REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 349 OF 2013

(FORMALLY EMBU H.C.C.C NO. 55 OF 2002)

EVANS KABURI GITHINJI (Executor of the Estate of the late

LEAH MUTHONI MURIGU…….....……..PLAINTIFF/APPLICANT

VERSUS

JANE WANJA MIANO…….....……1ST DEFENDANT/RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND DEFENDANT/RESPONDENT

RULING

The application dated 3rd April 2006 seeks the following orders:-

(a) ***"That this suit which has abated be revived and the applicant Evans Kaburi Githinji who is the executor of the will of the said Leah Muthoni Murigu be allowed to continue to prosecute the above suit.***

(b) Costs of this suit be provided for".

It is premised under the then ***Order XXII Rule 1, 8 (2) of the Civil Procedure Rules*** and was filed at the High Court Embu and according to the record, it was being canvassed before the late Lady Justice **Khaminwa J.** but was not completed before the file was transferred to this Court. Directions were thereafter taken that it be canvassed by way of written submissions.

According to the applicant's supporting affidavit, the deceased plaintiff **LEAH MUTHONI MURIGU** was his mother in law and had been allocated land parcel No. KABARE/NJIKU/745 by his late father while the 1st defendant was allocated land parcel No. KABARE/NJIKU/744. However, the 1st defendant fraudulently combined the two parcels of land thus defrauding the deceased plaintiff of her entitlement. The deceased plaintiff therefore filed this suit and before her death she had appointed the applicant as the executor of her will. The suit has now abated but before that, the applicant had enquired from his former advocate as to what would happen and he had been assured that the deceased plaintiff's name would be substituted with that of the applicant. However, that did not happen hence this application.

The 1st defendant filed grounds of opposition to the said application stating that it is misconceived and fatally defective since in the first place, there was no cause of action and therefore none has survived the deceased plaintiff.

Submissions have been filed both by **Mr. P.N. MUGO** advocate for the applicant and **Mr. M. NJAGE** advocate for the 1st defendant. The 2nd defendant did not file any responses or submissions to the application.

I have considered the application, the grounds of opposition thereto and the submissions by counsel.

It is clear from the annextures herein that the deceased plaintiff passed away on 4th May 2003 having filed this suit on 25th July 2002. The applicant who is the executor of the deceased plaintiff Estate therefore had one year from 4th May 2003 to apply to be made a party and proceed with the suit otherwise it would abate. ***Order 24 Rules 3 (1) and (2)*** are relevant and they 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 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***
>
> ***(2) Where within one year no application is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on application of the defendant, the Court may award to him the costs which he may have incurred in defending the suit to be recovered from the Estate of the deceased plaintiff***
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> ***Provided the Court may, for good reasons on application, extend the time".*** emphasis added.

It is also clear from the provisions of ***Order 24 Rule 7 (2) of the Civil Procedure Rules*** that the Court can, on account of sufficient cause, revive a suit that has otherwise abated. It reads:-

> ***"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 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"***

There is therefore a discretion reposed in the Court to revive a suit that has abated if sufficient cause is demonstrated by the applicant. Like all other discretions, it must be exercised judicially and on sound basis. What then is sufficient cause or good cause? This has been defined in ***BLACK's LAW DICTIONARY 9TH EDITION*** as follows:-

> ***"… the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused"***

In ***THE HON. ATTORNEY GENERAL VS THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPLICATION No. 133 of 2011 (2013) e K.L.R***, the Court of Appeal said the following:-

> ***"Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave un-explained gaps in the sequence of events".***

What then is the good cause or sufficient cause placed before this Court by the applicant to warrant the grant of the orders sought? These, in my view, are to be found in paragraphs 13 to 17 of his supporting affidavit. Following the demise of the deceased plaintiff on 4th May 2003, the applicant who is the executor of her will applied for a grant of probate in November 2004 as per the petition marked annexture **EKG 3.** However, the Court issued him the grant but on the form P & A 41 instead of P & A 45 (annexture **EKG 4)** and it was not until 17th February 2006 that the correct grant of probate was issued.

This application was filed on 3rd April 2006 some two months or so after he obtained the proper grant. Obviously the applicant could not seek to prosecute this suit, which he now has, before the grant was issued. That, in my view, is sufficient cause to warrant the grant of the orders sought. Counsel for the 1st defendant has submitted that this application is mounted under a provision that does not exist. This application was filed in 2006. ***Order 51 Rule 10 (2) of the Civil Procedure Rules*** states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. The orders sought by the applicant herein are to revive the suit and be allowed to prosecute it and it is not suggested that the 1st defendant was prejudiced in any manner by the want of form. It is clear that the 1st defendant knew the case that she was required to meet and she has done so. Counsel for the 1st defendant also submitted at length on matters such as that the land parcel No. KABARE/NJIKU/745 is no longer an issue. Those are issues that will be determined at the trial and cannot be the basis of an application such as is now before me.

It is also clear from the record that the applicant was let down by the previous counsel. Paragraphs 18, 19, 21 and 22 of his supporting affidavit demonstrate the steps he took in the matter and his frustrations. He says:-

18: "That when I enquired from my advocate on record, then Mr. Kariithi as to what will happen to my mother-in-law's pending suit, the said Advocate assured me that nothing would go wrong as he would substitute my late mother-in-law's name with my name to enable me prosecute the said case"

19: "That I rested assured everything was under control"

20: "That in June 2005, the defendant applied for Judicial Review to compel the Land Registrar to issue Titles to her on allegation that my mother-in-law's suit had abated"

21: "That when I asked my advocate the meaning of the word abated, he informed me that the suit had lapsed or expired as my late mother-in-law's name had not been substituted with my names within twelve (12) months"

22: "That in annoyance, I decided to change the advocate which I did"

It is obvious from the above that the applicant did not go to sleep. He was in touch with his previous advocate following up on this suit and he should not be penalized because of the failure of his advocate to take appropriate action to safeguard his interests. It is well settled that a party should not suffer the injustice of not having his case determined on its merit because of the mistake of his advocate. As was held in ***PHILIP CHEMWOLO & ANOTHER VS AUGUSTINE KUBEDE 1982-88 KAR 103:***

> ***"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit"***

I think I have said enough to demonstrate that the applicant herein is deserving of the orders sought in his Chamber Summons dated 3rd April 2006. I accordingly allow it and make the following orders:-

1. This suit is revived.

2. The name of the deceased plaintiff is substituted with that of the applicant who is allowed to prosecute the suit.

3. On costs, Order 27 Rule (2) of the Civil Procedure Rules provides that the Court may revive the suit "upon such terms as to costs or otherwise as it thinks fit". In the circumstances of this case, I find it proper to direct that the applicant meets the 1st defendant's costs of this application.

It is so ordered.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016

Ruling delivered, dated and signed in open Court this 4th day of November 2016.

Ms Ndorongo for Mr. Njage for the Respondent present

Mr. Mugo for the Applicant absent.

B.N. OLAO

JUDGE

4TH NOVEMBER, 2016