



**REPUBLIC OF KENYA**

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

**CORAM: A.K NDUNG'U J**

**CIVIL CASE NO. 215 OF 2009**

**WILFRED MACHIRA OSORO (DECEASED)..... PLAINTIFF**

**VERSUS**

**JOHNSON MATUNDURA OKEMWA ..... 1<sup>ST</sup> DEFENDANT**

**MARGARET OKAYO ..... 2<sup>ND</sup> DEFENDANT**

**PHILOMENA KAPKORY..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JANE NYABOKE ORESI ..... APPLICANT**

**RULING**

1. Wilfred Machira Osoro [deceased] filed the instant suit against the defendants for damages following a road traffic accident that occurred on 16<sup>th</sup> August 2007. None of the defendants entered appearance. The matter proceeded to hearing ex-parte and the court entered judgment in favour of the plaintiff on 21<sup>st</sup> July 2011.

2. Subsequently, the 2<sup>nd</sup> defendant filed an application for orders that the judgment be set aside and she be allowed to defend the suit on the grounds that she was not the owner of the vehicle that caused the accident. Before that application could be heard the plaintiff passed away and the matter was stood over generally.

3. The plaintiff's widow, Jane Nyaboke Oresi, then moved this court vide an application dated 10<sup>th</sup> March 2015 for the following orders;

1. Spent;

2. The honourable court be pleased to grant leave and/or liberty to the applicant to be substituted as the plaintiff herein, respectively in lieu of Wilfred Machira Osoro, now deceased.

3. Consequent to prayer (2) herein above being granted the applicant be deemed as the plaintiff suing for and on behalf of the Estate of Wilfred Machira Osoro, now deceased;

4. In the alternative and without prejudice to prayers (2) & (3) hereof, the honourable court be pleased to extend time within which the applicant herein be substituted as the plaintiff herein, in lieu of Wilfred Machira Osoro, now deceased;

5. Consequent to prayer (4) herein above being granted the applicant be deemed as the plaintiff suing for and on behalf of the Estate of Wilfred Machira Osoro, now deceased;

6. Costs of this application do abide the cause;

7. That such further and/or other orders be granted as the Court may deem fit and expedient.

4. The application is brought under **Order 24 Rule 3(1)** and **(2)** of the **Civil Procedure Rules**, which provide;

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.*

5. The applicant filed her application on 13<sup>th</sup> March 2015. She annexed a copy of the plaintiff's certificate of death which shows that he died on 9<sup>th</sup> January, 2014. From the foregoing provision of the law, it is clear that upon the death of a sole plaintiff, the legal representative of the deceased plaintiff should make an application for substitution within 1 year of that death. The court is however entitled to extend time for filing of the application if a good reason is given.

6. In this case, the applicant avers that she was issued with limited letters of administration *ad litem* on 15<sup>th</sup> December 2014. She states that she is desirous of protecting the interest of the estate of the deceased plaintiff and is keen on realizing the judgment debt.

7. In addition to the orders sought in her application, the applicant was also required to make an application for revival of the suit which abated a year after the death of the plaintiff in accordance with **Order 24 rule 7 (2)** of the **Civil Procedure Rules** which provides 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.*

8. In **Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others Civil Appeal No.16 of 2015 [2015] eKLR** the Court of Appeal outlined the procedure to be followed thus;

*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.*

9. In the above case, the Court of Appeal upheld the trial court's finding that a nine year delay in filing an application for substitution was inexcusable. In the present case, the applicant does not explain why she failed to file her application for substitution within the stipulated time.

10. Nonetheless, I find that this is a proper case to exercise my discretion to extend time and revive the suit. Judgment has already been entered in this case and it would be in the best interest of justice to have the matter finalized. The respondents did not oppose the application and I find that allowing the application would not be prejudicial to them.

11. I therefore allow the application in terms of prayers 4 and 5. I further order that the suit be revived.

12. Each party shall bear their own costs of the application.

**Dated and Delivered at Kisii this 10<sup>th</sup> day of December, 2019.**

**A. K. NDUNG'U**

**JUDGE**