



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 450 OF 2014

(Formerly NYERI HCC No. 166 of 2008)

F.G. WAHOME.....1ST PLAINTIFF
J.W. MUNUHE..... 2ND PLAINTIFF
P.H. GITONGA.....3RD PLAINTIFF
J. M. MUMU.....4TH PLAINTIFF
F. N. KAROBIA.....5TH PLAINTIFF

-VERSUS-

STANELY WANJOHI MATHENGE.....DEFENDANT/DECEASED

AND

CECILIA WAITHERERAPPLICANT

RULING

1. Before me are three applications by way of notice of motion all dated **24th January, 2018** brought under **Order 24 Rules 1, 2 and 3** of the Civil Procedure Rules in which the applicants, **Hellen Wairimu Wachira, Joyce Wamuyu Maina and Cecilia Waitherero Karobia** seeks orders that the court do reinstate the 2nd, 4th and 5th plaintiff's suits; that once the suits have been reinstated, the applicants be substituted with the deceased plaintiffs and that costs of the applications be in the cause.
2. The three applications are premised on the grounds on the faces of the applications and are supported by the affidavits of Hellen Wairimu Wachira, Joyce Wamuyu Maina and Cecilia Waitherero Karobia all sworn on 24th January, 2018. Hellen Wairimu Wachira deposes that she is the wife of J.W Muhune who passed on on 22nd March, 2007 and that she obtained letters of administration to her husband's estate on 13th April, 2010. Joyce Wamuyu Maina deposes that she is the wife to the 4th plaintiff, J.M. Mumu, who passed on in 1996 before this suit was concluded and she has obtained letters of Administration and able to prosecute this suit. Cecilia Waitherero Karobia deposes that she is the wife to the 5th plaintiff, F.N Karobia, who passed on on 8th December, 2016 and she has obtained a limited grant *ad litem* to prosecute the instant suit. They all pray that they be substituted and be allowed to prosecute their late husbands' claims.
3. The applications are opposed vide the replying affidavits of **Stanley Wanjohi Mathenge** all sworn on **27th January, 2018**. He deposes that the applicants are seeking to reinstate the suits not revive them and their applications should be dismissed for not seeking the appropriate orders; that none of the applicants have offered an explanation why they did not file their applications before the suits abated; that this is an old matter and that he is ailing. He urges the court to dismiss the applications with costs.
4. When the applications came up for hearing on 8th May, 2018 counsels for the respective parties chose to rely on their pleadings as filed.

The Law applicable

5. **Order 24 Rule 3(1) and 7(2)** gives the court discretionary power to substitute a deceased plaintiff with his/ her legal representative and to revive a suit that has abated. Those sections of the law provide as follows:-

3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to 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.

“7(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.”

6. For the court to exercise the discretion vested in it in favour of a person seeking to substitute and revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In this regard see the cases of **Janet Wangari Mwangi v. James Muchoki Kariuki & Bidco Oil refineries Ltd (2004) Eklr and Rukwaro Waweru v. Kinyutho Ritho & another (2015) e KLR.** In the Rukwaro Waweru case, this court held:-

“... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court

may not extend time once the suit against a deceased Defendant has abated. See H. J. Shah -versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar -versus- Manilal M Shah [1965] E. A. 321, Soni -versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrison & Crosfield Ltd - versus - Kassam [1982] K.L.R. 458.

In the case of Soni -versus- Mohan Dairy [1958] E. A. 58, it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period....”

7. Upon considering the applications, I find that for the application by Joyce Wamuyu Maina, the record shows that the 4th plaintiff died on 7th January, 1996. His personal representative is the public trustee who was issued with letters of administration on 1st November, 1999. Joyce Wamuyu Maina is not the representative of the estate of J.M. Mumu and therefore lacks capacity to file the instant motion or to prosecute the suit on behalf of her late husband’s estate. For the above reason, I find it unnecessary to consider the application on its merits and I dismiss her application with costs to the respondent.

8. Regarding the application by Hellen Wairimu Wachira, wife of J.W Muhune, who passed on on 22nd March 2007, the court record shows she obtained letters of administration on 13th April, 2010. She has offered no explanation on why she did not file her application within the time stipulated by law or even immediately after obtaining the letters of administration. In the case

of **Phillips, Harrison & Crosfield Ltd -versus- Kassam [1982] E.A. 458, Hancox J** (as he then was), stated that where there is undue delay, an application for extension of time to revive an abated suit may be refused.

9. In the circumstances of this case, I find the delay of 10 years to be inordinate and since the applicant has not offered any explanation for the delay I also dismiss her application with costs to the respondent.

10. Regarding the application by Cecilia Waitherero Karobia, wife to the 5th plaintiff, F.N. Karobia, who passed on on 8th December 2016, the record shows the applicant obtained a limited grant *ad litem* on 28th April, 2017. Her advocate filed an application to substitute her and the other wives of the deceased plaintiffs on 23rd May, 2017 but the application was later withdrawn as it did not include a prayer to revive the suit. Although the instant motion was not filed within the time stipulated by law, having instructed her advocate to

file the first application within one year of the death of her husband and considering that it was her advocate’s fault rather than hers for filing an inappropriate application, I exercise the inherent jurisdiction of this court under **Sections 1A, 1B and 3A** of the Civil Procedure Act and revive the 5th plaintiffs suit. I also substitute her in place of the 5th plaintiff. Costs of her application will be in the cause.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 11th day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Mr. King’ori h/b for Ms Kabethi for the applicant

Mr.Ndirangu h/b for Kebuka Wachira for the respondent

Court assistant - Esther