REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KIAMBU

CIVIL APPEAL NO. 71 OF 2017

1. WYCLIFF ATIENO OGONGI

2. BHAKTIPRIYA BUILDERS LTD.....APPELLANTS

VERSUS

ROSE AWINJA RATEMO.....RESPONDENT

(Being an appeal from the Ruling of Honourable D. N. Musyoka Senior Principal Magistrate

on 9th May, 2017, in Kikuyu SPMCC No. 62 of 2010)

J U D G M E N T

1. This appeal emanates from the Ruling of Hon. D. N. Musyoka Senior Principal Magistrate in Kikuyu SPMCC No. 62 of 2010 where the Plaintiff/Applicant in the lower court and now the Respondent herein vide a Notice of Motion dated 2nd November, 2016 sought for an order that she be granted leave to file out of time an Application to revive the Plaintiff's suit against the Defendants now the Appellants herein. The court allowed the said Application with costs to the Defendants therein.

2. The Appellants are dissatisfied with the lower Court's Ruling and have preferred the present appeal based on the following grounds:-

a) The learned Principal Magistrate erred in granting leave to file out of time an Application to revive the Plaintiff's suit against the defendant under order24 rule 3. In event, leave so granted was obtained on insufficient, wrong and contrived grounds.

b) The learned Principal Magistrate erred in allowing the wrong application under order 24 rule 3 and without good reasons shown by the Respondent herein.

c) The learned Principal Magistrate erred in using his discretion wrongly in making orders that amounted to granting all the subsequent contemplated applications prior to the hearing of the suit and further stating that the suit be heard within 8 months whereas no suit existed as at the time of making such orders.

d) The learned Principle Magistrate erred in granting leave to file out of time an application to revive suit whereas no application had ever been made for leave to extend time to apply for joinder of the deceased plaintiff's legal representative.

e) The learned Principal Magistrate erred by allowing the application and addressing himself to all the other subsequent applications under order 24 prematurely which applications should have been considered on their merits before time frame is set for the hearing of the suit.

3. The Court directed that the appeal be disposed of by way of written submissions. In their advocate's written submissions, the Appellants submitted that there are no good reasons advanced under order 24r 3(2) for the delay for a period of 5 years since the death of the deceased to file the subject application. Counsel relied on the case of ***Joseph Gachuhi Muthanji vs Mary Wambui Njuguna (2014) eKLR*** wherein the High Court's ruling allowing the application for substitution was set aside as the delay of almost 7 years was not properly explained. The same position was also held in the case of ***Said Swailem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 others (2015) eKLR***. Counsel faulted the learned Magistrate for shelving the provisions of Order 24 and picking Article 159(2) of the Constitution in regard to substantive justice. It was submitted that substantive justice is not only meant for one party. In the case of ***Charles Wanjohi Wathuku vs Githinji Ngure & another (2016) eKLR*** it was stated that Article 159(2) of the Constitution is not a panacea for all procedural shortfalls. Counsel urged the court to allow the instant appeal with costs.

4. The Respondent herein also filed his written submissions as the intended Plaintiff. Through counsel, he stated that the Plaintiff died on 27th October, 2011 and he never knew that the deceased Plaintiff was a party to any suit as they had earlier separated. Counsel stated that they only learnt that the Plaintiff had passed away after seeking the services of an investigator. In the case of ***Issa Masudi Mwabumba vs Alice Kavenya Mutunga & 4 others (2012) eKLR*** it was held that the decision whether or not to extend the time for appealing is essentially discretionary. Counsel submitted that the Plaintiff had every intention of prosecuting the case and that the delay of 5 years has been sufficiently explained and proven. It was further, submitted that the Appellants have failed to prove any prejudice they would suffer upon the revival of the subject suit.

5. The Court has considered the arguments by the respective parties on this appeal. The Respondents motion in the lower court was expressed to be brought under Order 24 rule 3 of the Civil Procedure Rule which provides that:

> **"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".**

6. The successful Applicant must demonstrate good reason to the satisfaction of the court. In **Issa Masudi Mwabumba v Alice Karenya Mutunga and 4 Others [2012] e KLR Kome J** observed that:

> **"The principles to guide the court on the exercise of judicial discretion to extend time or to revive a suit are similar and … have been articulated in a long line of authorities. See the case of; *Leo Sila Mutisa v Rose CA NAIT 255 OF 1997* (unreported)":**
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> **"It is now settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general, the matters which this court takes into account in deciding whether to grant extension of time are first, the length of the delay, secondly, the reason for the delay; thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the Respondent".**

7. In **County Executive of Kisumu v County Government of Kisumu and 8 Others [2017] e KLR** the Supreme Court reiterated the principles applicable in the consideration of an application for the extension of time, as enunciated in its decision in the case of **Nicholas Kiptoo Arap Salat v Independent Electoral and Boundaries Commission and 7 Others [2014] e KLR** by stating that:

> **"It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. Further, this Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the *Nicholas Salat* case to which all the parties herein have relied upon. The Court delineated the following as:**
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> **"the under-lying principles that a Court should consider in exercise of such discretion:**
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> ***1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;***
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> ***2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;***
>
> ***3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;***
>
> ***4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;***
>
> ***5. Whether there will be any prejudice suffered by the respondents if the extension is granted;***
>
> ***6. Whether the application has been brought without***
>
> ***undue delay*; and**
>
> ***7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."***

8. The deceased in this case died on 27th October 2011 thus the suit in the lower court stood abated on 27th October 2012. It would appear that it was not until March 2016 that the letters of administration were obtained by the Respondent and subsequently on 15th April 2016 he filed a motion to revive the suit, which application was struck out by the trial court. Thereafter, he filed the motion which is the subject of this ruling, on 6th December 2016. The trial court correctly observed in its ruling that the latter application had been made after a long delay rather than proceed to address the relevant considerations, the trial court delved into the issues of the alleged minor children left by the deceased and involving Article 159 (2)d) granted the application. The reasons given by the Applicant for the delay was that he was during the material period relevant to the suit separated from the deceased, only reuniting in the period preceding her death. This statement does not contain any details for instance, of the dates of the duration of the alleged separation; it is vague. The statement was not supported by any other material, not even an affidavit by the father of the deceased who had been traced by the investigators appointed by the Applicant's advocates. The report is dated 26th September, 2015. The actions of the Applicant in the lower court appear to spring from his contact with the investigators. From September 2015 he moved with some alacrity in seeking letters of administration and filing his first and 2nd

applications before the lower court.

9. While it is true that the delay of five years in bringing the applications is long, the reasons given may on a balance be reasonable. I doubt that the Respondent would have failed to pursue this claim if aware of it when he had been left to fend for two children of the marriage. The delay of five years in making the applications is long. The accident which is the subject of the lower court suit allegedly occurred in 2008. Delay on the part of plaintiff in the prosecution of cases is prejudicial to the defendant who may be unable to trace and summon key defence witnesses. Although such was not asserted by the Appellants in their Replying affidavit to the motion to enlarge time, it is self-evident that delay not only increases the defendant's costs in defending itself, but also that the defendant is held in a limbo for the defaulting plaintiff. This is obviously prejudicial and in my view the trial court ought to have considered such prejudice and not just the Respondent's interests and those of the deceased's as important as these were.

10. As correctly submitted by the Appellants the provisions of Article 159(2)d) have not nullified the rules of procedure, especially with regard to timelines. The Court of Appeal in **Charles Wanjohi Wathuku v Githinji Ngure and Another Civil Application No. 9 of 2016 [2016] e KLR** in stressing the importance of strict application of timelines in the law stated inter alia that:

> **"Timelines are not technicalities of the procedure which may be accommodate under Article 159 of the Constitution or Section 3A and 3B of the Appellate Jurisdiction Act".**

11. These rules exist to ensure that justice is dispensed in a timely, just, efficient and cost effective manner see **Rebecca Mijide Mungole and Another v Kenya Power and Lighting Company Ltd and two Others (2017) e KLR.** In **Salat's** case Supreme Court underscored the importance of adherence to rules of procedure and statutory timeless by stating that:

> **"Those rules and timeless serve to make the process of judicial adjudication and determination fair, just, certain and even handed. Court cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules … it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned…."**

12. Thus the trial court, in failing to consider the application before it within the relevant principles and involving article 159(2)d) the Applicants advantage erred. Nonetheless, in my own consideration of the matter at hand, and applying the relevant principles, I have concluded, that though the delay of five years was long, the explanation given by the Applicant in the circumstances of this case was probable and reasonable. And that, balancing the interests of the Respondent and those of the Appellants the justice of the case lay in giving the Respondent an opportunity to file an application to revive the abated suit within a given time frame, as he had demonstrated since September 2015, an alacrity in moving the matter forward. The time frame for filing such application will be 30 days from the date of the judgment and not 3 months as provided in the lower court ruling. In the circumstances, I would dismiss the appeal and order that costs be paid to the Appellants in any event.

13. I direct that the lower court file be returned to the subordinate court as a matter of urgency so that the parties can take the next steps as a matter of priority.

DELIVERED AND SIGNED AT KIAMBU THIS 5TH DAY OF DECEMBER 2019.

C. MEOLI

JUDGE

In the presence of: