



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. CASE NO. 101 OF 2014 (ORIGINATING SUMMONS)**

**NDICHU KAHUHA.....PLAINTIFF**

**VERSUS**

**STANLEY NJERU PETER.....DEFENDANT**

**DANIEL KAMAU NDICHU.....APPLICANT**

**RULING**

1. By a notice of motion dated 6<sup>th</sup> June 2018 brought under **sections 3A, 3B (1) (a) of the Civil Procedure Act (Cap 21), Order 24 Rule 4 (1), (2) & (3) of Civil Procedure Rules, 2010** (hereafter *the Rules*) and **all the enabling provisions of the law**, the Applicant sought the following orders;

*a. That this honourable court be pleased to extend time within which the Applicant will get the late Plaintiff Ndichu Kahuha name substituted with Applicant/Intended Plaintiff Daniel Kamau Ndichu (Sic)*

*b. That the costs of this application be provided for.*

2. The said application was based upon the grounds set out on the face of the motion and supported by the affidavit sworn by the Applicant, Daniel Kamau Ndichu, on 6<sup>th</sup> June 2018 together with the annexures thereto.

3. The Applicant is the son of the original Plaintiff who is now deceased. Having obtained a limited grant *ad litem*, the Applicant sought to be joined in the suit as the legal representative of the Plaintiff to enable him prosecute the suit to its logical conclusion.

4. The said application was opposed by the Defendant's advocate who swore and filed a replying affidavit on 12<sup>th</sup> June 2018. The terse 4 paragraph affidavit simply stated that the Applicant's application was *ill advised and incompetent*. Period.

5. When the said application was listed for *inter partes* hearing on 4<sup>th</sup> February 2019, Mr. P.N. Mugo prosecuted the same on the basis of the grounds set out in the motion and the supporting affidavit and urged the court to grant the same.

6. On the other hand, Mr. Muraguri for the Defendant opposed the application on the basis of the replying affidavit sworn and filed on 12<sup>th</sup> June 2018. He submitted that the application was incompetent because the suit had already abated by operation of law and that there was no prayer in the application for revival thereof. He consequently asked the court to dismiss the said application with costs.

7. The main question which arises for determination is whether 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 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 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.”**

8. Although the said Rule requires that an application for substitution shall be made within **one year** from the death of the Plaintiff, the court is empowered to extend that period under the proviso to **Order 24 Rule 3 (2) of the Rules**. The court has noted that the instant application actually seeks extension of time within which to apply for substitution of the deceased Plaintiff.

9. It is, therefore, evident that the court is empowered to extend the period of one year if a good reason is shown. The court is further of the opinion that where such period is extended by the court the question of abatement of a suit does not arise. If a suit abates only when no application for substitution is made within one year, then it means that no abatement can take place before expiry of the time. By parity of reasoning, where that period of one year is extended by the court, there can be no abatement until the extended period has expired.

10. The court has considered the reason tendered by the Applicant for the default in filing the application for substitution within the stipulated period. The court is satisfied that there was no personal representative between 12<sup>th</sup> July 2016 when the original Plaintiff died and 4<sup>th</sup> August 2017 when the limited grant *ad litem* was issued to the Applicant. The court is thus satisfied that there is a good reason to justify the extension of time under **Order 24 Rule 3 (2) of the Rules**.

11. The court is aware that the instant application was not elegantly drawn. The prayers sought were also not diligently drawn. For instance, the notice of motion refers to **Order 24 Rule 4 (1) (2) and (3) instead of Order 24 Rule 3 (1) & (2) of the Rules**. However, this court is obligated to dispense justice without undue regard to procedural technicalities both under **Article 159 (2) (d) of the Constitution of Kenya 2010 and section 19 (1) of the Environment and Land Court Act, 2011**.

12. The upshot of the foregoing is that the court finds merit in the Applicant's notice of motion dated 6<sup>th</sup> June 2018 and the same is hereby allowed in terms of Order No. 1 thereof. For the avoidance of doubt, it is hereby declared that upon extension of time, the Applicant is hereby joined as the Plaintiff in this suit in his capacity as the legal representative of the deceased Plaintiff. Costs of the application shall be in the cause.

13. It is so decided.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this **21<sup>st</sup>** day of **FEBRUARY, 2019**

In the presence of Ms. Muthama holding brief for Mr. P.N. Mugo for the Plaintiff and the Defendant in person.

Court clerk Mr. Muinde.

**Y.M. ANGIMA**

**JUDGE**

**21.02.19**