



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**ELC CASE NO. 651 OF 2013**

ELIZABETH WANGECHI MWAI

Suing as the Administrator of the Estate of

PETER MWAI MBURATI (DECEASED) .....APPLICANT/INTENDED  
SUBSTITUTED PLAINTIFF

VERSUS

JAMLECK MWANGI NJOKA .....1<sup>ST</sup> DEFENDANT

EDWARD NJAGI MURIITHI.....2<sup>ND</sup> DEFENDANT

JOSEPH MUCHIRI.....3<sup>RD</sup> DEFENDANT

LAND REGISTRAR KIRINYAGA.....4<sup>TH</sup> DEFENDANT

**RULING**

On 27<sup>th</sup> June 2014, this Court delivered a ruling in which it dismissed an application by one CATHERINE WAWIRA MURIUKI seeking to be substituted in place of the late PETER MWAI MBURATI. In dismissing the said application, this Court found that the applicant was not the legal representative of the deceased.

ELIZABETH WANGECHI MWAI has now filed an application dated 9<sup>th</sup> October 2014 brought under the provisions of Section 3A Civil Procedure Act and Order 1 Rule 10 and Order 24 Rule 3 and 7 of the Civil Procedure Rules seeking the following orders:-

***1. That this Court do revive this suit and substitute the late PETER MWAI MBURATI deceased with ELIZABETH MWAI as the plaintiff herein and the pleadings be amended accordingly.***

The application is based on the grounds that the said PETER MWAI MBURATI is deceased and the applicant has obtained letters of Administration Ad litem in respect of his Estate. In her affidavit in support of that application, the applicant has deponed, inter alia, that the deceased PETE MWAI MBURATI died on 18<sup>th</sup> August 2012 and an application by CATHERINE WAWIRA to substitute him was dismissed and that the delay herein is not long and was due to inadvertence as she was applying for letters of Administration Ad litem in respect of his Estate.

Grounds of objection to the application have been filed by Maina Kagio advocate on behalf of the 3<sup>rd</sup> defendant/respondent in which it is pleaded that the same is vexatious, frivolous and an abuse of the Court process since the original suit had been filed by the late PETER MWAI MBURATI who was said to be the administrator of the Estate of MBURATI KABURI and those two Estates are totally different and there is nothing to show the applicant's interest in the Estate of MBURATI KABURI. Further, that there has been an in-ordinate delay of more than 1 ½ years because the late PETER MWAI MBURATI died on 18<sup>th</sup> August 2012 and the petition for limited letters of Administration were filed in 2014.

Similar sentiments were expressed by the 1<sup>st</sup> defendant/respondent who stated in his replying affidavit that the application was more than 2 years late and in any case, this suit has dragged on since 2003.

Submissions were filed by both Ms Thungu for the applicant and Mr. Chomba and Mr. Maina Kagio for the 1<sup>st</sup> defendant/respondent and the 3<sup>rd</sup> defendant/respondent respectively.

I have considered the application, the rival affidavits and submissions by counsels.

It is not in dispute that the deceased PETER MWAI MBURATI died on 18<sup>th</sup> August 2012 and this application was filed on 13<sup>th</sup> October 2014 after the applicant obtained a limited grant Ad litem on 18<sup>th</sup> September 2014 in respect of his Estate. **Order 24 Rule 3(2) of the Civil Procedure Rules** provides as follows:-

***“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”*** emphasis added.

Therefore, although a suit will automatically stand abated if within one year no application is made to substitute the deceased plaintiff, the Court has a discretion, ***“for good reasons”*** to revive such a suit. Such discretion must of course be exercised judicially and on sound reason. The deceased herein died on 18<sup>th</sup> August 2012 and the applicant filed this application on 13<sup>th</sup> October 2014 having obtained the grant of letters of Administration in respect of the deceased's Estate on 18<sup>th</sup> September 2014. There was therefore a delay of some two years from the date of the deceased's death to the time the grant of letters of Administration was issued. What is the applicant's explanation for this delay? It is found in paragraph 4 of her supporting affidavit in which she has deponed as follows:-

***“That I wish to substitute the plaintiff in this case and proceed with the matter and I urge this Court to revive the suit as Peter Mwai Mburati died on 18.8.12 and my daughter Catherine Wawira had tried to substitute him in good time and her application was dismissed and one year has lapsed since Peter Mwai Mburati passed away and the delay in filing this application is not inordinate and was due to inadvertence as I was in the process of applying for letters of Administration Ad litem for the Estate of Peter Mwai Mburati which I did expeditiously after the application by Catherine Wawira was dismissed (annexed and marked EWM 3) is a copy of the application EWM 4 is a copy of the ruling”***

The applicant's explanation therefore is that she was applying for a grant of letters of Administration coupled with inadvertency on her part. **Order 24 Rule 7(2) of the Civil Procedure Rules** provides as follows:-

***“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”***

As indicated earlier, the applicant took some two years to apply for the grant in respect of the Estate of the deceased. That is her explanation for the delay. Courts have taken different views where the delay is based on the ground that the applicant was applying for a grant of letters of Administration. In DAVID NJIHIA VS K P & L 2001 H.C.C.C No. 1045 of 2001 (NBI), WAWERU J. declined to allow an applicant who had waited two years before applying for a grant of representation and a further two years to file the application to revive the suit. The applicant did not give satisfactory reasons for that delay.

In the case of BERNARD NAMUNWA & ANOTHER VS GEOFFREY JARED & ANOTHER H.C.C.C No. 70 of 2004 (BUNGOMA) MUCHEMI J. allowed the revival of a suit where the applicant took some ten months to apply for the grant and another six months to file the application to revive the suit. On the other hand, in NGAMBI MEME VS ELDORET PACKERS LTD H.C.C.C No. 56 OF 2000 (ELDORET) IBRAHIM J. (as he then was) allowed an application for revival of a suit where the applicant took two years to petition for a grant of letters of Administration. In both these last two cases, the explanation given for delay was that the applicants were looking for the fees to petition for grants.

In this application now before me, the applicant says she was applying for a grant of letters of Administration which she says she only did after the application by Catherine Wawira was dismissed on 27<sup>th</sup> June 2014. Each case must ultimately 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 the grant of the order sought.

I accordingly allow the application dated 9<sup>th</sup> October 2014 and grant the orders sought therein with no order as to costs.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> OCTOBER, 2015**

9/10/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Githuka for Thungu for Plaintiff – present

Mr. Abubakar for Chomba for Defendant – present

COURT: Ruling delivered this 9<sup>th</sup> day of October, 2015 in open Court.

Mr. Githuka for Ms Thungu for Plaintiff present

Mr. Chomba for Defendant present.

**B.N. OLAO**

**JUDGE**

**9<sup>TH</sup> OCTOBER, 2015**