



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 404 OF 2017

LALITCHANDRA DURGASHANKER PANDYA

PRIVATE RAMESHANDRA PANDYA.....PLAINTIFFS/APPLICANTS

-VERSUS-

E. K. BAYA

AMINA S. MWINYI

FRANCIS K. NZAI

MARK OWANGO.....DEFENDANTS/RESPONDENTS

RULING

1. For determination is the notice of motion application dated 9th March 2016 but filed in Court on the 24th November 2016. The applicant seeks the following orders:

- 1. That this Honourable Court be pleased to revive this suit which has abated in respect of the 1st plaintiff who is deceased.**
- 2. That KAMLESH PANDYA be made a party to this suit in place of the 1st plaintiff who is deceased.**
- 3. That HARSHIT MULVANTRAI RAWAL the donee of a Power of Attorney by the plaintiffs be allowed to proceed with this suit on their behalf.**
- 4. That costs of this application be in the cause.**

2. It is deposed by the applicant that the 1st plaintiff died on 3rd June 2014 making the 1st plaintiff's suit to abate on 2nd June 2015. The applicant deposes that the failure to file the application for substitution was their advocate's mistake since the file was not brought to his attention after they filed a notice of change of advocate and that mistake of counsel should not be visited upon the applicant. The applicant also states that no formal order for abatement has been recorded in the Court file. That he has shown sufficient cause and therefore urges the Court to allow the application.

3. The application is opposed by the defendants. The 1st defendant deposed that the reasons given for not filing the application in time are not cogent to warrant this Court to grant the orders as prayed. That the application has been brought after inordinate delay considering that the letters of administration were applied for and obtained by 27th February 2015. Further that the administrator should not make this application having donated powers of attorney to someone else. He therefore urged the Court to dismiss the application.

4. I have considered the submissions filed in support of and against the application. Order 24 rule 3 (1) provides that a deceased party shall be substituted within a period of one year from the date of death. The applicants herein state that this was not done due to an inadvertence on the part of their advocates on record. There is a provision under rule 3 of Order 24 that "*the Court may extend time where good reasons is given.*" Is the inadvertence on the part of an advocate good reason?

5. The application was supposed to have been brought on or before 2nd June 2015. The applicant annexed a copy of an ad litem grant issued to him on 27th February 2015. The notice of change of advocates was filed on 24th March 2015. Both of these was before the suit had

abated. The purpose for obtaining the grant is stated on the face of the certificate as "*filing and defending suits.*" No explanation has been given by the advocate on record why they did not file the application for substitution together with the notice of change as nothing was barring them from doing so.

6. This application was also ready by 9th March 2016 and presented to Court for assessment on 10th March 2016 as per the date stated. No explanation has been made why the same was not filed until 24th November 2016. The applicant having signed an affidavit in March 2016 ought to have followed up on the progress of his case. It is not enough to merely state that mistake of an advocate should not be visited on his client without giving reasons to justify that the mistake if any was genuine. Mistake of an advocate should not be used as a blanket even where the indulgence on the party seeking the exercise of discretion of the Court in its favour is glaring as in this case.

7. In any event, the suit property is jointly owned by the 2nd plaintiff who is surviving. The applicant has not specified what prejudice he will suffer if the suit proceeds with only one plaintiff. It is my considered view and I so hold that the deceased plaintiff's interest can still be taken care of, as the registration was joint. Therefore no cause has been shown to justify the extension of time in an application brought after inordinate delay (2 ½ years after the death of the 1st plaintiff). Prayers 1 & 2 the motion is hereby dismissed. The holder of power of attorney does not need permission of the Court to represent the donor. This Court granting prayer 3 is just a formality. The surviving plaintiff is at liberty to be represented by his/her donee. Lastly I order each party to meet their costs of the application.

Dated, signed & delivered at Mombasa this 20th July 2018

A. OMOLLO

JUDGE