



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 14 OF 2018

(FORMERLY HCC NO. 71/95)

MBOGORI BAICHU.....PLAINTIFF/APPLICANT

-v-

LIVINGSTONE M' MUNGANIA.....DEFENDANT

DAVID GITONGA MUNGANIA.....INTENDED DEFENDANT/RESPONDENT

RULING

1. Plaintiff /Applicant has filed a Notice of motion dated 12th July 2018, brought pursuant to the provisions of Order 24 Rule 1, 4 and 7 of the Civil Procedure Rules 2010, in which he seeks an order to revive the instant suit and appoint one David Gitonga M’ Mungania to be a party, effectively substituting **Livingstone M’ Mungania**, the deceased defendant herein.

2. The application is supported on the grounds on the face of it and on the affidavit of the applicant. He avers that the defendant herein passed away on 24th October 2006 and within 1 year thereof he applied vide **MISC application no. 133 of 2007** for the appointment of the intended defendant as the legal representative of Livingstone Mungania, but the application was not successful as the same was dismissed on 17th April 2008.

3. Applicant did not give up. He filed another application vide **Misc. Succession Cause no. 455 OF 2008**, where he cited the intended defendant to take up letters of administration but the latter refused and the judge ordered the file closed. Applicant believed he could still find justice whereupon he applied again vide **Misc. Succession Cause no. 159 OF 2015**, when he finally succeeded to have the intended defendant appointed as the personal representative of Livingstone by a ruling delivered on 27th June 2018. A Grant Ad Litem was then issued for purposes of defending this suit. Applicant avers that he has demonstrated that he had been prevented by circumstances beyond his control to proceed with the matter but nonetheless he surmounted them.

4. The application was opposed via a Replying Affidavit filed in court on 23rd July 2018, by the intended defendant/ respondent where he contended inter alia that the Grant filed in support of the application was in respect of one **Rutere Mbogori** and not the original defendant herein (**Livingstone**) and that as such the application was incompetent as it sought to substitute somebody who was not a party to the suit. The respondent further states that the Applicant sought to revive this suit twelve years after the death of the deceased and that no good reason had been advanced for such an inordinate delay. It was further contended that this suit was filed way back in 1987 over 31 years ago and there was no explanation as to why the suit had not been prosecuted to date.

5. I have carefully considered this application and the rival contentions by the parties. Order 24 of the Civil Procedure Rules provides inter alia as follows;

1) **The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.**

...

4. (1) **Where one of two or more defendants dies and the cause of action does not survive or continue to the surviving defendant, 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) **Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.**

5. **Where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff, or a deceased**

defendant, such question shall be determined by the court.

7. (1) ...

(2) The plaintiffmay 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.” (Emphasis supplied)

6. There is no doubt that this suit abated and what the applicant is now seeking is to revive the abated suit. Pursuant to the provisions of Order 24 Rule 7, it is necessary for the applicant to demonstrate "sufficient cause" as to why he could not continue with the suit before the same abated. It is evident that the plaintiff was all along keen on having this matter prosecuted despite the hurdles he encountered at the instance of the intended defendant.

7. With regard to the contention by the intended defendant that the Grant filed in support of the application was in respect of one Rutere Mbogori and not the original defendant, the plaintiff contended that the same was a typing error. I have perused the said Grant where the heading of the same reads "**in the matter of the estate of Livingstone M' Mungania (deceased).**" The Grant further proceeds to read as follows; "**be it known that letters of administration ad litem of the estate of the above named Rutere Mboogori.....**". This grant emanates from the orders given in the ruling delivered on 27.6.2018 in **succession cause no 159 of 2015, Meru High Court.** Paragraph 20 of the said ruling reads as follows; "**the respondent is appointed a personal representative of the estate of Livingstone Mungania.**". I am therefore in agreement with contentions of counsel for the plaintiff contention that inclusion of the name **Rutere Mboogori** was erroneous and there is no indication that the said Grant was in respect of another person other than **Livingstone M' Mungania.**

8. Accordingly I find the instant application to be meritorious and I allow the same. The plaintiff is hereby further directed to set the suit down for hearing within 4 months failure to which the suit will stand as dismissed. The costs of this application will abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 28th NOVEMBER, 2018 IN THE PRESENCE OF:-

C/A: Kananu

Mwiraria holding brief for Mwanzia for plaintiff

Muriithi holding brief for M. Kariuki for defendant

HON. LUCY. N. MBUGUA

ELC JUDGE