REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL SUIT NO.143 'A' OF 2010

M' RITHARA M' IKIOME (DECEASED)……..……PLAINTIFF

-VS-

H. YOUNG COMPANY LIMITED…….……..DEFENDANT

MARY KIUNGA IKIOME……APPLICANT

RULING

Revival of suit

[1] The significant orders sought in the Notice of Motion dated 2nd December, 2014 are:

1. Review of the order dated 23rd October 2014 dismissing the Applicant's application dated 14th November 2013;

2. The suit to be revived; and

3. The Applicant to be appointed as the legal representative of the deceased M' Rithara M' Ikiome.

[2] The said Application is expressed to be brought pursuant to Article 159 (d) of the Constitution of Kenya 2010 and Order 45 (1) and 51 (1) of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. It is supported by the affidavit sworn by the Applicant and other grounds set out in the application and the submissions filed herein. The Applicant deposed that she was the wife of the late M' Rithara Kiome who was the plaintiff in the original suit and passed away on 10th August 2012. According to her, her Application was dismissed solely because the death certificate of her late husband and the Limited Grant of Letters were not annexed to the application. But, she averred that the failure to annex the two documents was inadvertent and was caused by a clerk who was not familiar with filing of documents. Now that she has annexed a certified copy of the death certificate of her deceased husband the order dismissing her application for substitution should be reviewed and this suit to be revived. She stated that she had no control over the filing of documents by and so she should not be punished for the mistakes of her advocate.

[3] When the Application came up for hearing on 11th May 2015, it was agreed that the same be disposed off by way of written submissions. Parties filed their respective submissions. The Applicant emphasized the grounds set out on the face of the motion and specifically submitted that the certificate of death is now annexed which shows that the plaintiff had died on 10th August 2012 and that the Applicant had been issued with Limited Letters of Grant in respect of his estate. The Grant was indicated to have

been issued for purposes of pursuing CMCC 143 of 2010 instead of HCCC 143 of 2010 which is clearly a typographical error by the court.

Respondent opposed application

[4] On the other hand it was submitted for the Respondent that whereas the Applicant took the view that the Application to reinstate the suit was dismissed for failing to annex a copy of the death certificate, a careful reading of the ruling dated 23rd October 2014 made it abundantly clear that the main reason for the dismissal of the Application was because the suit sought to be reinstated had in fact abated in August 2013. Hitherto, there was no new important material that had come to the attention of the Applicant which was unknown. Also, there was no mistake or error on the record or sufficient reason to warrant the review.

DETERMINATION

[5] I have carefully considered this Application and the rival submissions by the parties. The Applicant's application has been brought inter alia pursuant to order 45 of the Civil Procedure Rules which provides as follows:

> ***1. (1) Any person considering himself aggrieved***
>
> ***a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.***
>
> ***2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the dependency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review."***

From the provisions of Order 45 rule (1), for an application for review to succeed, it must satisfy the following requirements:

> ***ii. That there has been a discovery of new and important matter or evidence which could not have been produced by or within the knowledge of the applicant even after exercising due diligence at the time the decree was passed, or***
>
> ***iii. On account of a mistake or error apparent on the face of the record, or***
>
> ***iv. On the basis of any other sufficient reasons; and***
>
> ***v. The application should be made within reasonable time.***

[6] The Applicant's argument was that her Application was dismissed mainly on the grounds that no death certificate was annexed to show that the plaintiff had died and that the Grant was erroneously indicated to have been issued for pursuing CMCC 143 of 2010 instead of HCC 143 2010; matters which could not be blamed on the Applicant for they were as a result of mistake of counsel and typographical error by the court, respectively. I have looked at the decision of the court. It is indeed discernible that the Application was dismissed on the grounds, inter alia, that death certificate and *Limited Grant of Letters*

Ad Litem had not been attached to the Application and that the suit had already abated. The question for determination before this court is, therefore, whether the Applicant has satisfied the conditions precedent for review as stipulated under Order 45 of the Civil Procedure Act. The Court of Appeal (**Omolo, O'kubasu & Githinji JJA**) in the case of ***FRANCIS ORIGO & ANOTHER vs JACOB KUMALI MUNGALA CIVIL APPEAL NO. 149 of 2001 {2005} 2 KLR 307*** succinctly stated:-

'In an application for review an applicant must show that there has been discovery of new and important matter or evidence which after due diligence was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason AND most importantly the applicant must make the application for review without unreasonable delay' **(Emphasis added).**

See also the comments in ***Mulla*** on similar provisions of the Indian Civil Procedure Code, 15th Edition at page 2726, that:

> ***"Applications on this ground must be treated with great caution and as required by r 4(2) (b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of a discovery of new evidence, it must be established that the applicant had acted with due diligence and that the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made."***

[7] From the circumstances of this case it was alleged that failure to annex the *Limited Grant Ad Lit*em and the death certificate was inadvertent as the documents had been filed by a clerk who was inexperienced. Sometimes, parties should be allowed to suffer the consequences of their advocates' mistakes and be left to seek remedies available under the law and especially the Advocates Act. In my opinion the omission to annex relevant documents to an application of this nature cannot be said to be discovery of new and important matter or evidence which after due diligence could not have been within the Applicant's knowledge. The Applicant and her legal counsel simply did not act with due diligence, thus, it is not open to the Court to admit evidence even on the ground of sufficient cause. In taking this approach I find support in the case of **MAWJI vs. LALJI LLR NO 2778 (CAK)** where Kwach J.A. said as follows;

> ***"…All said and done, the bottom line is that the applicant finds himself in this unfortunate position of negligence, pure and simple, on the part of his Advocates. I do not regard what happened in this case as a genuine error or mistake on the part of the Advocates.***
>
> ***I have arrived at the conclusion that the delay involved is inordinate and has not been explained to my satisfaction. This is one of those cases where I agree entirely with the remarks of Lord Griffiths in his speech in the case of KETTEMAN v HANSEL PROPERTIES LTD [1988] 1 ALL E.R. 38 AT PAGE 62 where he said:***
>
> > ***"…another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings."***
> >
> > ***"For these reasons, I decline to exercise my discretion in favour of the applicant and dismiss the application with costs."***

Consequently I do hold and find that the Applicant has not satisfied the 1st condition of discovery of new and important evidence.

[8] With due respect, and on the basis of my above analysis, it would be imprudent to even fathom that there could be an error apparent on the face of the record. The court was alive to the profound effects the omissions by the Applicant had on the application, and therefore, in my considered opinion**,** there is really no error or mistake on the face of the record for which review would be given. The alleged typographical error may not be of any meaningful assistance in view of that conclusion.

[9] I am yet to consider one more element. A request for review may be refused where the application is made with unreasonable delay. The decision that the Applicant seeks to be reviewed was made on 23rd October 2014, and the instant application was filed in court on 3rd December 2014. This was slightly a period of over one month but this delay has not been explained. In ***MBOGO GATIUKI vs A.G*** **HCCC 1983 of 1980,** High Court, Nairobi **Mwera J (as he then was)** emphasizing on the need to file applications for review without delay and to explain any delay thereto as ***'even a delay of a day or two calls for an explanation'.*** In the end result I find the application dated 2nd December 2014 to be unmerited and I accordingly dismiss it. I will not, however, condemn the Applicant to costs- that would be real punishment and pain. Accordingly, I order each party to bear own costs of the application.

Dated, signed and delivered in open court at Meru this 7th day of November 2016

F. GIKONYO

JUDGE

In the presence:

Mr. Mutunga Advocate holding brief for B.G. Kariuki advocate for applicant.

No representation for respondent.

F. GIKONYO

JUDGE