



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL CASE NO. 251 OF 2014

KASIMU MUNYITHYA MAWANIA (Suing asPLAINTIFF

the Legal representative and Administrator of

the estate of **JOHN VUNDI KASIMU - Deceased)**

VERSUS

RICHARD MACHARIA KIMAMO.....DEFENDANT

RULING

1. The Applicant, Francisca Kasimu Munyithya vide application dated 20th March, 2018 seeks orders that:

- (1) That this suit be revived**
- (2) That the plaintiff herein be substituted for Francisca Kasimu Munyithya.**
- (3) That the applicant be allowed to amend the amended plaint in terms of the annexed amended plaint.**
- (4) That costs of this application be in the cause.**

2. It is stated in the grounds and the affidavit in support of the application that the Plaintiff passed away on 27th December, 2016. The delay in substituting the Plaintiff is blamed on the delay in the obtaining of the grant of letters of Administration as the same was not issued by the court in time. It is further stated that the proposed amendment to the plaint goes to the core of the suit.

3. In opposition to the application, the Respondent filed a replying affidavit and a Preliminary Objection. It is stated that the application is fatally defective; that the affidavit in support fails to disclose the sources of information and that the contents therein are contradictory; that the delay in obtaining the grant is inordinate and that this application lacks merits and should be dismissed.

4. The Preliminary Objection dated 4th May, 2018 is based on the grounds that the application dated 20th March, 2018 does not comply with the mandatory provisions of Order 24 rule 3(1) and (2) of the Civil Procedure Rules which requires an application to make the legal representative of the deceased Plaintiff a party to the suit be made within one year of the Plaintiff's death in default of which the suit abates.

5. The application and the Preliminary Objection were argued contemporaneously. I have considered the application, the response to the same, the Preliminary Objection and the submissions made by the counsels for the respective parties.

6. Under Order 24 rule 3(2) Civil Procedure Rules, a suit abates if within one year no application has been made to substitute a deceased Plaintiff. However, for good reason, the court may extend the time within which the application for substitution can be made.

7. Order 24 rule 7(2) Civil Procedure Rules provides for the revival of a suit which has abated. It 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.”

8. The Court of Appeal in **Rebecca Mijide Mungole & another v Kenya Power & Lighting Co. Ltd & 2 others** [2017] eKLR expressed itself as follows in respect of Order 24 Civil Procedure Rules:

“Where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff’s legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3 (2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in manner he did.”

9. In the case at hand, the Applicant as the Legal representative of the deceased Plaintiff wishes to be enjoined in these proceedings and to be allowed to amend the plaint. The Applicant cannot be able to take these steps in a suit that has abated. There must first be an application for extension of time.

10. With the foregoing, I strike out the application with costs.

Date, signed and delivered at Nairobi this 17th day of July, 2018

B. THURANIRA JADEN

JUDGE