



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 43 OF 2014

JOYCE NDUNGWA KITONGA1ST PLAINTIFF

SAMUEL MACKENZIE KYALO2ND PLAINTIFF

VERSUS

LITHEPETER MUIA

ROSE PETER MUIA

(Sued in their capacity as personal representatives of

the Estate of the late PETER MUIA NDUNDA).....1ST DEFENDANT

MARTHA KINYAMASYO

(Sued in her capacity as the personal representative of the

Estate of the late PIUS KINYAMASYO MUSYOKI).....2ND DEFENDANT

RULING

1. In the Notice of Motion dated 15th August, 2018, the Applicant, Peggie Mwenesi Kyalo, is seeking for the following orders:

a. That the Honourable Court do revive the 2nd Plaintiff's suit which has abated.

b. That the Honourable Court do extend the time for filing the Application by Peggie Mwenesi Kyalo the legal representative of the 2nd Plaintiff Samuel Mackenzie Kyalo (deceased), to be made a party in this suit to substitute her deceased husband.

c. That cost of this Application be in the cause.

2. The Application is based on the grounds that the 2nd Plaintiff died on 30th July, 2015; that the Applicant is the Administrator of the Estate of the deceased Plaintiff and that the orders sought are necessary in order to ensure that the long standing dispute is heard and determined to its logical conclusion.

3. The Applicant deponed that she is still interested in pursuing the suit which survived the deceased Plaintiff; that she applied for the grant of Letters of Administration within one (1) year after the demise of the 2nd Plaintiff and that the suit property forms part of the Estate of the deceased.

4. In his Replying Affidavit, the 2nd Respondent deponed that it has been over three (3) years since the demise of the 2nd Plaintiff; that the Applicant did not intend to prosecute this matter; that the Application is merely an afterthought and that there has been inordinate delay in prosecuting the Application.

5. The Applicant's advocate submitted that the court is seized of the power and discretion to make an order to revive a suit which has abated; that the gazettelement of the Petition by the Applicant was not done within a good time and that the Application should be allowed.

6. The Respondents' advocate submitted that the Applicant has not followed the provision of Order 24 of the Civil Procedure Act; that the

Applicant has not sought for the extension of time for the joinder of the deceased's legal representative and that the Application should be dismissed with costs.

7. This suit was commenced by the two Plaintiffs by way of an Originating Summons dated 3rd September, 2014 and filed on 10th September, 2014.

8. According to the copy of the Certificate of Death annexed on the Applicant's Affidavit, the 2nd Plaintiff died on 30th July, 2015. The Applicant herein filed Machakos High Court Succession Cause No. 30 of 2016 and was issued with the Letters of Administration on 18th April, 2018.

9. Having been issued with the Letters of Administration, the Applicant is seeking for an order of revival of the suit and for extension of time to file an Application for substitution of the 2nd Plaintiff.

10. Order 24 Rule 3(1) and (2) of Civil Procedure Rules provides 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 subrule (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.”

11. The Applicant herein applied for the issuance of the Letters of Administration within one (1) year of the death of the 2nd Plaintiff. However, it was not until the year 2018 that the said Letters of Administration were issued whereafter she filed the current Application. Indeed, the Applicant could have applied for the revival of this suit and substitution of the 2nd Plaintiff before obtaining the Letters of Administration.

12. The Applicant's Application for the revival of the suit that has abated has included a prayer for the extension of time within which to file the Application for substitution of the 2nd Plaintiff pursuant to the proviso of Order 24 Rule 3(2) of the Civil Procedure Rules. That provision allows the court to extend the time as long as a good reason for the delay in filing the Application has been given.

13. What is crucial is for the Applicant to give good reason why he did not file the Application for substitution of a deceased Plaintiff before the lapse of one (1) year. Once satisfied with the reasons given, the court would extend the time.

14. The Applicant has deponed that although he applied for the issuance of the Letters of Administration within one (1) year of the death of the 2nd Plaintiff, the delay in the issuance of the said Letters of Administration was caused by the late gazettement of the Letters of Administration. Indeed, the Applicant, did not have any control over the gazettement of the Letters of Administration or the issuance of the same by the court. In the circumstances, the failure by the Applicant to file the current Application within one (1) year was not of her own making.

15. The Applicant having given a good reason why she did not file the current Application within one (1) year of the death of the deceased, I am satisfied that the Application should be allowed.

16. For those reasons, I allow the Application dated 15th August, 2018 as follows:

a. The 2nd Plaintiff's suit which had abated be and is hereby revived.

b. The Applicant is hereby given leave to file an Application to be joined in these proceedings out of time, which Application should be filed within twenty one (21) days.

c. Each party to pay for his costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE