



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC NO. 95 OF 2017

NTHENYA MBATHAPLAINTIFF

VERSUS

JOHN MULI NZAUDEFENDANT

RULING

1. There is before me a chamber summons application expressed to be brought to court under **order XXIII Rules 3(1) and 2 and 8(2)** of the Civil Procedure Rules and **Section 1A,1B and 3A** of the Civil Procedure Act for orders that the suit herein be revived and reinstated, that the plaintiff herein **Nthenya Mbatha**, who died on **26/07/2005** be substituted with **Mutisya Mbatha, Juda kimeu Mbatha** and **Charles Kituu Mbatha** her legal representatives and administrators of her estate with costs of the application being in the cause.

2. The application is predicated on the grounds on its face and is supported by the affidavit of **Juda Kimeu Mbatha** sworn on **16th December, 2010** and filed in court on **16th December, 2016**. It is opposed by **John Muli Nzau**. The Defendant/Respondent herein vide his replying affidavit sworn on **18th April, 2017** and filed in court on even date.

3. **Mrs. Nzei** for the application submitted that the orders sought by the Applicants are available since the only condition that they are supposed to show is that they were prevented by matters beyond their control within one year and that in this particular case, the only cause that they are supposed to show is that they were prevented by a sufficient cause. She went on to submit that the Applicants have demonstrated in their affidavit that the original plaintiff died on **26/7/2005** and that they were not issued with letters of administration of the deceased's estate until the **27/10/2007**. That as at time of issuance of the letter of administration, the suit had long abated and they could not have continued with the suit and added that the law requires that the Applicants to account for time between the death and expiry of one year. She further submitted that the Applicants could not file their documents since the court file has always been missing and were only able to do so when the matter came up before court for dismissal.

4. On the other hand, **Mr Mbithi** for the Respondent submitted that since the application was filed on **16/12/2016**, then it ought to have been filed under **Order 24** of the current Civil Procedure Rules regardless of the date it is said to have been drawn and added that there is no excuse for the matter to have been brought under a non-existent law. The counsel went on to submit that, this is a question of law and not procedure and that it is not merely a technical issue that can be waived.

5. The counsel submitted that the grant of letters of administration intestate marked as **JKVI-2** purports to have been issued on **27/10/2007** for a cause whose number is **399 of 2008**. He added that the error in the cause number or in the date is a question of law and the same has not been resolved and that there is no grant that has been validly issued.

6. The counsel submitted that **rule 7** of order **24** should be looked together with rule 3 of the same Order for the court to determine under which rule the applicant ought to have come to court. According to him, once the applicants obtained the grant, they ought to have come to court for extension of time under **order 24 rule 3(2)** of the Civil Procedure Rules and pointed out that thus is to be seen out of **prayer 2** of the application where they are seeking to be substituted and yet they have not prayed for it. The counsel submitted that assuming that a revival under prayer 1 can be granted, the applicants have not brought themselves within the preview of discretionary power to revive a suit. He added that the court can only exercise its discretionary power on only one condition which is prevention by sufficient cause. He submitted that no single cause has been shown to the satisfaction of the court or even an attempt to persuade the court that there was any cause that prevented them from filing the application and pointed out that the applicants are guilty of inordinate and inexcusable prolonged delays. He opined that a delay from **26/07/2005** to **16/12/2016** when the application was filed by all accounts cannot be said to be reasonable as it stretches to over **12 years**. The counsel added that the delay can only mean that the application is an afterthought by a reluctant or disinterested party who has not accounted for the delay. The counsel went on to say that there is no justification for the cumulative delay.

7. In reply the applicant's counsel submitted that the date of drawing the application is crucial as is the date of swearing of affidavit since those are the dates that the applicants started to move the court. The counsel added that they could not tear the application as originally drawn as they would have defeated the cause of justice. Regarding the allegation that the applicants are out of the law for coming under the old law, the counsel reiterated her earlier submissions on this issue. The counsel submitted that it is worth noting that the powers of this court to revive an abated suit as donated under **order 23 rule 8** has been carried forward under **order 24 rule 7(2)** of the Civil Procedure

Rules. The counsel further submitted that a court revives a suit at the instance of the legal representative of the estate of the deceased party or official liquidator and not anyone else.

8. On the issue of the anomaly on **JKM-2**, the counsel submitted that it is an issue this court might not be able to cross. The counsel added that there is clearly an error and pointed out that it is signed by a honorable judge of the High Court concerned and that it has not been demonstrated that it is not a valid grant. The counsel further submitted that the applicants have shown that they are the legal representative in succession cause number **399/08**.

9. Having heard the counsel for the Applicants and the counsel for the Respondent, the issues for determination are whether or not the Applicants have shown that they were prevented by matters beyond their control within one year from filing their Applications, whether or not they have shown that they have a sufficient cause to warrant the orders sought being granted and whether or not the application is brought under non-existent law.

10. Regarding the first issue, my finding is that no doubt the Applicants have demonstrated that the original Plaintiff died on **26/07/2005** and that it was not until the **27/10/2007** when they were issued with the letters of administration. As to whether or not the grant was validly issued, I am in agreement with the Applicant's counsel that it is not for this court to determine since no evidence was placed before me to show otherwise. The gist of the application is that the Applicants were prevented from filing their Application due to the missing court file even after they obtained the grant of letters of administration on **27/10/2007**. In my view they have not shown any evidence that the court file was ever missing. I say so because I see no annexures of complaint letters to the honorable the Deputy Registrar demanding for the file in question to be availed so that they could file their application and I am in agreement with the Respondent's counsel that the filing of this Application is an afterthought by the Applicants. The other issue is, have they shown sufficient cause to warrant this court to allow the Application?

In my view, they have not. I would have expected them to give reasons why they decided to file the Application on **16/12/2016** and also explain why they could file it on any other day prior to 16/12/2016 after they obtained the grant of letters of administration on the **27/10/2007**. They cannot be heard to say that the court file was missing.

11. On the issue of whether or not the application is brought under a non-existent law, I will treat the same as want of form and an issue of technicality which should not be used to defeat the cause of justice.

12. Arising from the reasons that I have given my finding is that the application lacks merits. The Applicants have not shown they were prevented by matters beyond their control within one year after **27/10/2007** and they have not shown that they have sufficient cause to warrant the application to be allowed. In the circumstances, I hereby proceed to dismiss it with costs to the Respondent.

DATED AND SIGNED ON 3RD DAY OF MAY 2017

C.G. MBOGO

JUDGE

DELIVERED ON 3RD DAY OF MAY 2017

C.G. MBOGO

JUDGE

MRS. NZAI for the Applicant present

MR. MBITHI for the Respondent present

MR. KWEMBOI - Court Assistant

ORDER: The applicants are granted leave to appeal.

C.G. MBOGO

JUDGE