



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL CASE NO. 65 OF 1997

KIBITA KIBUTHO PLAINTIFF/DECEASED

ALICE WARUGURU MUNYAGIA APPLICANT

VERSUS

ELIAS NJAGI NJOKA1ST RESPONDENT

PHYLIS MICERE KUBUTA2ND RESPONDENT

R U L I N G

The Applicant is a wife to the Plaintiff who passed away on 20/2/2011. On 14/2/2012 the Applicant obtained a limited grant ad litem authorizing her to pursue this matter on behalf of the Plaintiff (AWM1). She therefore filed this application dated 21/3/2012 on 27/3/2012 for substitution. It is supported by her sworn affidavit.

The Respondents have opposed the application through their grounds of opposition. The grounds are that the suit has abated and the application is therefore incompetent and bad in law.

Mr. Abubakar for the Respondents argues that the application was made after the one year allowed by Order 24 rule 3 (2) Civil Procedure Rules. That even though the Applicant obtained the limited grant on time she delayed in filing the necessary application within the one year. And that thereafter she failed to make an application for extension of time.

M/s Wairimu in response submitted that the application for extension could not be made by the Applicant before the substitution. And that Order 24 rule 3(1) and (2) Civil Procedure Rules should be read together. Order 24 rule 3(1) provides;

“Where one of two or more Plaintiffs dies and the cause of action does not survive or continue to the surviving Plaintiff or Plaintiffs alone, or a sole Plaintiff dies and the cause of action survives or continues, the Court on an application made in that behalf shall cause the legal representative of the deceased Plaintiff to be made a party and shall proceed with the suit.

2. 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”.

It is true that the present application was filed exactly thirteen (13) months after the death of the Plaintiff herein. It's also true that the Applicant had obtained a limited grant ad litem for the purpose of being substituted in this case among others before the expiry of the required one year. What is being contested is the one month delay in filing the present application.

Considering the steps taken before the filing of this application I am convinced that the Applicant tried her best to regularize her position by obtaining the limited grant ad litem. The delay by one month is not inordinate in the circumstances. The Proviso to Order 24 rule 3 (1) and (2) is that the Court has the discretion to extend time for good reasons. The Courts now being guided by the principles under Article 159(1) (d) of the Constitution which provides;

“Justice shall be administered without undue regard to procedural technicalities”

will not inhibit justice to be dispensed by virtue of procedural technicalities. In this case I do find that the Applicant lost her husband and she moved in the right direction by obtaining the limited grant to enable her pursue this case. My finding is that she qualifies for the extension of time which I hereby do. The application will be deemed to have been filed within the required time and the prayer for substitution is therefore allowed. Costs in the cause.

DATED SIGNED, AND DELIVERED IN OPEN COURT AT EMBU THIS 15TH DAY OF MAY 2014.

H.I. ONG'UDI

J U D G E

In the presence of:-

Mr. Abubakar for Mr. Magee for Respondent

M/s Wairimu for Applicant

Njue/Kirong – C/c