REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

ELC CASE NO. 45 OF 2017

EBBY MINAYO MUNGASIA.....PLAINTIFF

VS

SHADRACK MACHARIA MWANGI.....1ST DEFENDANT

JOSEPH KOROS.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 30th September 2019 by the plaintiff/applicant seeking for the following orders:

a) Spent

b) That this Honourable court be pleased to admit and substitute the applicant as the plaintiff in his capacity as personal legal representative of the estate of Ebby Minayo Mungasia.

c) That the Honourable court be pleased to reinstate the plaintiff/applicant's initial suit that was dismissed.

d) That this Honourable court be pleased to revive the plaintiff's initial suit

e) Costs of the application be provided for.

Counsel agreed to canvas the application vide written submissions which were duly filed.

PLAINTIFF/APPLICANT'S SUBMISSIONS

Counsel for the plaintiff/applicant relied on the grounds on the face of the application and the supporting affidavit It was counsel's submission that the delay in filing the application was due to the nature of work of the applicant and the challenging responsibility of taking care of young children in the absence of his late wife. He further stated that the delay in obtaining letters of administration ad litem also contributed.

Counsel swore an affidavit and annexed copies of the title deed for the suit land, a marriage certificate, a death certificate and a limited grant. It was counsel's further submission that the applicant has an interest in the matter as the suit land is matrimonial property and is the best suited person to substitute the deceased plaintiff as he has locus standi having obtained a limited grant.

Mr Marimoi submitted that the applicant prays that the suit be reinstated as it was dismissed for non-attendance by the plaintiff's advocate. That a hearing date was fixed but due to a mix up the same was not put in their diary hence the plaintiff was not informed of the hearing date.

Counsel urged the court not to visit the advocate's mistake on the client and exercise discretion to reinstate the plaintiff's case. That the matter proceeded whereby the defendant's counterclaim was dismissed

Counsel cited the case of **Gold Lida Limited v Nic Bank Limited & 2 others [2018] eKLR** where the court reinstated a suit and held that "*inconvenience to be suffered by the defendants as a result of reinstatement of this suit can be adequately remedied through an award of costs".*

Mr Marimoi submitted that this suit has abated by the operation of the law but relied on the provisions of Order 24 Rule 2 of the Civil Procedure Rules, which provides that upon the demise of the plaintiff, the suit can proceed at the instance of a legal representative.

Order 24 Rule 2 (7) provides that :

> ***(1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***
>
> ***(2) 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***.

Counsel submitted that although this application was to be filed within a year of the plaintiff's demise, the applicant was distressed by the demise of his wife and was not in a good mental state to comply. Counsel urged the court to exercise its inherent power and discretion to revive the suit

Mr. Marimoi relied on the case of **Timothy Limo & 2 ors v. Joel Kinyanjui (2020) eklr** and urged the court to allow the application as prayed.

DEFENDANT/RESPONDENT'S SUBMISSIONS

Counsel for the defendant submitted that the applicant is guilty of laches as the suit abated on 30th December 2018 as the plaintiff died on 30th December 2017.

Counsel relied on the provisions of Order 24 Rule 3 of the Civil Procedure Rules and that the application was filed 19 months after the demise of the plaintiff contrary to the law providing for one year.

Mr Mogambi submitted that the applicant had not sought for time within which to extend the one year period provided by the law, as was held in the case of **Joseph Gachuhi Muthanji v. Mary Wambui Njuguna(2014) eKLR** and **Said Sweilem Gheithan Saanum v. Commissioner of Land**s(being sued through the A.G) & 5 Ors(2015)eKLR.

Counsel submitted that the applicant has not given sufficient reasons to account for the absence of the plaintiff during the hearing on 22nd February 2017 and relied on the case of **Nilani v. Patel (1969) E.A 341** where the court held that:

> *"It is only too trite to say that as in every civil suit, it is the plaintiff who is in pursuit of a remedy, that he should take all the necessary steps at his disposal to achieve an expeditious determination of his claim. He should not be guilty of latches. On the other hand, when he fails to bring his claim to a speedy conclusion, it is my view that a defendant ought to invoke the process of the Court towards that end as soon as it is convenient by either applying for its dismissal or settling down the suit for hearing... Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisor to get on with the case. Every year that passes prejudices the fair trial. Witnesses may have died where a period of over nine years have elapsed. ... documents may have been mislaid, lost or destroyed and the memory tends to fade."*

Mr Mogambi therefore urged the court to dismiss the application with costs as the defendant will suffer prejudice.

ANALYSIS AND DETERMINATION

This is an application where the applicant is seeking for various reliefs namely; substitution of the decease plaintiff, revival and reinstatement of the plaintiff's suit and extension of time. The issues for determination are as to whether the applicant has sufficiently explained the reason for the delay in bringing this application outside the one-year statutory requirement of filing such applications and whether the court can exercise its discretionary power to revive this suit.

It is not in dispute that the plaintiff died on 30th December 2017 and that the matter proceeded in her absence whereby her claim was dismissed for non-attendance and the defendant proceeded with his counterclaim which was also dismissed.

Counsel for the applicant has explained that there was a mix up in his office and did not enter the hearing date of this case in their diary hence the absence in court during the hearing. Counsel submitted that the mistake of counsel should not be visited on the litigant and urged the court to exercise its discretion in favour of the applicant.

In the case of **BELINDA MURAS & 6 OTHERS –VS- AMOS WAINAINA [1978] KLR** in which **Hon Madan JA** (as) he then was defined what constitutes a mistake as follows:

> *"A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because of a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate."*

The applicant should not be locked out from the seat of justice due to the mistake of counsel. Allowing such draconian action would not be in

furtherance of the spirit of Article 159 to do substantive justice.

Order 24 Rule 3(2) and 4 (3) provides as follows:-

"3(1) 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 or sole surviving 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 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: Provided the court may, for good reason on application, extend the time.

4(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant."

The applicant has made elaborate explanations as to why he did not file the application within one year upon the demise of the late wife who was the plaintiff. The applicant stated that the wife died and left him with young children to take care of and was not in a correct mental state to file the application. He further stated that he had to file for letters of administration to enable him to have locus standi to be substituted in the case.

In the case of **Soni –versus- Mohan Dairy [1958] E. A. 58,**

" *it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period…."*

In the case of the **Honouarable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011** was cited for the proposition that:

"Sufficient cause or good cause in law means: the burden placed on a litigant usually by court, rule or order to show why a request should be granted or an action excused. (See Blacks Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events."

To my mind there is no doubt that the applicant has been truthful on the explanation as to why he did not file the application within the stipulated time.

On the issue of delay as was enumerated in the case of **Jackson Ngungu Kaguae v Attorney General & 595 Others [2016] eKLR** the court held that the test for what amounts to delay is that which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.

The court will determine the issue of delay on a case by case basis whereby a day or two may be considered as inordinate delay while 5 or so years may be considered otherwise. These depends on the circumstances of the case and whether sufficient explanation is given to convince the court.

The circumstances of this case are that the plaintiff's case was not heard on merit but was dismissed for non-attendance which is one of the options provided for under procedure that when a day fixed for hearing of the suit and a party does not attend the suit shall be dismissed. The defendant proceeded with the counterclaim and the same was also dismissed upon hearing. The defendant has not shown any prejudice that will be caused by the reinstatement of this suit.

This is a case where the court can exercise its discretion to do substantive justice. In the case of **SHAH –VS- MBOGO & ANOTHER [1967]6.A U7,** the Court of Appeal for Eastern Africa held that:-

"Applying the principle that the court's discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice, the motion should be refused".

The discretion being exercised in not to assist the applicant for inaction to file the application within the stipulated period but to do justice. No prejudice will be occasion by reinstatement of this case as the defendant will also have an opportunity to be heard.

In the case of **MARTHA WANGARI KARUA –VS- IEBC Nyeri Civil Appeal No.1 of 2017** the Court of Appeal held as follows:-

> *"The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be.."*

Further in the case of **Vue Taure Vue & another v Felix Tsori Chivatsi & another [2020] eKLR where Ololа J** in allowing an application revive an abated suit stated that:

> *"As the Applicant submits, a refusal to grant this application is tantamount to the dismissal of the Plaintiff's case without hearing it on the merits. That is a draconian act as it would be driving away the Plaintiffs from the Judgment seat without being given a hearing. In the circumstances before me, I will not punish the Applicant and other beneficiaries of the estate for the failure to revive the suit earlier.*
>
> *Instead, I invite the intrinsic power of this Court to administer justice devoid of technicalities as well as the overriding objective for the suit to be heard and disposed off on merit and hereby allow the application as prayed in terms of prayers 1 and 2 thereof."*

I have considered the application, the submission of counsel, relevant judicial authorities and find that the application has merit and is therefore allowed as prayed. The suit is hereby reinstated which in effect sets aside the dismissed counterclaim. The matter to be heard afresh on merit. Parties to comply with order 11 within 30 days and fix the case for hearing.

DATED and DELIVERED at ELDORET this 25TH DAY OF NOVEMBER, 2020

M. A. ODENY

JUDGE