



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 127(B) OF 2014**

**JAMES MUTHII GATHOGO (Suing as a Legal**

**Representative of the Estate of**

**ELIJAH GATHOGO KAMAKU.....PLAINTIFF**

**VERSUS**

**KARIUKI KAMAKU KIMOTHO.....1<sup>ST</sup> DEFENDANT**

**REBECCA NJOKA KARIUKI.....2<sup>ND</sup> DEFENDANT**

**SIMON MAINA KARIUKI.....3<sup>RD</sup> DEFENDANT**

**GEORGE NJOGU KARIUKI.....4<sup>TH</sup> DEFENDANT**

**DAVID WACHIRA KARIUKI.....5<sup>TH</sup> DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 18<sup>th</sup> January 2019 brought under **Order 24 Rules 3 (1) and 7 (2) and Order 1 Rule 10 C.P.R.** The applicant is seeking the following orders:

***(1) The Honourable Court be pleased to revive this suit which has abated.***

***(2) That James Muthii Gathogo be substituted in his capacity as an attorney of the plaintiff to and in place to represent this case in his capacity as the Legal Representative of the Estate of Elijah Gathogo Kamaku.***

***(3) That the costs of this application be in the cause.***

The application is supported by the affidavit of James Muthii Gathogo and grounds on the face of the said application. The application is opposed with grounds of opposition dated 11<sup>th</sup> February 2019.

When the application came up for directions on 12<sup>th</sup> February 2019, the counsels appearing for the parties agreed to canvass the same by way of written submissions.

**APPLICANT'S CASE**

The applicant in his supporting affidavit filed on 18<sup>th</sup> January 2019 deponed that he had previously been representing the plaintiff in this case as an attorney and that he has been advised that with the demise of the plaintiff who is also his father, the capacity has now changed from an attorney to that of legal representative of the Estate. He also deponed that the suit has since abated and upon realization of the mistake, he has been advised by his advocate to petition for grant of letters of administration. That upon advice by his advocate, he filed and obtained a limited grant of letters of administration Ad litem for purposes of filing suit which was issued on 23<sup>rd</sup> November 2018. He deponed that he did not make an application for substitution within the statutory period but continued acting only in the capacity as an attorney. He now seeks leave to be substituted as the legal representative of the Estate of Elijah Gathogo Mamaku (deceased).

## RESPONDENTS' CASE

The respondents through their grounds of opposition opposed the application and raised five (5) grounds as follows:

- 1. The application is an abuse of the Court process, fatally defective and the orders sought are not available to the applicant.**
- 2. That the subject matter of this suit does not belong to the deceased hence the same is not the Estate of the deceased to be followed by the applicant.**
- 3. That Order 1 Rule 10 of the Civil Procedure Rules is not applicable, same deals with live persons.**
- 4. The suit abated on the 27<sup>th</sup> August 2018 and there are no sufficient reasons given the by the applicant to warrant the revival.**
- 5. That the applicant and the deceased plaintiff have always been guilty of delay necessitating the defendants to file an application for dismissal for want of prosecution.**

## APPLICANT'S SUBMISSIONS

The applicant has submitted that he was under the mistaken belief that as an attorney of the deceased, he had the capacity to continue representing the matter. He submitted that as the Attorney for Elijah Gathogo Kamaku (deceased), the counsel who was having the conduct of the case one Caroline Mwikali misadvised the said Elijah Gathogo Kamaku (deceased) that he could continue prosecuting the suit in his capacity as an attorney and failed to advise to petition for letters of administration on time.

The applicant further submitted that the Estate should not suffer for the mistake from an advocate. The applicant cited the following in support of the application:

**(1) Evans Kaburi Githinji (Executor of the Estate of the late Leah Muthoni Murigu Vs Jane Wanja Miano & another (2016) e K.L.R.**

**(2) Article 159 of the Constitution.**

## RESPONDENTS' SUBMISSIONS

The respondents on the other hand submitted that this suit has abated and no applications were filed within one year. Counsel further submitted that there is no good reason(s) advanced for the delay of more than one year. The applicant also argued that the annexure to the supporting affidavit marked as JMG 2 indicates that the deceased died on 27<sup>th</sup> August 2017 while averments contained in the grounds apparent of the face of the application and the supporting affidavit reflect that the deceased died on 27<sup>th</sup> September 2017. The two conflicting dates in the absence of a death certificate does not give a definite date when the deceased passed on or whether he even passed on or not. The respondents also submitted that the limited grant issued to the applicant on 23<sup>rd</sup> November 2018 amounts to nothing since the instant suit had been commenced sometime in May 2014. The respondents counsel further submitted that **Order 1 Rule 10** deals with substitution and addition of parties and that there is no prayer on the face of the application requesting for addition and/or substitution. In conclusion, the respondents submitted that the deceased plaintiff and the applicant are always guilty of delay and that the application should be dismissed.

## DECISION

This application is brought under **Order 24 Rule 3 (1) Rule 7 (2) and Order 1 Rule 10 CPR. Order 24 Rule 3 (1) CPR** states as follows:

***“Where one of the two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, 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”.***

**Rule 7 (2)** states as follows:

***“The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the trustee or official receiver in the case of bankrupt plaintiff may apply for an order to revive a suit which has abated or to set aside an order of dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall revive the suit or set aside such dismissal upon such terms as to costs or otherwise as it thinks fit”.***

The applicant has admitted that this suit abated and that he was previously appointed as a legal attorney of the plaintiff. The applicant has deponed in his affidavit under oath that his counsel misadvised him that he could continue representing the suit as an attorney after the demise of the original plaintiff. The applicant further deponed that he sought further legal advice from one Mr. Mahinda Advocate who reviewed the position and further advised him that with the demise of the original plaintiff, his capacity has since changed from an attorney to that of a legal representative of the Estate of the late Elijah Gathogo Kamaku (deceased). Upon that realization, he now seeks to revive this suit and to be substituted from being an attorney to a legal representative of the Estate of Elijah Gathogo Kamaku. These depositions on oath were not controverted by affidavit evidence.

I am indeed satisfied that the applicant has given sufficient reasons to warrant the Court reviving this suit which has abated. Consequently, the Notice of Motion dated 18<sup>th</sup> January 2019 be and is hereby allowed as prayed. The costs of the application shall be costs in the cause.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 4<sup>th</sup> day of October, 2019.**

**E.C. CHERONO**

**ELC JUDGE**

**4<sup>TH</sup> OCTOBER, 2019**

*In the presence of:*

- 1. M/S Mwikali holding brief for Mahinda for Plaintiff/Applicant*
- 2. Mr. Asimwe holding brief for Munene for Defendants*