



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL SUIT NO. 86 OF 2000
JOSEPH KARANDINI NDIEMA.....PLAINTIFF
VERSUS
WASIKE NAMIANYA.....1ST DEFENDANT
JUMA BAKARI.....2ND DEFENDANT

RULING

[1]. This is an application brought under *order 24 rule 1&2 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.*

The application seeks to substitute the second defendant Juma Bakari with Amina Kageha Bakari and Mwanaisha Makoba Bakari to act as defendants in this suit.

Secondly the application seeks for an order that the suit be revived and be set down for hearing. The application is supported by the affidavit of Joseph Karandini Ndiema who swears that the respondents are the legal representatives and administrators of the estate of the deceased who died on 25/2/2010 and that they obtained Letters of Administration on 8/7/2014.

[2]. The application is opposed. Grounds of opposition were filed by the advocate for Amina Kageha Bakari and Makoba Bakari. It is argued that the application is defective and lacks merit as the 2nd defendant died on 25/2/2010 and that the case against the 2nd defendant has abated and finally that the case is an abuse of the process of the Court.

The respondents argue that the plaintiff herein died on 8/12/2003 that an application dated 1/11/2004 for substitution to have one Joseph Martin Nyongesa substituted for Joseph Karandini Ndiema is still pending for determination. That the time taken for substitution of the plaintiff is now 12 years while that of the 2nd defendant is 6 years and 8 months.

[3]. On perusal of the Court record I find that there is an application dated 1st November 2004 where one Joseph Martin Nyongesa applied to be substituted for the plaintiff herein Joseph Karandini Ndema. He also asked for the suit to be revived because it had abated as against the plaintiff.

On 1/11/04 the Court records shows that Martin for Wetangula for the intended plaintiff was present and there was no appearance for Ocharo for the defendant. The order recorded by the registry was

“application dated 1st November 2004 fixed for hearing on 6th June 2005 H.N.T.I.”

On 6/6/2005 the Coram and proceedings reads:- Thus,

J.K. Sergon, J

Makokha for the applicant

No appearance for the respondent

MR. MAKOKHA: The application which is coming up for hearing is the Chamber Summons dated 18/11/2004. The same is not opposed. I spoke to my colleague Mr. Ocharo and it appeared he did not have any objection. He is supposed to be here but I have not seen him.

COURT: The Chamber Summons dated 18/11/2004 is allowed as prayed.

Signed

J.K. Sergon, J

[4]. My perusal of the entire file does not reveal a Chamber Summons dated 18/11/2004. No one has shown any nexus of that application to the application of 1/11/2004. The order of **J.K. Sergon, J** has not been reviewed, varied and/or set aside. I have not been moved to review the same. To the best of my knowledge no one has appealed against the same. The Judge did not therefore deal with the application of 1st November 2004 to revive the suit and for substitution of the plaintiff herein.

[5]. It is therefore no wonder that Mr. Areba Learned Counsel for Amina Kageha Bakari and Mwanisha Makoba Bakari states that the application of 1/11/2004 is still pending for determination and that 12 years have elapsed since the death of the plaintiff and that the suit for the plaintiff has abated for that long.

[6]. The notice of motion dated 3/8/2016 is supported by the affidavit of Joseph Karandini Ndiema. He swore the same on 28th day of July 2016, in the presence of Charles Keago Areba Commissioner for Oaths. The affidavit is drawn by Makokha Wettanga & Luyali Advocates.

Mr. Joseph Karandini Ndiema died on 8th December 2003, some 13 years before his affidavit herein. Mr. Charles Keago Areba before whom he appeared is the Counsel for the respondents herein and Mr. Makokha who appears for the said Joseph Karandini Ndiema drew the said affidavit. The Notice of motion to say the least is embarrassing to Mr. Makokha and Mr. Areba the Counsels involved. It is an abuse of the Court's process. Mr. Areba himself stated in his grounds of opposition to the application dated 20th September 2016 that the application is an abuse of the process of the Court. He was right.

[7]. This suit has abated as against the plaintiff. It has so abated for 12 years. It has abated as against the 2nd defendant for six years. It cannot be revived. No reason has been shown to me why it should be revived.

Indeed, in the Court file, there is a notice issued by the Court dated 13/5/2015 for dismissal under *order XVII Rule 2*. This is what preempted the application for revival of this suit dated 3rd day of August 2016.

The application before me is an abuse of the process of the Court. It is dismissed. I will not grant any costs to the applicant's advocate since they took part in commissioning an affidavit in support of the same while the deponent had been dead for 13 years.

There are no orders of the Court.

Ruling read in open court of Counsels.

DATED and DELIVERED at BUNGOMA this 10th day of March, 2017

S.N. MUKUNYA

JUDGE

In the presence of:

Court Assistants - Chemtai/Joy

Mr. Wattanga - For the plaintiff

Miss Odek - For the defendant