



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CASE NO. 421 OF 2011

GEOFFREY MWANGI KIHARA.....PLAINTIFF

VERSUS

MWIHOKO HOUSING COMPANY LTD.....1ST DEFENDANT

NJENGA NJOROGE.....2ND DEFENDANT

MARY WANJIRU KINYUA.....3RD DEFENDANT

MAINA NGUKU KINYUA.....4TH DEFENDANT

RULING

The Application

The application for determination is a Notice of Motion dated 19th December 2013 filed by the Plaintiff brought under Order 24 Rule 4(1) and Rule 7(2) of the Civil Procedure Rules. The Plaintiff seeks orders that:

1. Margaret Muthoni Njenga be substituted for the 2nd Defendant as his personal representative.
2. The Plaint be amended to show the new status.
3. The suit against the 2nd Defendant which abated on 21st April 2013 be revived.
4. Costs be in the cause.

The application is supported by an affidavit sworn by the Plaintiff, wherein he deponed that the 2nd Defendant died on 21st April 2012. It is his deposition that on 14th December 2012, he filed Miscellaneous Succession Cause No. 1796 of 2012 in Nairobi to compel the deceased's wife to take letters of administration *ad litem* to represent the deceased in the suit, which application was allowed and the Court granted a limited grant on 24th September 2013. The Plaintiff further deponed that he was unable to get representation for the 2nd Defendant on time, as his letter dated 10th May 2012 to the deceased's lawyer asking the progress on legal representation was never responded to. The Plaintiff urged the court to allow the application.

The Response

The 2nd Defendant filed Grounds of Opposition dated 1st July 2014 in response to the Plaintiff's application. It was averred therein that the Plaintiff's application is null and void as there is no suit existing against the 2nd Defendant. Further that the orders sought are against the law and unjust to the said

Defendant. Additionally, that the application is against the maxim: equity aids the vigilant not the indolent.

The Submissions

The application was canvassed by way of written submissions. The Plaintiff's counsel filed submissions dated 11th July 2014 while the 2nd Defendant's counsel filed submissions dated 30th October 2014. For the Plaintiff, counsel submitted that Order 24(4)(1) of the Civil Procedure Rules allows the Court to revive a suit which has abated provided sufficient cause is shown, and that the delay in this matter was caused by the 2nd Defendant's failure to appoint a personal representative in this matter which forced the Plaintiff to make the application for letters of administration *ad litem*.

On behalf of the 2nd Defendant, counsel submitted that Order 24 Rule 4(3) of the Civil Procedure Rules places a limitation period of one year within which the application for substitution ought to be made. Counsel submitted that in this instance, the application was made after the suit against the 2nd Defendant had abated. Counsel referring to Rule 7 (2) of the said Order submitted that the Plaintiff had to demonstrate to the satisfaction of the court that he was prevented by sufficient cause from continuing the suit, which he had not. Reliance was also placed on the decision in **Leonard Mutua Mutevu vs Benson Katela ole Kantai & Another (2014) e KLR** in this respect.

The Issues and Determination

I have considered the pleadings and submissions made by the parties herein. The issues are whether the suit against the 2nd Defendant should be revived, and if so, whether the 2nd Defendant should be substituted. Order 24 Rule 4 of the Civil Procedure Rules provides for the effect of death of one of several Defendants or of the sole Defendant. It states that:

“4. (1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant 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 defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

It is clear from the said provisions that a suit abates by operation of the law when no substitution is made within one year on the death of a Defendant. However, Order 24 Rule 7(2) of the Civil Procedure Rules gives the court discretion to revive an abated suit if there is sufficient proof that the applicant was prevented by any sufficient cause from continuing the suit. The Court of Appeal in the case of **The Hon. Attorney General v The Law Society of Kenya & Another – Civil Appeal (Application) No. 133 of 2011** observed as follows as to the meaning of sufficient cause:

“Sufficient cause or good cause in law means:-

‘The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused.’ See Black’s Law Dictionary, 9th Edition, page 251.

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 unexplained gaps in the sequence of events.”

In the instant application, the Plaintiff averred that he filed a succession cause to compel the deceased 2nd Defendant's wife to take letters of administration *ad litem* to represent the deceased in the suit, after it became apparent that the 2nd Defendant's family was not keen on taking out letters of administration. This, in my view, is good reason to revive the suit against the 2nd Defendant, and also to extend time for the Plaintiff to make his application for substitution, noting that it was indeed the delay by the deceased's family to take out letters of administration that caused the suit herein to abate as against the 2nd Defendant.

The Plaintiff has in addition brought evidence of his application for, and of the issue of limited grant of letters of administration *ad litem* to Margaret Muthoni Njenga on 24th September 2013 in Nairobi High Court Succession Cause No. 1796 of 2012, which were attached as annexures "A" and "B" to his supporting affidavit sworn on 19th December 2013. The said issue of a limited grant of representation makes Margaret Muthoni Njenga the personal representative of the 2nd Defendant for the purposes of this suit, and she is therefore qualified to be substituted in the place of the deceased 2nd Defendant.

The Plaintiff's application is accordingly allowed for the foregoing reasons, and it is hereby ordered as follows:

1. The suit against the 2nd Defendant be and is hereby revived.
2. That Margaret Muthoni Njenga be and is hereby substituted herein as the 2nd Defendant in this suit.
3. The Plaintiff is granted leave to amend his Plaintiff accordingly and to file and serve the Amended Plaintiff within 14 days of today.
4. The costs of the Plaintiff's Notice of Motion dated 19th December 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 4th day of May, 2015.

P. NYAMWEYA

JUDGE