



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**HCCC NO. 25 OF 2003**

**DISMAS ODUORI NAMALWA.....PLAINTIFF**

**VERSUS**

**JOSEPHINE MAKOKHA NAKHAMA.....DEFENDANT**

**ROBERT OUNDO NAKHAMA.....APPLICANT**

**R U L I N G**

1. The application before me for determination is the Notice of Motion Application dated and filed on 5<sup>th</sup> July 2018 by the Applicant - **ROBERT OUNDO NAKHAMA** - in his capacity as the Personal Representative to the Estate of the Defendant. It is brought under Order 24 Rule 4(3) of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act. The Applicant is seeking orders that the suit be declared as having abated against the Defendant and therefore no longer legally tenable against him and/or Defendant.
2. The Application is supported by the affidavit of **ROBERT OUNDO NAKHAMA**. He depones that the Defendant - **JOSEPHINE MAKOKHA NAKHAMA** - died on 5<sup>th</sup> January 2011. He produced a Death Certificate confirming the same. He states further that his Advocates were served with a Hearing Notice to the effect that the case was scheduled for hearing on 9<sup>th</sup> July 2018 yet he had never been substituted for the Defendant. Since the Plaintiff failed to take steps towards the said substitution within the requisite one year period after the demise of the Defendant, the Applicant contends that the suit has abated automatically by operation of the law and that it cannot be revived.
3. Instead of filing a response to the Application, the Defendant, despite being accorded several opportunities to do so, filed a cross-Application on 25<sup>th</sup> October 2018 under Order 24 Rule 7 (b) of the Civil Procedure Rules seeking orders of revival of the abated suit as well as substitution of the Defendant with the Applicant in the current Application. He attributed the delay to citation proceedings in **High Court Miscellaneous Application No. 151 of 2012** where he purportedly sought the Court's intervention in compelling the Applicant to take out Letters of Administration ad litem for purposes of defending the case. He states further that the Application for revival of suit was also mistakenly filed in September 2014 under the aforementioned file. The third excuse concerned the loss of this Court file and their subsequent Application for its reconstruction that occasioned further delay.
4. The Applicant then filed a Further Affidavit on 16<sup>th</sup> November 2018. He stated that on 25<sup>th</sup> February 2015, the hearing date of his Application for revival of this suit, the Plaintiff was directed to file it in this file and it was consequently withdrawn. Moreover, the Application to reconstruct the Court file was allowed on 28<sup>th</sup> February 2017 and parties directed to include only the documents that were in the original file. The Plaintiff however went ahead to include extraneous documents. The Plaintiff then fixed the matter for hearing on 27<sup>th</sup> July 2017 without substitution. On that date, the Applicant's counsel objected to the inclusion of strange documents prompting the Court to grant an extension for parties to put in the correct documents. On 5<sup>th</sup> February 2018, the case was scheduled for mention to allow the Plaintiff to regularize the position with regard to the Defendant's demise but they did not do so hence the file was returned back to the registry.
5. Parties canvassed the Application by way of written submissions. The Applicants submissions were filed on 1<sup>st</sup> November 2018. Counsel for the Applicant submitted that there was no response to the Application on abatement, hence it was unopposed. He relied on Order 24 rule 4(1) and (3) that provides that if an Application for substitution is not made within one year of the Defendant's death, the suit shall abate against the Defendant. Counsel quoted the case of **GEORGE KIRIMA VS RUFUS KIAMBATI (2013) eKLR** where the Court held that abatement is not a technicality but a fundamental legal issue.
6. The Respondent's submissions were filed on 4<sup>th</sup> December 2018. Counsel for the Respondent submitted that the Respondent was at all times interested in prosecuting his case but delays were occasioned by citation proceedings and the loss of the Court file. He quoted section 2A of the Civil Procedure Act that sets out the overriding objective, Article 48 of the Constitution on access to justice, section 3A on the

inherent powers of the Court and Order 24 rule 7 (2) of the Civil Procedure Rules on revival of suit by a personal representative of a deceased plaintiff.

7. I have read the parties' pleadings, submissions and applicable law. The Court record is largely in accord with the Applicant's version of events as enumerated in his Affidavits. There has been incomprehensible lethargy in the manner in which the Plaintiff has conducted his case since the Defendant's demise on 5<sup>th</sup> January 2011. The Plaintiff is represented, yet his Advocate kept making miscellaneous Applications in the wrong forum while the main suit remained dormant. Six (6) years later, an Application to reconstruct the current Court file was made and granted on 28<sup>th</sup> February 2017. The Plaintiff then filed wrong documents in the file prompting the Defence to point out and correct the position. The Defence then moved on abatement on 5<sup>th</sup> July 2018. Instead of filing a response after requesting the Court extensions to do so on 2 occasions on 9<sup>th</sup> July, 20<sup>th</sup> September 2018, he filed a cross-application. It is important to note that the Plaintiff's Counsel also sought an extension on 16<sup>th</sup> October 2018 which was denied. It appears to me that the filing of a cross-application to revive the suit is in itself an implicit admission that the suit has abated.

8. I agree with the with the Court's ruling in GEORGE KIRIMA VS RUFUS KIAMBATI (supra). Order 23 rule (3) allows for extension of time for substitution by way of an Application on the death of a Plaintiff but Order 24 does not have a matching proviso. This suit automatically abated on 5<sup>th</sup> January 2012 thus also rendering the Plaintiff's purported Application for revival of suit bad in law. His quoted authorities also do not aid his cause.

9. The upshot of the foregoing is that the Notice of Motion Application dated 5<sup>th</sup> July 2018 is hereby allowed in effect dismissing the case with costs to the Applicant.

**Dated, signed and delivered at Busia this 11<sup>th</sup> day of September, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Applicant: Present

Plaintiff/Respondent: Absent

Defendant/Applicant: Absent

Counsel of the Plaintiff/Respondent: Absent

Counsel of the Defendant/Applicant: Absent

Counsel for the Applicant: Absent

CA: Nelson Odame