



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
CIVIL CASE NO. 2808 OF 1990

JOHN MACHARIA MWENDA.....PLAINTIFF

V E R S U S

1. LUKA NJARARUHI KAMAU

2. SAMUEL KARUGA WANDAI

3. ESTATE OF D.K. GITAU.....DEFENDANT

RULING

The Applicants herein, Sarah Njuhi Mwenda and Emmanuel Wanderi Macharia, are the legal representatives of the deceased Plaintiff herein, John Macharia Mwenda, who died on 13th August, 2013. They seek in this application an order under Section 3A of the Civil Procedure Act (the Act); Order 1, rule 10 and 14 of the Civil Procedure Rules (the Rules) for substitution of themselves in place of the deceased Plaintiff. The application is supported by their affidavit sworn on 29th September, 2015.

The Defendant has opposed the application as set out in the grounds of opposition filed on 13th October 2015. The grounds of objection emerging therefrom are - that the application as drawn and filed is fatally defective, incompetent and does not lie in law; it is a non-starter and ought to be struck out with costs as it is premised on a suit that has abated; the alleged grounds as set out are an abuse of the process of the court; that there has been inordinate delay in obtaining the letters of administration since the death of the Plaintiff which has not been explained; and that the application is an afterthought as litigation has to come to an end. There is a 'further' affidavit sworn by one of the Applicants on 30th October 2015 in response to the grounds of opposition.

I have considered the submissions of the learned counsels appearing together with the authorities cited. I have also read the supporting and opposing pleadings. An applicant for revival of a suit which has abated must prove that he was prevented by any sufficient cause from continuing the suit. If he does so, the court must then revive the suit upon such terms as to costs or otherwise as it thinks fit. See Order 24, rule 7(2) of the rules. The applicable standard of proof is on a balance of probabilities.

Have the Applicants herein proved that they were prevented by sufficient cause from continuing the suit? It has been deponed in the supporting affidavit that the Plaintiff died on 13th August, 2013; and that the suit remained in abeyance during which it was mentioned severally in court as they sought the necessary powers to continue the prosecution of the suit, which limited grant of letters of administration ad litem for purposes of prosecuting this suit was granted on 14th September 2015. The Applicant does not state when

she applied for the grant. In the further affidavit, the deponent has alluded to the fact that the delay in applying for letters of administration was occasioned by the loss of a will that had been left by the Plaintiff which they attempted to trace all along in vain. She also states that the matter was never left unprosecuted as it was being mentioned in court periodically to confirm whether or not the grant had been issued to her and her co-applicant.

It is not in dispute that the deceased Plaintiff died on 13th August 2013. This application was filed on 29th September 2015 after the Applicants obtained a limited grant Ad litem on 14th September 2015 in respect of his estate.

Order 24 Rule 3(2) of the Rules provides -

“Where within one year no application is made under Sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased plaintiff.

Provided the court may, for good reason on application, extend the time.”

Although suit automatically stands abated if within one year no application is made to substitute the deceased plaintiff, the court has discretion ‘for good reason’ to revive it. In this case the delay of two years has been attributed to inadvertency on the applicants’ part to obtain the grant of letters of administration.

Order 24 Rule 7(2) of the Rules provides -

“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”

Each case must be considered on its own peculiar circumstances and taking into consideration all the matters herein, I am persuaded that this is a proper case to warrant grant of the orders sought as the Applicants did not completely abandon the suit. From the record, the matter was mentioned severally in court to convey the progress of the application for grant of letters of administration. The delay has not also been inordinate especially because they moved with speed to make this application after they were granted the authority to represent the deceased Plaintiff.

I accordingly allow the application dated 29th September 2015 and grant the orders sought therein. Costs shall be in the cause.

Dated and delivered at Nairobi this 10th Day of March, 2016.

A.MBOGHOLI MSAGHA

JUDGE