



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

LAND CASE NO 492 OF 2015

JOHN BRUNO MALANGA OLOO.....PLAINTIFF

VERSUS

INDUSRIAL AND COMMERCIAL

DEVELOPMNET CORPORATION.....DEFENDANT

AND

IAN DAVID OLOO.....APPLICANT

RULING

1. Before me for determination is the Notice of Motion dated 20th June 2017 brought under Order 24 Rules 7(2) Order 1 rule 10 and Order 49 rule 7(1) (b) of the Civil Procedure Rules, Sections 1A, 1B, 3A & 3B of the Civil Procedure Act, Article 159 of the Constitution of Kenya and all other enabling powers and provisions of the Law, where the Applicant seeks for the following prayers :-

a. An order for the revival of this suit which had abated;

b. An order to amend the plaint to substitute the Applicant in this application as a Plaintiff in place of John Bruno Malango Oloo(deceased)in the suit;

c Costs of this application be provided for.

2. The said application is premised on the grounds set down in the application to the effect that the Plaintiff herein died on the 14th August 2015 and the suit herein abated because the estate of the plaintiff had no administrator until the 18th May 2017 when the Applicant herein was appointed as one. That the cause of action survived the death of the plaintiff. The said grounds are supported by an undated affidavit sworn by Ian David Oloo the Applicant herein, filed on the 21st June 2017.

3. The Application was urged by Mr. Otieno Counsel for the Applicant who relied on the grounds on the face of the application as well as what was deponed in the supporting affidavit where he sought for the suit herein to be revived.

4. Counsel submitted that that the plaintiff died on the 14th August 2015 while the suit was still pending. A death certificate was annexed hereto.

5. That the cause of action survived the deceased wherein the Applicant who is a son to the plaintiff, desirous of proceeding with this suit, obtained grant of letters of administration on 18th May, 2017. This however was two (2) years after the Plaintiff's death. He subsequently filed this application immediately thereafter to be substituted in this suit.

6. The suit abated at the expiry of one (1) year from the date of death of the deceased The applicant is therefore seeking the revival of the suit and the joinder of the applicant in this suit as a plaintiff in place of the deceased pursuant to Order 24 rule 7(2) of the Civil Procedure Rules that allows the legal representative of the deceased plaintiff to apply for revival of a suit that has abated as a result of sufficient cause being shown.

7. Counsel further submitted that there will be no prejudice caused to the defendant if the application was allowed so that the suit can be heard on merit.

8. The application was opposed by Mr. Yogo counsel for the Defendant/ Respondent on the issue that an application for substitution cannot be made in the same application for revival of the suit.

9. That the application was time barred as the same ought to have been made on or about the 14th or 15th August 2016 That the provision of Order 24 rule 3(2) is clear although the law is silent whether one can make substitution after the first year has lapsed. That Order 24 rule 7(2) makes a condition that there has to be sufficient reason placed before the court before the court can make a decision in favor of the Applicant. That in this case no sufficient cause was shown by the Applicant to be granted the prayers sought.

10. Rejoinder to the submission was that the delay was explained in the applicant's grounds to the effect that the deceased had no administrator until the appointment of the Applicant. Further it on the second issue raised, Counsel submitted that it was automatic that when a representative makes an application for revival of a suit, it follows that there has to be a substitution and that there was no contradiction of the law.

11. Under **sections 1A and 1B** of the Civil Procedure Act Cap 21 Laws of Kenya the court is enjoined to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. Article 159 (2) (a) (b) (c) and (d) of the Constitution further underscore the role of the court in the administration of Justice. Article 159 (2) (d) provides that justice shall be administered without undue regard to procedural technicalities.

12. These Constitution provisions mirrored against sections 1A and 1B of the Civil Procedure Act clearly enjoin the courts to endeavor to do substantive justice to the parties without necessarily being shackled by procedural technicalities.

13. While it is true that the application was filed after the expiry of the stipulated period yet in my view and noting from the annexures herein attached, the fact that when the applicant obtained a grant of letters of administration on the 18th May 2017 and filed this application on the 21st June 2017 in my humble view is an indication that he was desirous to have this matter heard and determined.

14. Whether or not to extend time for a legal representative of a deceased plaintiff to be made a party to a suit in place of such deceased after the expiry of the prescribed time is a matter that calls for the exercise of the discretion of the court. Order 24 rule 3 (2) of the Civil Procedure Rules provides that the court may extend time for good reason.

15. I am satisfied that the reason given by the Applicant in the present instance is good enough. The applicant's application is herein allowed.

16. The Applicant be and is hereby granted leave to amend his plaint accordingly, thereafter to file and serve the same 14 days from the date of this ruling.

17. The matter to be mentioned before the resident Judge for further directions on the 9th November 2017.

18. Costs of the application shall be in the cause.

Dated and delivered at Kisumu this 24th day of October 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE