



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC. CASE NO. 132 OF 2019**

**(FORMELY MILIMANI HIGH COURT COMMERCIAL CIVIL SUIT NUMBER 366 OF 2002**

**AND ALSO FORMERLY DESIGNATED AS NAIROBI HCCC NUMBER 2382 OF 1999)**

**JOHN MURITU KIGWE.....1 ST PLAINTIFF**

**KIGWE SERVICE STATIONS.....2ND PLAINTIFF**

**VERSUS**

**AGIP KENYA LIMITED.....DEFENDANT**

**(CONSOLIDATED WITH HIGH COURT CIVIL CASE NUMBER 2218 OF 1999)**

**KIGWE SERVICE STATIONS.....PLAINTIFF**

**VERSUS**

**AGIP KENYA LIMITED.....DEFENDANT**

**RULING**

1. Before me for determination is a notice of motion dated 29/4/2019 brought by the estate of John Muritu Kigwe (the deceased) seeking enlargement of time for bringing an application for revival of the deceased’s suit which abated in April 2015. The application further seeks orders of substitution and revival of the abated suit.

2. It is indicated on the face of the application that two causes: (i) **Nairobi High Court Commercial Division Case No 366 of 2002** [formerly registered as **Nairobi HCCC No 2382 of 1999**] **John Muritu Kigwe & Kigwe Service Station and Transporters Limited v Agip Kenya Limited** and (ii) **Nairobi HCCC No 2218 of 1999; Kigwe Service Station and Transporters Limited v Agip Kenya Limited 1999** were at some point consolidated by the High Court. It is not clear from the High Court record the exact date when the consolidation order was issued, if at all. The two files were subsequently transferred as one file to Nairobi Environment and Land Court last year pursuant to a consent letter presented to the Deputy Registrar. Upon receipt of the file in the Environment and Land Court Registry, the two suits were registered as one suit and designated as **Nairobi ELC No 132 of 2019**. It is not clear why they were registered as one suit. Secondly, it is noted from the pleadings that the suit property is situated in Thika Town within the jurisdiction of Thika Environment and Land Court.

3. The case of the estate is set out in the grounds on the face of the application; in the supporting affidavit sworn on 29/4/2019 by Susan Wanjiru Muritu; and in the written submissions filed by the estate’s advocates, M/s Kamau Kuria & Co Advocates. In summary, the estate of John Muritu Kigwe contends that the deceased died on 9/2/2014 during the subsistence of the two causes. The cause of action in the suit where John Muritu Kigo (the deceased) was a co-plaintiff survived the death of the deceased. At the time of death, the relevant court file was untraceable and this prevented the estate from applying for substitution within the time frame stipulated by the law. The problem subsisted for a long period. Further, through inadvertence on part of the estate’s advocates, when the court file became available, the application for substitution was not promptly made. Lastly, the estate contends that there was a delay in obtaining the grant of letters of administration relating to the deceased’s estate.

4. Urging the court to allow the application, Dr Kamau Kuria SC, urged the court to be guided by the decisions in: (i) **Murai v Murai (1982) KLR 38**; (ii) **Issa Masudi Mwabumba v Alice Kavenya Muhinga & 4 others [2012] eKLR**; and (iii) **Wageche Muriyu Muturi v Muturi Mariyu [2013] eKLR**. Dr Kuria submitted that because the respondent had neither presented controverting evidence nor

demonstrated probable prejudice, it was in the interest of justice that the suit be revived and the two cases be heard and determined on merit. Relying on the Judgment of Ouko JA in **Nicholas Arap Salat v Independent Electoral and Boundaries Commission & 6 others [2013] eKLR**, Senior Counsel urged the court to uphold the paradigm shift in jurisprudence relating to exercise of judicial discretion in applications for extension of time by focusing on substantive justice as dictated by **Article 159 of the Constitution**.

5. The respondent did not file a replying affidavit. They filed grounds of opposition dated 3/2/2020 and written submissions dated 4/2/2020. Their case was that the applicant had failed to furnish the court with facts that would enable it to exercise discretion in her favour; the applicant had failed to satisfy the requirements of **Order 24 rule 7 (2)** of the **Civil Procedure Rules**; the applicant had failed to satisfy the criteria of “sufficient cause”; and there was unexplained inordinate delay in bringing the application.

6. Mr Thuo, counsel for the respondent, submitted that the key issue falling for determination in the application was whether the applicant had demonstrated that he was prevented by a sufficient cause from effecting substitution of the deceased plaintiff within the prescribed time. Relying on the decisions in: (i) **The Hon Attorney General v The Law Society of Kenya & Another- Civil Appeal (application) No 133 of 2011**; (ii) **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 others [2017] eKLR**; and (iii) **Said Sweilem Gheilhan Saanum v Commissioner of Lands & 5 Others [2015] eKLR**, counsel submitted that the reasons proffered by the applicant did not demonstrate that the applicant was hindered by a “sufficient cause” from continuing with the suit. Counsel added that the grounds advanced by the applicant were not rational, plausible, logical, convincing, reasonable or truthful. Counsel contended that the applicant had failed to satisfy the requirements of **Order 24 rule 7 (2)** and there was unexplained inordinate delay. Lastly, counsel urged the court to consider the prejudice that would be suffered by the defendant if the application was granted. He urged the court to dismiss the application.

7. I have considered the application, grounds of opposition, and parties’ respective submissions. I have also considered the relevant legal framework and jurisprudence on the key question in the application. The single question falling for determination in this application is whether the applicant has satisfied the criteria upon which our courts exercise the discretionary jurisdiction to extend time for bringing an application for revival of a suit and subsequently grant a revival order within the framework of **Order 24 rule 7 (2)**.

8. The guiding criteria in exercise of the above discretionary jurisdiction was summed up by the Court of Appeal in **Rebecca Mijide Mungole & another v Kenya Power & Lighting Company Ltd & 2 Others [2017] eKLR** in the following words:

*“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. After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in rule 7(2) “sufficient cause” has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of bona fides, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.*

9. **Apaloo JA** outlined the following approach to a similar scenario relating to the exercise of discretionary jurisdiction in **Philip Chemwolo & Another Vs Augustine Kubede (1982-88) KAR 103**.

*“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.*

10. In the application under consideration, the respondent did not file a replying affidavit to controvert the evidence presented to the court through the supporting affidavit sworn by Susan Wanjiru Muritu. The import of that omission is that the applicant’s evidence is uncontroverted. Secondly, the respondent failed to utilize the platform available to demonstrate any probable prejudice they would be exposed to in the event of revival. Thirdly, it is not disputed that the deceased died on 9/4/2014. Consequently, both the deceased’s suit and the defendant’s counter-claim in **Nairobi High Court Commercial Division Case No 366 of 2002 (formerly Nairobi HCCC No 2382 of 1999)** abated in April 2015. From the record, there is joinder of issues on the suit and counter-claim. The full grant of letters of administration relating to the deceased’s estate was obtained in January 2018. The present application was presented to court on 29/4/2019. It is therefore apparent that there was delay in the procurement of succession papers and in bringing the present application.

11. The explanation tendered by the applicant for the apparent delay is, firstly, that the court file was not traceable. The second limb of the explanation is that it took long for the estate to procure the grant of letters of administration. Thirdly, the applicant has stated that there was inadvertence on part of the estate’s advocates. I have considered the said explanation. Indeed, court proceedings relating to the period between 2013 and 2016 indicate that one of the two files could not be traced. There is however doubt that tracing of the missing file would have changed the scenario in the absence of appropriate succession papers under the Law of Succession Act.

12. However, because allegations of **unintentional delay** in the obtention of the grant of letters of administration and **inadvertency on part of the estate’s advocates** were made and were not controverted, I will accept the explanation tendered as sufficient cause. I will grant extension of time and allow revival of both the suit and the counter-claim. I would have granted the defendant throw-away costs in relation to this application were it not for the fact that they have a counter-claim and the revival order granted will inevitably cover both the suit and the counter-claim because the two are co-joined and there is joinder of issues on them. I will revive both for complete and effectual adjudication of the dispute in the two causes.

13. Lastly, because the suit property is located in Thika Town and there is an Environment and Land Court at Thika, the two suits herein will be transferred to Thika Environment and Land Court for hearing and disposal.

**Disposal Orders**

14. In light of the foregoing, I make the following disposal orders in relation to the plaintiff's application dated 29/4/2019:

*(a) The time for bringing an application for substitution of Susan Wanjiru Muritu in place of John Muritu Kigwe is deemed to have been enlarged.*

*(b) Susan Wanjiru Muritu is hereby substituted in place of the late John Muritu Kigwe in her capacity as the administrator of his estate.*

*(c) Both the deceased's suit and the defendant's counter-claim are hereby revived*

*(d) The two causes herein are hereby transferred to Thika Environment and Land Court for hearing and determination.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF DECEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Dr Kamau Kuria SC for the Plaintiffs/Applicants

Mr Thuo for the Defendant/Respondent

Court Clerk - June Nafula