



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO.52 OF 2007**

**YONAH NAMACHEMO WAFULA.....PLAINTIFF**

**VERSUS**

**MICHAEL W. WANYONYI.....1<sup>ST</sup> DEFENDANT**

**RESAH SIFUNA.....2<sup>ND</sup> DEFENDANT**

**DAVID MACHIMBO WALUKHU.....3<sup>RD</sup> DEFENDANT**

**AND**

**CHRISTINE NAFULA ODEKE.....1<sup>ST</sup> INTERESTED PARTY**

**EMMANUEL MUTIBOKO.....2<sup>ND</sup> INTERESTED PARTY**

**ABRAHAM KUNGURU.....3<sup>RD</sup> INTERESTED PARTY**

**MIRIAM NAMARONE.....4<sup>TH</sup> INTERESTED PARTY**

**ANGELA WAFULA.....5<sup>TH</sup> INTERESTED PARTY**

**DANIEL WAFULA MWATUTO.....6<sup>TH</sup> INTERESTED PARTY**

**RULING**

What calls for my determination herein is the plaintiff's Notice of Motion dated 26<sup>th</sup> July 2018 which seeks the following orders:

**a. Spent**

**b. That the Honourable Court be pleased to extend time and reinstate the suit as against the 1<sup>st</sup> defendant and substitute the interested party RHODA NASIMIYU MASINDE in place of the 1<sup>st</sup> defendant who is now deceased.**

**c. Costs.**

The application is premised on the provisions of **Section 3 and 3A of the Civil Procedure Act** and **Order 24 Rule 3, 4 and 5 of the Civil Procedure Rules 2010** and is grounded on the plaintiffs supporting affidavit. Her plea is that the 1<sup>st</sup> defendant having died on 16<sup>th</sup> July 2013, it was expected that his Counsel would deal with the substitution and it took a while for the widow of the 1<sup>st</sup> defendant to be traced after which **SUCCESSION CAUSE NO.165 of 2018** was filed and orders granted on 3<sup>rd</sup> July 2018. Therefore, the delay was not deliberate.

In opposing the application, the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendants filed grounds of opposition describing the application as an abuse of the Court process and offending the provisions of **Order 24 of the Civil Procedure Rules**. The 2<sup>nd</sup> defendants stated that no sufficient cause has been given for the extension sought and the cause of action is extinguished. The 3<sup>rd</sup> defendant on his part added that the intended substitute lacks the locus to do so.

The application has been canvassed by way of written submissions which have been filed by **MS. MUMALASI ADVOCATE** for the

plaintiff and **Mr. ONYANDO ADVOCATE** for the 2<sup>nd</sup> defendant.

I have considered the application, the annexures thereto, the grounds of opposition and the submissions by Counsel.

It is clear that **Order 24 Rule 7(2) of the Civil Procedure Rules** allows the plaintiff to apply for revival of a suit which has abated if he can show that he was **“prevented by any sufficient cause from continuing the suit.”**

It is common knowledge that the 1<sup>st</sup> defendant died on 16<sup>th</sup> July 2013. The plaintiff was aware about that but he says he expected that the Counsel would deal with the substitution. He then took a while to trace the 1<sup>st</sup> defendant’s widow whom she then cited in **BUNGOMA CHIEF MAGISTRATE P & A CAUSE NO.585 of 2017** before a Limited grant of letters of Administration ad litem was issued on 3<sup>rd</sup> July 2018. Counsel for the plaintiff has submitted that if the suit proceeds without representation of the 1<sup>st</sup> defendant, then any judgement may be challenged on the ground that the 1<sup>st</sup> defendant was never given a hearing. However, Counsel for the 2<sup>nd</sup> defendant has submitted that this suit was in fact dismissed on 13<sup>th</sup> July 2015 for want of prosecution and that the plaintiff is guilty of non-disclosure of material fact and further, that the plaintiff has not given any explanation as to why the 1<sup>st</sup> defendant was not substituted.

In my view, the issue to be determined is whether the plaintiff has proved that he **“was prevented by any sufficient cause from continuing the suit.”**

As I have already indicated above, the 1<sup>st</sup> defendant died on 16<sup>th</sup> July 2013 and that fact was known to the plaintiff who however claims that since he was represented by Counsel, he **“expected that the Counsel would deal with the substitution.”** Litigation belongs to the parties and not to the Counsel. The Counsel would only act on the instructions of the client. He cannot be **“expected”** to move the Court without instructions as that could expose him to complaints of acting without instructions. From the Plaintiff’s own supporting affidavit, he does not appear to be claiming that he did not know that the 1<sup>st</sup> defendant ought to have been substituted. He seems to be aware of that legal requirement and it was his responsibility to instruct his Counsel to move the Court for substitution. In any case, the plaintiff has not even told us when he discovered that his Counsel had not dealt with the substitution. The 1<sup>st</sup> defendant having died on 16<sup>th</sup> July 2013, it took him four years to file **BUNGOMA CHIEF MAGISTRATE P & A CAUSE No.585 of 2017**. From the Plaintiff’s own affidavit dated 25<sup>th</sup> June 2007 in support of an application for injunction, he has averred in paragraph three thereof that the 1<sup>st</sup> defendant is his brother and therefore the widow must be someone that he knew and is not a stranger to him. It cannot be possible that he could not trace his sister-in-law. It would be different if he did not know the proper person to be substituted in place of the 1<sup>st</sup> defendant. The plaintiff is clearly being economical with the truth in his application.

The Court would have wanted to know for instance, where the 1<sup>st</sup> defendant’s widow lives, where she was from the time the 1<sup>st</sup> defendant died on 16<sup>th</sup> July 2013 upto the time she was eventually traced and where. The delay from the time the plaintiff filed **BUNGOMA CHIEF MAGISTRATE P & A CAUSE NO.585 of 2017** which was on 18<sup>th</sup> December 2017 upto the time that he filed this application on 26<sup>th</sup> July 2018 can be explained as he could not move this Court without the grant. However, the delay from the time the 1<sup>st</sup> defendant died on 16<sup>th</sup> July 2013 upto the time the plaintiff filed **BUNGOMA CHIEF MAGISTRATE P & A CAUSE NO.585 of 2017** (a delay of four years) is not only inordinate but has also not been satisfactorily explained. It must be remembered that an application such as this one is granted at the discretion of the Court. Such discretion can only be invoked on sound grounds but not capriciously or otherwise.

Unfortunately, no **“sufficient cause”** has been shown by the plaintiff as to why he did not continue with the suit and therefore why I should order for its revival. The plaintiff appears to have gone to sleep.

As the Court of Appeal observed in **SAID SWEILEM GHEITHAN SAANUM V COMMISSIONER OF LANDS & OTHERS C.A. CIVIL APPEAL NO.16 of 2015 [2015 eKLR]**:

**“ “Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a Constitutional principle that emphasizes the duty of the advocates, litigants and other Court users to assist the Court to ensure the timely and efficient disposal of cases. The principles which are reiterated by Section 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation neither is it a licence to parties to ignore or contravene the law and rules of procedure.”**

From the foregoing, it is my view that no **‘sufficient cause’** has been shown to warrant the grant of the orders sought in the Notice of Motion dated 26<sup>th</sup> July 2018.

It is accordingly dismissed with costs to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling dated, delivered and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma.

Ms. Mumalasi for plaintiff - present

Mr. Onyando for 2<sup>nd</sup> defendant - present

Mr. Onkangi for Mr. Kassim for 3<sup>rd</sup> defendant – present

Mr. Wekesa for Interested party – present

Plaintiff – present

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**