



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

ELC CASE NO. 18 OF 2012.

TERESA NAMAEMBA WASIKE.....PLAINTIFF

VERSUS.

WILSON WAFUBWA NAMACHANJA.....1ST DEFENDANT

JOSEPH MUTUBUKA SOKISI.....2ND DEFENDANT

KENNEDY WASWA NAMACHANJA.....3RD DEFENDANT

HERBERT MABELE WAFULA.....4TH DEFENDANT

RULING.

[1]. The applicant in this case brought an application under Order 24 rule 3(2) of the Civil Procedure Rules 2010 and applied that the court be pleased to order that this suit has abated. The plaintiff having passed on 15/11/2014.

[2]. The application is supported by an affidavit of Kennedy Waswa Namachanja who argues that the deceased having died on 15/11/2014 the suit abated on 15/11/2015 since no substitution had been done.

[3]. One Martin Muhindi Masumbuko who has not been made a party to this suit filed a replying affidavit he said that he is a legal representative of the deceased plaintiff.

He said that as a family they had a meeting and that he was nominated to replace his late mother for purposes of prosecuting this suit. He annexed a letter of 11/12/2014. He alleged that due to the nature of his work, he obtained a certificate of death in respect to the deceased on 20/11/2015. He stated that he works in Bagdad Iraq and that it was difficult to get beneficiaries to execute the consent to enable him to be issued with Limited Grant ad litem. He also alluded to a consent entered into by himself and Kennedy Waswa Namachanja and signed by M/s J.O. Makali & Co. for the plaintiff and Omundi Bw' Onchiri for the defendants on 5/4/2016. He himself explains that the consent was not adopted by the Deputy Registrar because he had not been substituted in the place of the plaintiff herein.

He prays that;

- 1) *The suit be reinstated.*
- 2) *That the court be pleased to substitute him in place of the plaintiff who is deceased.*
- 3) *That the consent filed in court on 8/4/2016 be adopted as the order of the court.*

He stated that he had filed an application seeking for the orders aforesaid dated 17/3/2017.

[4] From the replying affidavit of the respondent herein, there is no doubt that the suit herein has abated. That is the reason why, in their application dated 17th March aforesaid, they have applied that the court extends time and reinstate the suit herein among other prayers.

[5] Under Order 24 rule 3, a court may extend time where a sole plaintiff dies and where the cause of action survives and continues to survive. The court must be moved on an application to make a Legal representative be substituted in the place of the deceased plaintiff. The application must be made within one year since death of the plaintiff otherwise, the suit shall abate so far as the deceased plaintiff is concerned. However, for good reason on application, the court may extend the time.

[6] Is there a good reason herein to extend the time?

An application, though not argued but alluded to in a reply herein has been filed. It was so filed on 17/3/2017. The supporting affidavit is basically the same as the reply to this application. Are these reasons given therein good enough to extend time? One needs to look at the history and the conduct of the Counsels of the applicant to answer that question.

[7] On 5/5/2014 Mr. Murunga Advocate who was appearing for the plaintiff told the court the plaintiff was unwell. He said that the information of the plaintiffs sickness was brought by the plaintiff daughter and that they may require substitution. The case was adjourned and the plaintiffs were ordered to pay costs. On 22/6/2015, Mr. Murunga advocate for the plaintiffs told the court that he needed time to substitute the plaintiff. The case was marked S.O.G. Then on 21/10/2015 Mr. Murunga advocate acting for the plaintiff told the court that they were asking for an opportunity to substitute the plaintiff. He asked for 14 days to file the necessary documents. The court gave them up to 23/11/2015 to have the substitution done. On 23rd November, 2015 Mr. Musumba advocate for the plaintiff told the court that grant had not been signed. He said that they needed time. Mr. Omukunda advocate then appearing for Mr. Bw' Onchiri advocate for the defendant said that the deceased died on 15/11/2014 and that the suit had abated. Mr. Musumba advocate produced a Certificate No.0501199 dated 20/11/2015 to prove that the deceased was dead. The case was then stood over to 10/12/2015 for Mr. Musumba advocate to explain to his client on abatement. On 10/12/2015, Mr. Musumba advocate told the court that they (advocates) were filing a consent in court. Mr. Bw' Onchiri advocate was not in court and the case was stood over generally for the alleged consent to be filed. On 3/5/2016 The parties purported to file a consent before the Deputy Registrar. However on 27/7/2016, when the advocate for the defendant wanted to tax his costs arising out of the aforesaid Consent, the Deputy Registrar noticed that the same was not endorsed because one party Mr. Martin Muhindi Masumbuko (the applicant herein in the extension of time application) was not a party to the suit. The file was returned to the Court Registry. The applicant herein filed his application of 14/10/2016 for an order that the suit had abated since no one on behalf of the plaintiff had moved the court for 2 years. The application of 17/3/2017 was then filed to extend the time, and to substitute Martin Muhindi Masumbuko in the place of the deceased plaintiff. It also prayed that the court adopts the consent of 5/4/2016 which the Deputy Registrar had said that it was not endorsed.

[8] From the history of the case that I have tabulated, it is evident that the deceased plaintiff had the benefit of Counsel from when she was alive up until now. When she was ailing, Counsel noticed it and said he was to substitute. He did not. No reason is given why substitution was not done. There was ample time to do so. When the plaintiff died, her advocate asked for time to substitute. He was given time. All this time he was well within time. Counsel knew or ought to have known of the provisions in order 24 rule 3(1) and (2). If he needed to wait for letters of Administration Ad Colligenda Bona from the High Court, which in any case, are given by the High Court as a matter of course, and if he thought the one year period was running out, he should have filed the application for extension of time prior to the time running out and avoid the difficulties of obtaining the Letters aforesaid in time. The court indulged the Counsel for the plaintiff all along in regard to substitution. The counsels were indolent and did not appreciate that time was running out.

[9] The deceased died on 15/11/2014. The limited grant of letters of administration ad litem were issued to Martin Masumbuko Muhindi by the High Court Bungoma on 15th March 2017. By the time the letters were issued, the suit had abated four months before. There was therefore no suit that the holder of the letters could prosecute. The consent relied upon by the Counsel for the respondent was entered into with a person who was not a party to the suit namely Martin Muhindi Masumbuko. I therefore find no good reason to extend the time.

[10] The application by the respondent dated 14/10/2016 is allowed. It is allowed as prayed. The application filed therein dated 17th of March, 2017 was filed in an abated suit. It has nowhere to stand on and it is therefore struck out with costs to the applicant.

It is so ordered.

Ruling read in Open Court before Mr. Were.

Dated at Bungoma this 10th day of January, 2018.

S. MUKUNYA

JUDGE.

In the presence of:

Chemutai - Court Assistant

Mr. Were for the Applicants

Bw' Onchiri for the Defendant/Respondents