



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

E.L.C. CASE NO. 178 OF 2014

DAVID MWANIKI MBITI (DECEASED).....PLAINTIFF

VERSUS

JANE WANGUI NGURU.....DEFENDANT

AND

THOMAS MUGO MBITI.....APPLICANT

RULING

1. By a notice of motion dated 16th August 2018 and amended on 22nd October 2018 brought under the provisions of **section 1A of the Civil Procedure Act, (Cap 21) Order 24 Rule 3(2)** and **Order 51 Rule 1 of the Civil Procedure Rules, 2010** (hereinafter the *Rules*), the Applicant sought the following reliefs;

- a. That there be an extension of time within which to file an application for substitution and this suit be reinstated.*
- b. That the Applicant Thomas Mugo Mbiti be substituted in place of David Mwaniki Mbiti who was the Plaintiff.*
- c. That costs of this application be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the Applicant on 22nd October 2018. The gist of the application was that the Plaintiff was deceased and that the Applicant, having taken out a limited grant of letters of administration *ad litem*, desired to be joined as the Plaintiff in the suit. The Applicant stated that he was a brother of the deceased Plaintiff.

3. The Defendant filed a statement of grounds of opposition dated 7th November 2018 in opposition to the said application. It was stated that the said application was incompetent and that no cause of action survived the death of the Plaintiff since he had filed the suit as a personal representative of the estate of Mbiti Muthigire.

4. When the said application was listed for hearing on 12th November 2018, the concerned parties consented to canvass it through written submissions. The Applicant was granted 21 days to file and serve his submissions whereas the Defendant was granted a similar period upon service by the Applicant. However, the record shows that the Defendant filed his submissions on 7th December 2018 whereas the Applicant filed his on 9th January 2019.

5. The court has considered the Applicant's said notice of motion, the Defendant's response thereto, as well as the written submissions of the parties. The main issue for determination is whether or not the Applicant has made out a case for the grant of the orders sought. The provisions of **Order 24 Rule 3 of the Rules** stipulate that;

“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 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.”

6. Although the said Rule requires the application for substitution to be made within one year from the death of the Plaintiff, the court is empowered to extend that period. The Applicant in this matter has actually sought such extension of time. It is evident from the record that although the Plaintiff died on 31st October 2015, the letters of administration *ad litem* were not obtained until 9th July 2018. The court is satisfied that the suit could not proceed and no application for substitution of the deceased Plaintiff could be made without letters of administration. The court is thus satisfied that there is a good reason to grant an extension of time under the proviso to **Order 24 Rule 3 (2) of the Rules.**

7. The Defendant objected to the order for substitution on the basis that the Plaintiff's cause of action did not survive his death since he was himself a legal representative in the suit. The Defendant did not cite any legal authority for that proposition. Under **section 2 of the Law Reform Act (Cap 26)** which deals with survival of causes of action, all causes of action subsisting against or vested in a deceased person shall survive against or for the benefit of his estate except actions for defamation; seduction or inducement of a person to leave his spouse; and damages for adultery. The court is not persuaded that the Defendant's proposition on survival or extinction of causes of action is sound in law. The same is accordingly rejected.

8. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 18th August 2018 and amended on 22nd October 2018 and the same is hereby allowed in terms of order Nos. 1 and 2 thereof. Costs of the application shall be in the cause.

9. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 28th day of FEBRUARY, 2019.

In the presence of Ms. Nzikele holding brief for Mr. Kathungu for the Plaintiff, Ms. Muthama holding brief for Mr. Kiama Kinyua for the Defendant.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

28.02.19