



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 186 OF 2017

FORMERLY MACHAKOS CIVIL SUIT NO.29 OF 2010 (O.S)

JUSTUS MUTHOKA NZAU.....PLAINTIFF

VERSUS

DANIEL MWAMBU MWAMATIDEFENDANT/RESPONDENT

JOSEPH MWANDUKA NZAU.....APPLICANT

RULING

1. What is before this Court for ruling is the notice of motion application dated 19th June, 2018 and filed in Court on 20th June, 2018. It is expressed to be brought under Order 24 Rule 3(1) of the Civil Procedure Rules, 2018. The Applicant seeks the following orders:-

1. THAT the Applicant Joseph Mwanduka Nzau be made party to this suit as a substitute for Plaintiff.

2. THAT costs of this application be costs in the cause.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Joseph Mwanduka Nzau, the Applicant herein, sworn at Kitui on the 19th day of June, 2018.

3. The Respondent has opposed the application vide his replying affidavit sworn at Kitui on 28th June, 2018 and filed in Court on the 29th June, 2018. In addition, the Respondent filed grounds of opposition dated 28th June, 2018 and filed contemporaneously with the replying affidavit.

4. The Court directed that the application be disposed off by way of written submissions.

5. The Applicant has deposed in paragraphs 2, 3 and 4 of his supporting affidavit that the Plaintiff, Justus Muthoka Nzau, died on 14th July, 2010 as can be seen from the certificate of death annexed to the supporting affidavit as JMN-1. That consequent to the Plaintiff's death, the Applicant petitioned for grant of letters of administration of his intestate estate vide succession cause number 152 of 2011 in the Chief Magistrate's Court at Kitui. That on 06th January, 2011 a grant of letters of administration intestate was issued to him as can be seen from a copy of the grant annexed as JMN-2. The Applicant has further deposed in paragraph 5 of his supporting affidavit that he is a proper person to be substituted in this suit in order to conclude the dispute herein as the legal representative of the deceased Plaintiff.

6. On the other hand, the Respondent has deposed in paragraphs 2, 3, 4, 5 and 6 of his replying affidavit that it is 8 years since the death of the Plaintiff and that the Applicant has not explained the delay of close to 7 years in filing the instant application. That since the Applicant was granted letters of administration on 06th January, 2011, he did nothing towards substitution until the Court on its own motion moved to close this file. He termed the Applicant's move as an afterthought that will clearly prejudice him. The Respondent has also deposed that he has been informed by his advocate on record, which information he verily believes to be true that substitution ought to be made within one year after the death of a party.

7. In his grounds of opposition, the Respondent has raised the same issues that he deposed in his replying affidavit. The issues in grounds of opposition are:-

1. The Plaintiff having died on 14/07/2010 and no substitution having been made within one year after the death of the Plaintiff, the suit abated against the Plaintiff and consequently there is no suit in existence warranting substitution.

2. The Applicant having been granted letters of administration on 6/01/2011, there is inordinate delay in presenting this

application.

3. The application is clearly an afterthought as it was prompted by action by Court to close the file.

4. The grant issued to the Applicant is under challenge in Kitui Probate and Administration Cause No.152 of 2011 vide application dated 29th November, 2017 seeking to revoke the said grant, now coming before Court on 11/07/2018.

5. The Applicant does not explain the delay of 7 years in bringing this application.

8. In his submissions, Mr. Kinyua Musyoki, Counsel for the Applicant has submitted that under Order 24 Rule 3(1) of the Civil Procedure Rules, the Court may for good reason on application, extend time. He went on to submit that despite the submissions by the Respondent that the Applicant has not sought for extension of time, he has nevertheless sought to be made a party notwithstanding the year period provided for by Order 24 Rule 3(2) having expired, is a clear indication that his application in essence, amounts to an application to extend the period.

9. The Counsel added that every case should be considered on its own merits and peculiar circumstances. Regarding this case, the Counsel submitted that the circumstances of this case are that the Applicant is furthering the administration of the estate of the deceased Plaintiff.

10. On the issue of award of costs as provided for under Order 24 Rule 3(2) of the Civil Procedure Rules, the Counsel submitted that the Defendant may lose what he is entitled to in case the suit is ordered as having abated.

11. The Counsel cited Article 159 (2) (d) of the Constitution which provides that justice shall be administered without undue regard to procedural technicalities and urged the Court to enjoin the Applicant since no prejudice will be occasioned on the Defendant.

12. Regarding the case of **Ngari Ndengenyie vs. Charles Githinji and another [2008] eKLR** which the Respondent has relied upon, the Applicant's Counsel urged the Court to disregard it since it was made before the promulgation of the Constitution of Kenya, 2010 and besides it is a High Court decision which is not binding on this Court.

13. On the other hand, the Respondent's Counsels submissions were that the Applicant has not explained the delay in coming to Court after 7 years. The Counsel termed the delay as inordinate and the same cannot persuade the Court to exercise its discretion in favour of the Applicant.

14. The Counsel cited the case of **Ngari Ndengenyie vs. Charles Githinji & another [2008] eKLR** where Khamoni, J ruled that an application made under Order 23 Rule 4(1) of the Civil Procedure Rules was made when the suit had already abated.

15. I have read the application together with the supporting affidavit as well as the replying affidavit and the grounds of opposition. I have also read the submissions that were made by the Counsel on record for the parties herein. It is not in dispute that the application was filed on 19th June, 2018 which is close to 7 years since the suit herein abated on the 13th July, 2011 in view of the fact that the Plaintiff herein died on 14th July, 2011. The Applicant obtained letters of administration intestate on 06th January, 2011. He did not apply for letters of administration *ad litem* to enable him be substituted in place of the deceased Plaintiff. That notwithstanding, the Applicant has not explained why he delayed in filing this application upon being issued with the letters of administration intestate. He has conceded that the grant of the orders sought under Order 24 Rule 3(1) of the Civil Procedure Rules is discretionary. That being the case, it was upon the Applicant to present reasons why the Court should exercise its discretion in his favour. As was pointed out by the Respondent, the Applicant was woken up from his slumber by the Court vide its notice dated 05th June, 2018. The Court cannot aid his indolence. Suffice it to say, my finding is that the application has no merit since the suit herein abated on 13th July, 2011.

16. I hereby proceed to dismiss the application with costs to the Respondent.

Signed, dated and delivered at Makueni this 28th day of February, 2019.

MBOGO C.G.,

JUDGE.

In the presence of:-

Mr. Masaku holding brief for Mr. Kinyua Musyoki for the Applicant

No appearance for the Defendant/Respondent

MBOGO C.G, JUDGE,

28/02/2019.