



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.241 OF 2015

NORBERT MUNGAI WAMBETI.....PLAINTIFF

VERSUS

EDWIN MBUBA MBUNGU Sued as legal representative of

NANCY CIAMWERI MBUNGU (Deceased)....INTENDED DEFENDANT/RESPONDENT

RULING

Before the court is the Notice of Motion dated **22nd March 2018**, by which the Plaintiff/Applicant seeks the following Orders:-

“1. SPENT

2. SPENT

3. THAT this Court do grant an extension of time and/or revive this suit.

4. THAT Edwin Mbuba Mbungu be enjoined as Defendant in this suit in place of Nancy Ciamweri Mbungu (deceased).”

The application which was premised upon **Sections 1A and B and Sections 3 of the Civil Procedure Act, Order 24 Rule 4 and 9 of the Civil Procedure Rules 2012, Section 82(a)** of the Law of Succession Act and all other enabling provisions of the law was supported by the affidavit of **NORBERT MUNGAI WAMBETI** (the Applicant herein) sworn on **22nd March 2018**.

The Defendant/Respondent filed their Grounds of Opposition dated **14th May 2018**. The court gave directions that the application be disposed of by way of written submissions. The Plaintiff/Applicant filed his written submissions on **20th September 2018**, whilst the Defendant/Respondent filed his written submissions on **20th August 2018**.

The Plaintiff/Applicant filed this suit on **18th May 2018** seeking judgment against the Defendant in the sum of **Kshs.7,969, 340.50** plus interest and costs of the suit. It is readily conceded by both parties to the suit that the original Defendant in the suit one **NANCY CIAMWERI MBUNGU** passed away on **2nd January 2016** at Igamatundu Sub-location, in Tharaka Nithi County within the Republic of Kenya.

The Plaintiff/Applicant avers that he only came to learn of the Defendants demise through a Notice **No.4866** published in the Kenya Gazette Special Issue of **24th June 2016**, by which an application for Grant of Letters of Administration had been made in the High Court of Chuka vide **Succession Cause No.42 of 2016**. The Plaintiff/Applicant averred that this notice was only brought to his attention by chance one year later.

Upon learning that one **EDWIN MBUBA MBUNGU** (the Defendant/Respondent herein had been issued with the Letters of Administration, the Applicant made the present application.

The Defendant/Respondent submits that the present application has no merit as the Applicant has failed to give any rational explanation as to why he failed to make the requisite application expeditiously and without delay. Since the close of pleadings in **June/July 2015** the Plaintiff/Applicant took no steps to progress the matter until he was prompted by the court through a notice dated **14th November 2016**. The Respondent contends that the present application amounts to an abuse of court process and the same ought to be dismissed with costs.

ANALYSIS AND DETERMINATION

I have carefully considered the present application, the Affidavit in Support, the Grounds of Opposition, the submissions filed by both counsels and the relevant law. Where a party to a suit dies before determination of said suit the law provides for a mechanism through which the suit may be continued. **Order 24 Rule 4(1)** of the **Civil Procedure Rules 2010** provides that:-

“Where one or two or more Defendants die and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or surviving Defendant dies and cause of action survives or continues, the court on an application made in that behalf shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.”

There are two issues to be determined in this application.

- (i) Did the cause of action survive the death of the original Defendant?
- (ii) Has just cause been shown to substitute the legal representative of the deceased as the Defendant in the suit?

Order 24 Rule 4 provides for the procedure to be followed in case of death of one of several Defendants or of a sole Defendant (as in this case). **Order 24 Rule 4(1)** provides that the legal representative of the deceased Defendant may be substituted as a party to the suit and the suit may proceed. **Order 24 Rule (3)** provides:-

“Where within one year no application is made under sub rule (1) the suit shall abate as against the deceased Defendant.”

In this case the Defendant is said to have died on **2nd January 2016**. The application seeking to substitute the deceased’s legal representative as a party to the suit was made on **22nd March 2018** a full two (2) years after the demise of the Defendant. By operation of **Order 24 Rule (3)** this suit had abated.

However **O24 Rule 7(2)** of the Civil Procedure Rules grants the court the discretion to revive a suit which has abated by reason of the demise of the Defendant(s). **O24 Rule 7(2)** provides:-

“(2) The Plaintiff or the person claiming to be the legal representative of the 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.”

This provision of law gives to the court the discretion to revive an abated suit where the court is satisfied that the Applicant was prevented by sufficient cause from continuing the suit (See **GEOFFREY MWANGI KIHARA –VS- MWIHOKO HOUSING COMPANY LIMITED & 3 OTHERS [2015] eKLR**).

The Applicant had no way of knowing about the demise of the Plaintiff unless he was informed about it by the family members of the deceased. It is unlikely that the family members of a deceased person would alert a person who has sued the deceased about his/her death. The only way the Applicant could have come to know of the death of the deceased would have been through some official communication e.g gazette notice. As it happened the Succession Cause relating to the estate of the deceased was published vide Gazette Notice No.4866 dated **24th June 2016**. The Applicant only came to learn of the death of the purely by chance in the **year 2016** one year after the Petition for Grant of Letters of Administration had been published. This is not unusual as the public in Kenya do not read the Kenya Gazette as avidly as they read the daily newspapers. It was at this point that the Applicant sought to establish who the legal representative of the deceased’s estate was and subsequently filed this application to revive the suit.

I find that the Applicant was not unduly indolent in pursuing his case. He did what he could in the circumstances.

The Applicant has explained that the file initially went for mediation and was later to be returned from the mediation Registry. Due to some confusion in the Court Registry the file was mislabelled making it difficult to access it at the Court Registry.

The deceased died in **January 2016**. By operation of law the suit abated in **January 2017**. This application was brought in **March 2018** about two (2) years after the death of the deceased.

Given the circumstances as explained by the Applicant, I do not find this delay to have been inordinate. In **ISSA MWABUMBA –VS- ALICE KAVENYE MUTUNGA & 4 others [2012] eKLR Hon Lady Justice Martha Koome J.A** held as follows:-

“...The principles to guide the Court on the exercise of judicial discretion to extend time or to revive a suit are similar and they have been articulated in a longline of authorities....Besides the principles set out in the case of LEO (Supra) I am also guided by the provisions of Section 3A and 3B of the Appellate Jurisdiction Act otherwise known as the oxygen principle... from the overarching objectives in the administration of justice the goal at the end of the day, the court attains justice and fairness in the circumstances of each case. This is the same spirit that is envisaged as the read that breeds through the constitution of Kenya in Article 159....”

I am guided by the above authority. The Applicant had no real way of knowing about the demise of the deceased. He only stumbled upon the

information a year after her death. Not surprisingly the relatives of the deceased took no steps to inform the Applicant of her demise. The suit had been pegged for mediation. All the above do amount to sufficient cause why the Applicant failed to continue with the suit within the 1 year period.

On the whole I am satisfied that this application has merit and I do allow the same in terms of Prayer (3) and (4).

The suit is hereby revived and one **Edwin Mbuba Mbungu** be and is hereby enjoined as the Defendant in place of **Nancy Ciamweri Mbungu** (deceased). No orders on costs.

Dated in Nairobi this **14th** day of **December** 2018.

Ruling delivered in open Court on **14th December** 2018

Delivered in open Court.

Maureen A. Odero

Judge