



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE No. 64 OF 2015**

**NORAH ANYANGO OSAYE (Suing on behalf of and as co-administrator**

**of the Estate of the late Smarts Osaye Ogwenoh).....PLAINTIFF**

**VERSUS**

**JAVAN OMBASO ABAGA SAGERO.....DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 25<sup>th</sup> March 2019 seeking the following orders:

1. *That leave be granted to make this application.*

2. *THAT the Honourable Court do substitute the name of the respondent herein JAVAN OMBASO ABAGA SAGERO with that of ESTHER ROBI OMBASO & ENOCH OKENG'O OMBOGO SAGERO as the legal representatives of the Estate of the deceased.*

3. *THAT cost of this application be in the cause.*

2. The application is supported by an affidavit sworn by the plaintiff. She deposed that upon this suit being filed, her advocates were unable to serve summons upon the defendant. That she later learnt from her advocates who conducted a search through Kenya Gazette that the defendant passed away on 17<sup>th</sup> June 2015 and that letters of administration in respect of his estate were taken out by Esther Robi Ombaso and Enoch Okeng'o Ombogo Sagero. She annexed a copy of a gazette notice and urged the court to allow the application.

3. Esther Robi Ombaso filed a replying affidavit in which she stated that Enoch Okeng'o Ombogo Sagero is her co-administrator and added that summons in this suit having not been renewed expired and that there can be no suit without valid summons. She also filed a Notice of Preliminary objection dated 8<sup>th</sup> May 2019 stating that she would raise a preliminary objection against the application and the suit generally. No grounds were however stated in the preliminary objection.

4. The court ordered that the application be canvassed through written submissions. Both parties filed and exchanged submissions. The respondent argued in her submissions that summons having not been renewed, the suit ceased to exist after 12 months since there can be no suit without summons.

5. The applicant argued that the preliminary objection does not meet the threshold of a preliminary objection and that the suit is not a nullity for failure to serve summons.

6. I have considered the application, the affidavits filed and the submissions. I will deal with the preliminary objection first. A valid preliminary objection must be on a pure point of law. In **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**, the *locus classicus* on preliminary objections in this region, *Law JA* stated:

***So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.***

7. The preliminary objection herein does not on the face of it state the grounds on which the objection is based. It is thus not possible to tell whether there are any points of law raised or not. I am aware that some arguments have been raised by the respondent in her submissions in support of the objection. However, grounds of an objection must be stated in the objection itself. One cannot raise an objection without stating grounds then seek to introduce grounds in submissions. I find that the preliminary objection is not a valid preliminary objection. I dismiss it.

8. The application is brought inter alia under **Order 24 rules 4 and 7(2)** of the **Civil Procedure Rules**. **Order 24 rule 4** provides:

**4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.**

**(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.**

**(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

9. There is no dispute that the defendant passed away on 17<sup>th</sup> June 2015 and that Esther Robi Ombaso and Enoch Okeng’o Ombogo Sagero are co-administrators of his estate. This suit therefore abated by 17<sup>th</sup> June 2016.

10. **Order 24 rule 7(2)** provides:

**7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.**

**(2) 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 a 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.**

11. In view of the foregoing, this is a proper case in which to order substitution. Although the applicant has not specifically sought reinstatement, I will grant it in the interest of justice.

12. There has been some argument as to the consequences of failure to renew the summons herein. I note that summons to enter appearance were issued on 10<sup>th</sup> March 2015. In view of the provisions of **Order 5 rule 2(1)** of the **Civil Procedure Rules**, the summons expired by 10<sup>th</sup> March 2016 since they do not appear to have been renewed. Although under **rule 2(7)** the court may have dismissed this without notice at the expiry of twenty-four months from 10<sup>th</sup> March 2015, no such step was taken. In any case the debate on the summons is now moot because Esther Robi Ombaso and Enoch Okeng’o Ombogo Sagero the co-administrators of the deceased’s estate filed Notice of Appointment of Advocates on 8<sup>th</sup> May 2019.

13. The parties seem to be stuck on arguments around technicalities of abatement and validity of summons. It is the intention of the court that we get to the bottom of the case by dealing with substantive issues in line with the overall mission of the court under **Article 159 (2) (d)** of the constitution.

14. In view of the foregoing, I make the following orders:

- a) This suit is hereby revived.
- b) The defendant Javan Ombaso Abaga Sagero is hereby substituted with Esther Robi Ombaso and Enoch Okeng’o Ombogo Sagero.
- c) The plaintiff to file and serve an amended plaint to reflect the substitution within 14 days of delivery of this ruling.
- d) The defendants to file and serve statement of defence within 14 days of service of the amended plaint.
- e) Costs of the application shall be in the cause.

**Dated, signed and delivered in open court at Nakuru this 27<sup>th</sup> day of November 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the defendant

Court Assistants: Beatrice & Lotkomo