REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 592 OF 1998

MOHAMMED BARAKA…….....…...……1ST PLAINTIFF

FRANCIS SABWA…….…...…..…….....2ND PLAINTIFF

SIMON MBOGO MUCHIRI……..3RD PLAINTIFF

WANJIRU NDERITU……..……..……...4TH PLAINTIFF

LUCY MWAURA…….…….....……...5TH PLAINTIFF

VERSUS

JOHN NGAIRA SABWA…….....……..1ST DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....2ND DEFENDANT

IGAINYA LIMITED.....3RD DEFENDANT

THE CHIEF LAND REGISTRAR, NAIROBI.....4TH DEFENDANT

RULING

1. The application before me is dated 4th August 2014. It seeks the following reliefs;

*"1.**THAT** this Honourable Court be pleased to revive this*

suit as against the 3rd plaintiff.

*2. **THAT** this Honourable Court be pleased to extend time within which to apply for substitution of the 3rd plaintiff (deceased).*

*3. **THAT** the 3rd plaintiff herein **SIMON MBOGO MUCHIRI** (deceased) be substituted by **ROSEMARY JAJA MBOGO, CHARLES GACHUGU MUCHIRI, MERCY MAKAU AND WILLIAM MUCHIRI.***

*4. **THAT** the cost of this application be costs in the cause".*

2. The 3rd plaintiff, **SIMON MBOGO MUCHIRI,** died on 21st October 2001. Therefore, by dint of the provisions of Order 24 Rule 3 (2) of the Civil Procedure Rules;

> ***"Where within one year no application is made under subrule (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:***
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> ***Provided the court may, for good reason on application, extend the time".***

3. The time which the court may extend is that within which the legal representative of the deceased plaintiff may apply to the court, to be made a party to the suit.
4. Logically, if the suit had abated, it would appear that there would be no sense in making the legal representative a party to such a suit.
5. In **ROSEMARY BUNNY Vs GICHURU KAMOTHO & ANOTHER (NKU) HCCC No. 370 of 1994,** the application of the legal representative had been struck out when she sought to substitute the plaintiff, who was deceased.
6. Following the striking out of the application, the applicant filed an application for the revival of the suit.
7. In that case, the suit had abated about five (5) years before the applicant applied for it to be revived. However, the applicant provided the court with all the details of the efforts she had made and actions that she had taken, to try and pursue the original claim.
8. Kimaru J. was satisfied that the applicant had demonstrated persistence, in the pursuit of the claim. For that reason, the learned Judge ordered that the suit, which had abated, be revived.
9. Meanwhile, in the case of **NGAMBI MUTHIRA MEME Vs PATRICK MUSUNGA [ELDORET] HCCC No. 56 of 2000**, the Administrator of the Estate of plaintiff, asked the court to order that the suit be revived. The plaintiff had died on 11th November 2001, whilst the Letters of Administration were issued on 3rd February 2005.
10. In effect, by the time the Letters of Administration were issued, the suit had abated.
11. The applicant explained to the court that her family was so very poor that it took her over 12 months to raise the sum of Kshs. 15,000/- which their lawyers told them to raise, in order to enable him apply for the Letters of Administration.
12. The learned Judge was satisfied that the impecuniosity of the applicant, was sufficient explanation for the delay in bringing the application for the revival of the suit. The court ordered that the suit be revived.
13. Ibrahim J. (as he then was) also ordered that the Applicant do substitute the plaintiff. He explained that there was really no practical sense in the argument that the applications for the revival of the suit and the one for substitution of the deceased must be made separately.
14. In his considered view, when the two applications were brought together, that was:

"Practical, expeditious and less expensive to the parties".

15. Meanwhile, in the case of **SERA WACHUKA GITHONGO Vs MICHAEL GITHINJI & ANOTHER [NKU] HCCC No. 686, of 1995,** Musinga J. (as he then was) found that the applicant's previous advocates were entirely to blame for the delay in the application for substitution of the deceased.
16. In that case, the applicant proved that he had even paid all the legal fees which his lawyers asked for. The applicant therefore believed that the lawyer was prosecuting the application.
17. Considering that the applicant had instructed the lawyer and had also paid him within one week of the death of the plaintiff, the court revived the suit, and also substituted the deceased with the applicant.
18. In arriving that his decision, Musinga J. took into account the fact that the claim was in relation to family land, and that the family of the deceased should not be prevented from pursuing their claim because of a mistake made by their former advocates.
19. In this case, the Applicants have said that their lawyers first learnt about the demise of the 3rd plaintiff when the lawyers were taking instructions from the Applicants in June 2014.

20. As far as the Applicants were concerned, they were not able to tell whether or not their previous lawyers had known about the demise of the 3rd Plaintiff. The Applicants expressed the view that it was only those previous advocates who could tell whether or not they had known of the demise of the 3rd plaintiff.
21. But the Applicants said that the failure to revive the suit would cause irreparable loss to the beneficiaries of the Estate of the deceased. The reason why the Applicants say that the beneficiaries would suffer irreparable loss is that no fresh suit can be filed, in order to enable the beneficiaries of the Estate litigate, so that their claims could be determined on merit.
22. The 1st, 3rd and 4th Defendants did not oppose the application. It was only the 2nd defendant who opposed the application.
23. According to the 2nd defendant, there was no existing legitimate claims which could be capable of being taken over.
24. The 2nd defendant also submitted that it was a total stranger to the plaintiffs, as the bank had never dealt with them. The only person who the bank dealt with is **JOHN NGAIRA SABWA,** the 1st defendant.
25. Therefore, the bank believed that it was only Sabwa who could have had any legitimate claim against the bank. But as any such possible claim was not brought within 6 years of the accrual of the cause of action, the said potential claim was long barred by limitation of time.
26. On the issue of the request for the revival of the suit, it is the bank's position that the Applicant failed to meet the threshold for the revival of an abated suit and the enlargement of time.
27. To my mind, when the bank made reference to the existence of a threshold which, if met, an abated suit could be revived, I consider that to be an acknowledgment, by the bank, that it knew that even after a suit had abated it can be revived.
28. Therefore, even if there should currently not be any suit against the 2nd defendant, due to the fact that it had abated, that alone, cannot bar the court from giving consideration to an application for the revival of the suit which had abated. Indeed, it is because the Applicants appreciate that the suit had abated, that they have sought its revival.
29. In the case of **NICHOLAS K.A.K SALAT Vs IEBC & 7 OTHERS SUPREME COURT APPLICATION No. 16 of 2014;** the Supreme Court laid down the following as the principles which a court should consider when called upon to extend time;

"1. Extension of time is not a right of a party. It is an equitable relief that is only available to a deserving party at the discretion of the court.

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.

3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.

4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.

5. Whether there will be any prejudice suffered by the respondents if the extension is granted.

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time".

30. In this case, the delay has lasted for a considerable period of time. The 3rd plaintiff died in October 2001, but it was not until August 2014 when the application was filed.

31. What happened in the intervening period?

32. The court records show that on 9th February 2005, Mrs. Guserwa, the learned advocate for the plaintiffs, told the court that the plaintiffs were ready to prosecute their case. She had 3 witnesses in court.

33. Mr. Mburu, the learned advocate for the 2nd defendant, was also ready. However, the trial did not proceed because the case could not be reached.

34. On 28th April 2005, Mrs. Guserwa advocate asked for an adjournment because her client's "chief witness" was not in court. Mr. Mburu Advocate did not oppose the application for an adjournment.

35. On 7th June 2005, Mrs. Guserwa advocate told the court that she had just learnt that the bank had sold the suit property.

36. Mr. Mburu advocate explained that the land had actually been sold in 2002. At the time of sale, the bank says that it was not aware of any court order stopping the sale.

37. In the light of the new development, the case was put-off, as Mrs. Guserwa advocate needed time to seek further instructions from her clients.

38. On 23rd October 2009, the court granted leave to the plaintiffs to amend the plaint.

39. The Amended plaint still mentioned the names of all the plaintiffs, including those who had already passed away.

40. After close of pleadings, the parties set down the case for hearing.

41. In the light of the conduct of the parties, as set out above, it is obvious that the advocates for the plaintiffs did not have any clue that any of her clients were deceased.

42. Meanwhile, because there were still 3 other plaintiffs, it does appear that the plaintiffs' lawyers went ahead to make ready the case for trial, whilst completely oblivious of the death of two of her clients.

43. I find no reason to fault the plaintiffs advocates.

44. On the part of the surviving plaintiffs, I find no fault with them too. I so find because their advocates were taking steps in the case, notwithstanding the demise of 2 of the plaintiffs. Therefore, those plaintiffs would appear to have had no reason to give "un-necessary information" to their advocates.

45. In respect to the family of the 3rd plaintiff, they had obtained the Letters of Administration, fairly early. But, again, as the plaintiffs' lawyer appeared able to take steps in the case, without being interrupted with the demise of the 3rd plaintiff, it does appear that the Estate of the deceased felt no need to inform their lawyers of the death of that plaintiff.

46. Of course, Ignorance of the Law is no Defence.But I also think that it would be unfair to punish innocent persons just because of their lack of knowledge. They did not know that the suit of the 3rd plaintiff had abated. They did not know that there was need to seek to revive the suit. That would explain why they obtained the Letters of Administration, but did not see the need to use them in having either the suit revived or in substituting the deceased.

47. The Bank is the only defendant who opposed the application. The other 3 defendants did not oppose the application. In effect, the application would be granted in relation to those 3 other defendants, as it was un-contested.

48. If the case against the 3 other defendants was proceeding, it would only be fair to have the whole case presented at one forum.

49. All the parties had, as recently as 9th June 2014, been ready to prepare their respective cases, for trial. In particular, the bank sought and was granted leave to file Supplementary statements of witnesses, together with a Supplementary Bundle of Documents.

50. In those circumstances, I find that the revival of the suit and the substitution of the 3rd plaintiff would not be prejudicial to any of the parties.

51. Accordingly, I now order that the suit of the 3rd Plaintiff be revived.

52. Following the revival of the suit, I further order that the 3rd plaintiff be substituted by **CHARLES GACHUGU MUCHIRI, MERCY MAKAU, WILLIAM MUCHIRI and ROSEMARY JAJA MBOGO.**

53. Notwithstanding the success of the application dated 4th August 2014, the bank cannot be condemned to pay the costs thereof. I order that each party will bear his/her own costs of the application.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **11th day** of **June** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the 1st Plaintiff

Gachie for Kiongera for the 2nd Plaintiff

Gachie for Kiongera for the 3rd Plaintiff

Gachie for Kiongera for the 4th Plaintiff

No appearance for the 1st Defendant

Odhiambo for the 2nd Defendant

No appearance for the 3rd Defendant

No appearance for the 4th Defendant

Collins Odhiambo – Court clerk.