



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 239 OF 2014

(FORMERLY KERUGOYA ELC NO. 777 OF 2013)

JANE GITIRI NJUE.....1ST PLAINTIFF

DOROTHY WERIMBA KARIUKI.....2ND PLAINTIFF

VERSUS

PETER MBOGO.....1ST DEFENDANT

NJURURI ANGELO NYAGA.....2ND DEFENDANT

RULING

1. By a notice of motion dated and filed on 24th July 2017, the Applicant, Lewis Muthee Mbogo, sought the following orders under Order 50 Rule 6 and Order 24 Rules 3 and 7 of the Civil Procedure Rules;

- a. That time be enlarged to the Applicant to file an application to substitute the Plaintiff who is now deceased.
- b. That the Applicant be allowed to substitute the Plaintiff.
- c. That the suit herein be revived.
- d. That costs of this suit be provided for.

2. The said application was based on the grounds that the 1st Plaintiff had died more than one year ago; that no order for dismissal of the suit had been made; that it was fair and just to grant the orders; and that the Defendants shall not suffer any prejudice.

3. It was supported by an affidavit sworn by the Applicant on 24th July 2017. He stated that he was the son of the 1st Plaintiff who died in 2015 and that he had obtained a limited grant *ad litem* to enable him to prosecute the pending suit. He had apparently filed an application on 1st July 2015 for substitution but the same was never prosecuted by his advocate in consequence of which the suit was said to have abated by operation of law under **Order 24 of the Civil Procedure Rules**.

4. The 2nd Defendant filed a statement of grounds of opposition dated 1st August 2017 in response to the said application. It was stated that the said application was filed out of time and in contravention of **Order 24 Rule 3 of the Civil Procedure Rules**; that both Plaintiffs and the 1st Defendant were deceased; that the Plaintiffs had withdrawn the suit against the Defendants; and that there was no nexus between the Applicant and the 2nd Defendant.

5. The advocates for the parties herein appear to have agreed to dispose of the said application through written submissions. The record shows that they filed written submissions on their own before the matter was listed for mention before me on 16th November 2017 when it was fixed for ruling on 15th March 2018.

6. The court has considered the said application, the 2nd Defendant's grounds of objection thereto, and the written submissions on record. There is no doubt that the 1st Plaintiff died in 2015. There is also no doubt that the Applicant was issued with a limited grant *ad litem* for the purpose of prosecuting the suit in the same year. The record also shows that he filed an application dated 17th June 2015 for substitution of the 1st Plaintiff. That is the application which was never prosecuted expeditiously.

7. The material provisions of Order 24 Rule 3 of the Civil Procedure Rules provides as follows;

“3(1) where one of two or more Plaintiff dies and the cause of action does not survive or continue against 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 sub rule (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”

8. It is apparent from a reading of Order 24 3(2) that a suit may not abate if no application is made to court for substitution within one year upon the death of a Plaintiff. That is the plain meaning of that provision. So, if the 1st Plaintiff died on 17th January 2015 and the application for her substitution was made on 1st July, 2015 then the 1st Plaintiff’s suit could not have abated simply because it was not prosecuted within one year. It is, therefore, not clear why the Plaintiff’s counsel withdrew his earlier notice of motion dated 17th June 2015 in order to file the instant application seeking extension of time and for revival of the suit.

9. Be that as it may, even if the suit had abated in the first instance, the proviso to Order 24 Rule 3 provides that the period of one year limited by the rule may be extended by the court for good reason. Bearing in mind the circumstances of this case, the court would be inclined to grant an extension of time even upon expiry.

10. The 2nd Defendant submitted that the Plaintiffs had completely withdrawn the suit against both Defendants before their death hence there was no suit to be revived or prosecuted. The court has perused the record and noted that there are two notices filed in court purportedly by the Plaintiffs. The first is a notice of intention to act in person and the second is a notice of withdrawal of suit. Both notices are dated and filed on 27th May 2014.

11. The court has also perused the handwritten record of proceedings in relation to the two notices. When the Plaintiffs appeared before Hon Justice Boaz Olao on 1st July 2014, the 1st Plaintiff disowned having signed or thumb printed the two notices. However, the 2nd Plaintiff admitted to have filed the notices. I think it is for that reason that the said notices were never minuted and adopted by the court. In my view, there is no evidence to demonstrate that the 1st Plaintiff had withdrawn the suit during her lifetime. In fact, the record of proceedings shows that she did not withdraw the suit.

12. The real question for determination is whether or not the Applicant has made out a case for the orders sought in the notice of motion dated 24th July 2017 for extension of time, revival of the suit and substitution of the 1st Plaintiff. The material on record demonstrates that the Applicant moved expeditiously to obtain a limited grant *ad litem* upon the death of the 1st Plaintiff. He also moved the court expeditiously on 1st July 2015 for substitution of her deceased mother. The only pitfall was that the said application was not prosecuted expeditiously, which was compounded by his advocates’ unjustified withdrawal of the said application to enable him file a fresh one.

13. The court is satisfied that there is merit in the Applicant’s notice of motion dated 24th July 2017 and consequently the same is allowed as prayed. Costs of the application shall be in the cause.

14. Since it would appear that the value of the subject matter falls within the pecuniary jurisdiction of the Magistrate’s court, this suit is hereby transferred to the Chief Magistrate’s Court at Embu for trial and disposal.

15. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 15th day of MARCH 2018

In the presence of Mr Mureithi holding brief for Mr Mogusu for the Plaintiff and Ms Kimotho holding brief for Mr Guantai for the Defendant.

Court clerk Leadys

Y.M. ANGIMA

JUDGE

15.03.18