



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKS ELC NO.661 OF 2017

(FORMERLY NRB 476 OF 2015)

MARY WAIHERA GIKIMA.....1ST PLAINTIFF

KENNETH NJOROGE GIKIMA.....2ND PLAINTIFF

VERSUS

KARIUKI WAIRAGU.....1ST DEFENDANT

GACHUHI KAMENYA2ND DEFENDANT

MICHEAL WARUI GIKIMA.....3RD DEFENDANT

LEGORN FEEDS INTERNATIONAL LIMITED.....4TH DEFENDANT/APPLICANT

RULING

The matter for determination is the **Notice of Motion Application** dated **20th January 2020**, by the 4th Defendant/ Applicant seeking for orders that ;

1. That the Honourable Court do extend time to substitute the 1st Defendant herein Kariuki Wairagu (Deceased) with his legal representatives and the suit against him be deemed to be subsisting.

2. That costs of this Application be provided for .

The Application is premised on the grounds that the death of the 1st Defendant has not been made known to the 4th Defendant/Applicant on time, until the time an Application to cease acting was filed in Court by Counsel for the 1st Defendant. That the family of the 1st Defendant when contacted, indicated that it was yet to file for Letters of Administration. Further, that the Applicant is still awaiting communication from the family of the 1st Defendant on the issue of the Legal Representative of the 1st Defendant and it is in the interest of Justice that the 1st Defendant be substituted to enable this matter proceed to conclusion.

In his Supporting Affidavit, Stephen **Waithiru Baiya** averred that he learnt of the 1st Defendant 's death when the Application to cease acting was filed on **6th September 2019**, by his Advocates and he was advised by is Advocate that there was need to substitute the 1st Defendant with the Legal Representative of his Estate. Further that the 1st Defendant's family informed him that they were in the process of getting Letters of Administration, and his efforts to get information on the legal Representation have not been fruitful as the family is yet to file for Letters of Administration. He urged the Court to extend time for substituting the 1st Defendant.

The Application is opposed by the 2nd and 3rd Defendants who filed grounds of opposition dated **4th February 2020**, and averred that **Order 24 Rule 4 of the Civil Procedure Rules** is very clear that the Legal Representative of the deceased is the one to be made a party, in a suit through a substitution of the deceased Defendant. That the Applicant has not shown evidence regarding who is the Legal Representative being fronted to be substituted. It was contended that **Sections 1A,1B or even**

3A cannot come to the aid of the Applicant herein without there being evidence of a Legal Representative who is to be made a party. That the interests of justice are best served by upholding the law. Further that **Order 24 Rule 4** has no provision for extension of time for substitution of a deceased Defendant after one year and that the substitution should be done within one-year failure to which the provision is mandatory that the suit as against the deceased Defendant shall abate.

The Plaintiffs swore a Replying Affidavit sworn by Mary **Waithera Gikima** on **11th March 2020**, in support of the instant Application and averred that they are aware that the 1st Defendant is deceased and having been a person of great interest in the suit, there is need to have the Legal Representative of his Estate substituted in this suit. That her Advocate has advised her which she believed to be true that the time given for substituting a deceased person is limited and that the suit will abate if the same is not done within the statutory time.

Further that the Administration of the Estate of the 1st Defendant has not been done and as such, the 1st Defendant (Deceased) cannot be substituted within the required time. She further averred that the Plaintiffs stand to suffer great prejudice if the suit against the 1st Defendant abates for lack of substituting and the Estate of the 1st Defendant will not be prejudiced in any way by the extension of the time for substitution. It is in the interest of justice that the Application is allowed.

The Application was canvassed by way of written submissions which the Court has carefully read and considered.

The Applicant has sought for the extension of time within which the 1st Defendant (Deceased) should be substituted. The 4th Defendant/Applicant has submitted that it sought for extension of time before the expiry of the one year period considering it only learnt of the 1st Defendant's death in **September 2019**. However, the 2nd and 3rd Defendants submitted that the Application is **frivolous** and **vexatious** and ought to be dismissed. It was their further submissions that the 1st Defendant who died on **26th March 2019**, and who the 4th Defendant/ Applicant is attempting to substitute is a Co Defendant. Since here are other Defendants the suit survives.

Order 24, rule 4 Of the **Civil Procedure Rules** provides ;

(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.

From the above provision of law, it is thus clear that the Court can order for the substitution of a Defendant, but the said substitution ought to be made within one year. In this instant case, it is clear that the 1st Defendant died on, **26th March 2019** and though the Application seeking for extension of time was filed before the time had expired, it is not in doubt that the substitution had not occurred by time the one year lapsed. Therefore, the suit abated against the 1st Defendant, one year after his death. However, the Court can extend the time within which such substitution can be made. See the case of **Rebecca Mijide Mungole & another ...Vs... Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR** where the Court of Appeal held that;

“Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. Order 24 must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to rule 3(2) to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of Joseph Gachuhi Muthanji (supra) was therefore right in dealing with that aspect of the application in the manner he did.”

Indeed, the Court can extend time and **for the court to exercise the said discretion vested in it in favour of a person seeking to revive a suit that has abated, the Court must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. See the case of Rukwaro Waweru...Vs... Kinyutho Ritho & another (2015) eKLR** Where the Court held that ;

“... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. See H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni –versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd – versus- Kassam [1982] K.L.R. 458.

Has the Applicant herein demonstrated sufficient cause?

It is the Applicant's contention that it learnt of the 1st Defendant's death after six months. Further that its efforts to get information on the issue of representation have not been fruitful and the 1st Defendant's family has informed him that it is yet to take out Letters of Administration. It is not in doubt that the 1st Defendant can only be substituted by his Legal Representative. That someone has to take out

letters of Administration. The Court finds that the fact that Applicant learnt of the 1st Defendant' death after six months and no one has taken out Letters of Administration in regard to the 1st Defendant's Estate is sufficient reason to extend time. Further, there is no one to be substituted at the instant time.

Coupled with the fact that on **18th March 2019**, the Court stayed the instant suit, the Court finds that no prejudice will be occasioned to the 1st and 2nd Defendants if the Application is allowed.

Having now carefully read and considered the **Notice of Motion Application** herein, the grounds of opposition and the Replying Affidavit, the Court finds and holds that the said **Notice of Motion Application** dated **20th January 2020**, is merited and the same is allowed entirely with costs to the 4th Defendant/ Applicant

It is so ordered.

Dated, signed and Delivered at Thika this 10th day of December, 2020.

L. GACHERU

JUDGE

10/12/2020

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Ms Chelule holding brief for Mr. Bosek for the Plaintiffs

Ms. Rungare for the 4th Defendant/Applicant

L. GACHERU

JUDGE

10/12/2020