup> and 6<sup>th</sup> Plaintiffs. However, the court in its ruling dated 29<sup>th</sup> November, 2016, note that the 1<sup>st</sup> Plaintiff's suit had and directed the said plaintiff's legal representative were at liberty to apply for

substitution if the 1<sup>st</sup> Plaintiff's suit survived. According the applicants' legal advisers advised them that they were to make an application for extension of time within which the deceased could be substituted and for the revival of the 1<sup>st</sup> Plaintiff's suit.

3. It was averred that the matter was thereafter mentioned before the Judge severally with a view to seeking leave to file the application seeking the said orders and on 16<sup>th</sup> January, 2018 the court declared that the suit had abated based on the ruling of 29<sup>th</sup> November, 2016. After several requests the court file which was not traceable in the registry was finally traced on 29<sup>th</sup> June, 2018 at the archives and the matter was mentioned on 30<sup>th</sup> July, 2018 when this court stated that there was an order directing that the suit had abated hence the need to revive the same.

4. According to the applicants by the time of the death of the 1<sup>st</sup> Plaintiff the parties' respective cases had been closed and submissions filed and the only remaining issue was for the delivery of the judgement. However, after the transfer of the previous judge, it was ordered that the proceedings be typed hence the delay in fixing the matter for judgement.

5. According to the applicants, the claim herein is very substantial and the Plaintiffs are determined, entitled to and are pursuing the claim in which they had feely executed an undertaking as to damages to the tune of Kshs 700,000.00 each as sign of their commitment to pursuing the same. It was the applicant's case that this court has the power pursuant to Order 24 Rule 7(2) of the **Civil Procedure Rules** to revive an abated suit and to give such further orders as it may deem fit in order to meet the ends of justice.

6. In opposing the application, the Defendant/Respondent filed the following grounds of opposition:

- 1) **No explanation has been given for the delay in obtaining the letters of Administration Ad Litem noting that they were obtained on 14.3.2015 yet the deceased died on 2.1.2014.**
- 2) **No plausible explanation has been given on the delay in filing the application for substitution from 14.3.2015 when the grant of letters were issued on 19.10.18 when this application was filed.**
- 3) **It is now 5 years since the demise of the deceased and the reasons advanced for the delay do not satisfy the provisions of order 24 rule 3 of the Civil Procedure Rules.**
- 4) **There is also no plausible explanation as to the delay in bringing this application from 29.11.16 when the applicant was set at liberty by the court to do so, it took them 2 years to follow the advice of the court in its ruling.**
- 5) **This application is therefore an afterthought and ought to be dismissed and pave way for the delivery of the judgment on the suit.**

7. It was submitted on behalf of the applicants that in a ruling delivered by this Honourable Court on 29<sup>th</sup> November, 2016 by **Hon. Judge Nyamweya** granted the deceased Plaintiff's representatives liberty to apply for substitution if the 1<sup>st</sup> Plaintiff's suit is revived. In essence, the Hon. Judge declared the suit abated as against the 1<sup>st</sup> Plaintiff. The Plaintiffs' advocates, being of the view that only the 1<sup>st</sup> Plaintiff's suit had abated, fixed the matter for directions on 16<sup>th</sup> January, 2018 and 30<sup>th</sup> July, 2018 for directions on how the matter will proceed but the suit was declared abated. This then prompted the Plaintiffs to file this Application seeking among others the revival of the Plaintiffs' suit.

8. According to the applicants, the law applicable to revival of abated suits is Order 24 Rule 7(2) of the **Civil Procedure Rules, 2010** which gives the court discretionary power to revive an abated suit by providing that:-

9. The applicants relied in the case of **Charles Mugunda Gacheru vs. Attorney General & Another [2015] eKLR**, where it was held that for a court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. They also relied on the case of **Rukwaro Waweru vs. Kinyutho Ritho & Another [2015] eKLR**, where it was held that it is clear that the court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. Similarly, they cited the case of **Soni vs. Mohan Dairy [1958] EA 58**, where it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period.

10. According to the applicants, the Court of Appeal at Malindi in **Civil Appeal No. 16 of 2015, Said Sweilem Gheitham Saanaum vs. The Commissioner of Lands (being sued through the Attorney General) & 5 Others**, outlined the three stages that arise under Order 24 upon death leading to substitution.

11. It was submitted that based on the supporting affidavit, the Plaintiffs have valid reasons as to why they were unable to substitute the deceased Plaintiff within the requisite period allowed. Therefore, this Court was urged to exercise its discretion and grant the prayers sought namely, revive the Plaintiffs suit and extend the time limit of one year that the Applicants/legal representatives should have substituted the Deceased. The court was urged to take into account the fact that both the Plaintiffs and Defendant testified, closed their respective cases and filed submissions and what is remaining is delivery of judgment.

12. On behalf of the Respondent it was submitted that the 5-year delay since the demise of the 1<sup>st</sup> plaintiff does not satisfy the provisions of order 24 rule 3 of the civil procedure rules. The reasons given by the applicant for the delay in extension of time is that there was a 10 months' delay in putting together pleadings since their mother lives out of the country, in order to petition for the letters of administration in respect of the deceased's estate. However, no proof in support of the asserted fact has been tendered. Further between November 2016 and May 2018, a space of two years, no effort has been demonstrated on the part of the applicants in prosecuting the matter.

13. It was therefore submitted that the reasons given do not constitute good reasons as contemplated by Order 24 Rule 3(2) aforesaid and therefore this court was urged to dismiss the application with costs.

#### **Determination**

14. I have considered the issues raised in this application.

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

*(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.*

16. Rule 7(1) of the said Order on the other hand provides that:

*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.*

17. It is therefore clear that this court has the jurisdiction to grant the orders sought in this application. I agree with the holdings in **Rukwaro Waweru vs. Kinyutho Ritho & Another [2015] eKLR**, and **Soni vs. Mohan Dairy [1958] EA 58**, and associate myself with the position adopted by the Court of Appeal at Malindi in **Said Sweilem Gheithan Saanum vs. Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR**, that:

*“There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “good reason” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “good reason” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit. Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action. Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “sufficient cause” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff. There have been arguments, as to whether or not a formal order is necessary to confirm the fact of abatement. See M’mboroki M’arangacha v Land Adjudication Officer, Nyambene and 2 others, Meru H.C.C. Application No.45 of 1997 where the High Court held that an order to record the abatement of a suit was not necessary. See a similar holding in KFC Union v Charles Murgor (Deceased) NBI HCCC No.1671 of 1994. From the language of Order 24 Rule 3(2) aforesaid, earlier reproduced and highlighted, the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience an order of the court is necessary for a final and effectual disposal of the suit. We borrow the statement of Lord Denning in MacFoy v United Africa Co. Limited (1961) 3 All ER 1169, that*

*“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado. Though it is sometimes convenient to have the court declare it to be so....”*

**It follows that the question of whether or not to extend time or grant an order for revival of an abate suit is essentially one of discretion.”**

18. That an express order abatement of suits is unnecessary was also recognised in **Vamus & Partners vs. S. F. Hassan [1964] EA 644** where it was held that a suit having been abated a declaration to that effect is unnecessary but the estate is entitled to costs.

19. for What I understand the Court to have been staying is that the provisions dealing with abatement of suits is a deeming provision and as was held in **Prof. Peter Anyan’g Nyong’o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397:**

*“The word “deemed” is commonly used both in principal and subsidiary legislation to create what is referred to as legal or statutory fiction and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word “deemed” is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond*

doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

20. That an order for abatement of suits is unnecessary was Dealing with the timelines prescribed under the above provision, **Bosire, J** (as he then was) in **Rawal vs. Rawal [1990] KLR 275** reiterated that:

**“The object of any limitation enactment is to prevent a plaintiff from prosecuting “stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after along lapse of time. It is not to extinguish claims.”**

21. In this case the applicants have explained the reasons for the delay in applying for substitution. In my view the actions of the applicants are inconsistent with those of a party who was in the contemplation of the Court of Appeal in **Shah vs. Mbogo & Another [1967] EA 116** as one who has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice. To the contrary the applicants seems to be parties who are seeking the court’s discretion in order to avoid injustice and hardship resulting from accident, inadvertence or excusable mistake or error. Blunders may have been committed by the applicants’ legal representatives erroneously believing that the applicants were the successful parties but as the courts do recognise that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits. The broad approach under the current constitutional dispensation is that unless there is fraud or intention to overreach, an error or default that can be put right by payment of costs ought not to be a ground for nullifying legal proceedings unless the conduct of the party in default can be said to be high handed, oppressive, insulting or contumelious. The court, as is often said, exists for the purpose of deciding the rights of the parties and not imposing discipline. See **Philip Chemwolo & Another vs. Augustine Kubende [1986] KLR 492; (1982-88) KAR 103.**

22. Where it is not shown that there is fraud or intention to overreach and an innocent party may adequately be compensated in costs, cases ought as far as possible be determined on their merits rather than on technicalities of procedure. In this case, I did not hear the Respondents contend that if the application is allowed they will suffer such prejudice that cannot be compensated by an award of costs. It has been said there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake which has put the other side to such advantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

23. In this case both parties had closed their cases by the time of the death of the 1<sup>st</sup> Plaintiff. It cannot therefore be said that by allowing this application, the plaintiffs will be prosecuting “stale claims or that the defendant’s protection against loss of evidence will be lost.

24. In the premises, I find this application merited. Accordingly, I hereby this suit be revived. I further extend time within which the 1<sup>st</sup> Plaintiff/Applicant is to be substituted and direct that the 1<sup>st</sup> Plaintiff (deceased) be substituted with the 4<sup>th</sup> and 6<sup>th</sup> applicants, **Elizabeth Mutuku and Nzioka Mutuku.**

25. The costs of this application will be in the cause.

26. It is so ordered.

**Ruling read, signed and delivered in open Court at Machakos this 18<sup>th</sup> November, 2019.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Serem for Mr Mulei for the Defendant**

**Mr Nzei for Mr Musau for the Plaintiffs**

**CA Geoffrey**