



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC MISC CIVIL APPL. NO. 15 OF 2014

CHARLES MUGUNDA GACHERU.....APPLICANT

-VERSUS-

THE HON. ATTORNEY GENERAL.....1ST DEFENDANT

MAINA GACHERU 2ND DEFENDANT

RULING

Background

1. Vide a ruling delivered on 8th June, 2015 this court dismissed the applicant's application dated 1st December, 2014 in which the applicant sought enlargement of time within which an application for substitution of Charles Mugunda Gacheru (deceased) ought to have been substituted.
2. In dismissing the application, this court, *inter alia*, observed:-

“It is not in dispute or in contention that both the plaintiff and the 2nd defendant passed on without being substituted within the time stipulated in law (Order 24 of the Civil Procedure Rules).

The effect of the failure to substitute the deceased parties with the time stipulated in law was to render the suits abated. See Order 24 Rule 3(2) and 4 (3)
.....

Being of the view that the cases cited hereinabove captures the right legal position of a suit that has abated and the applicants having failed to apply for revival of the abated suit, I find the current application to be bad in law for want of substratum. Consequently, I dismiss it with costs to the respondents.”

3. Barely a month after this court dismissed the application cited herein above, Lawrence Maina Muritu who has described himself as an administrator of the estate of the deceased filed the notice of motion dated **8th July, 2015** seeking the following orders:-
 - a) **Reinstatement and/or revival of the plaintiff's suit;**
 - b) **Enlargement of the time within which to substitute the deceased plaintiff;**

c) That the deceased plaintiff be substituted by Lawrence Maina Muritu and Rose Wangare Muritu.

4. In alternative to the foregoing prayers, the applicant urges the court to review or set aside its orders made on 8th June, 2015 and be pleased to reinstate the plaintiff's suit and substitute him with the persons mentioned in (c) above.

5. The application is premised on, among other grounds, the ground that the applicant erroneously omitted to include a prayer for reinstatement of the abated suit in his application dated 1st December, 2014.

6. Explaining that they are still interested in pursuing the claim, which survived the deceased plaintiff, the applicants contend that the order of 8th June, 2015 dismissing their application for enlargement of time within which to substitute the plaintiff was not only prejudicial to them but also draconian.

7. The application is supported by the affidavit of Lawrence Maina Muritu in which the grounds thereon are reiterated.

8. In opposing the application, the 1st respondent filed the grounds of opposition dated 19th August, 2015. In those grounds, it is contended that the application is misleading, incompetent and an abuse of the court process. The following reasons are offered for the foregoing contention-

- a) That the applicants are asking this court to sit on appeal against its own orders;
- b) That the applicants are guilty of none disclosure of material facts or are deliberately misleading the court;
- c) That the applicants are guilty of laches, lack candidness and diligence;
- d) That the applicants are only interested in protracted litigation to the detriment of justice; and
- e) That the application is against the policy that litigation must come to an end.

9. Counsel for the 2nd respondent filed grounds of opposition dated 22nd July, 2015 and a replying affidavit that he swore on the same day. Through those court papers, on behalf of the 2nd respondent, it is contended that the application is *res judicata*, incurably defective, and an abuse of the court process. Pointing out that the suit against the 2nd respondent has also abated, counsel for the 2nd respondent contends that granting the orders sought will serve no useful purpose.

The Law applicable

10. **Order 24 Rule 7(2)** gives the court discretionary power to revive a suit that has abated. That section of the law provides as follows:-

“7(2) 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 plaintiff 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.”

11. **For the court to exercise the discretion vested in it in favour of a person seeking to revive a suit that has abated, it must be satisfied that the applicant was prevented by a sufficient cause from continuing the suit. In this regard see the cases of Janet Wangari Mwangi v. James Muchoki Kariuki & Bidco Oil refineries Ltd (2004) Eklr and Rukwaro Waweru v. Kinyutho Ritho & another (2015) e KLR. In the Rukwaro Waweru case, this court held:-**

“... it is clear that the Court is given the discretion to extend time for substitution of parties and to revive a suit that has abated if sufficient cause is shown. This notwithstanding, precedent seems to suggest that this Court may not extend time once the suit against a deceased Defendant has abated. See H. J. Shah – versus- Ladhi Nanji w/o Haridas Vasanji & 2 others [1960] E. A. 262, Dhanesvar –versus- Manilal M Shah [1965] E. A. 321), Soni – versus- Mohan Dairy [1968] E. A. 58, and Phillips, Harrisons & Crosfield Ltd – versus- Kassam [1982] K.L.R. 458.

In the case of Soni –versus- Mohan Dairy [1958] E. A. 58, it was held that for an applicant to succeed in having the suit revived, he has to prove that there was a sufficient cause that prevented him from seeking the substitution of a deceased litigant within the requisite period....”

12. Whereas the applicant has made attempts to explain why he failed to substitute the plaintiff within the time stipulated in law, I am not satisfied with the explanation offered. My observation is that the cause of delay is the casual manner the applicant has handled the application. A diligent litigant would, in the circumstances of this case, not fail to note that the current application is fatally defective as the 2nd respondent who is a key party to the proceedings is also deceased. In this regard see the case of Nephant Kiguta Kingori & 2 others v. Jane Gathoni Kingori & another (2015) e KLR where this court observed:-

“...a suit for or against the estate of a deceased person can only be brought by an administrator of the estate or against an administrator of the estate. In the circumstances of this case, it is not clear in what capacity the applicants have brought the suit or the capacity in which the respondents are sued. In this regard, see the decision in the case of Robert Meleya *supra*.

Since the capacity in which the applicants have brought the suit or in which the respondents are sued is unknown and there being no evidence that the applicants and/or the respondents are administrators of the estate of the deceased, I find and hold that the suit is incompetent for lack of capacity to sue on the part of the applicants and capacity to be sued on the part of the respondents.”

13. Also see the cases of:-

(a) Phillips, Harrison & Crosfield Ltd –versus- Kassam [1982] E.A. 458, Hancox J (as he then was) stated that where there is undue delay, an application for extension of time to revive an abated suit may be refused.

(b) Leonard Mutua Muteru vs. Benson Katela Ole Kantai & another (2014)e KLR F. Gikonyo J., stated:-

“...Now, the 1st defendant died on 2.1.2010. From the facts of and pleadings in this case, the 1st defendant is the principal party; the suit cannot be effectively proceeded with against the 2nd defendant alone. Accordingly, the personal representative of the 1st defendant ought to be made a party. That process is governed by rule 4 of Order 24 of the CPR. There are two important aspects of rule 4(1) of Order 24 of the CPR; 1) under rule 4(1) any party may apply; and 2) on such application being made, it is the court which shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit. The party applying just needs to establish the personal representative of the deceased defendant and the rest is left to the court’s administrative mechanisms of case management. For purposes of rule 24 of the CPR, the personal representative of the deceased defendant is the one appointed in accordance with the Law of Succession Act. Rule 4(3) of Order 24 of the CPR, however, places a limitation period and consequences of failure to apply within the prescribed time.....”

14. In the circumstances of this case, I find the delay of more than two years to be inordinate. Granting

the orders sought, will in my view, unnecessarily prolong litigation as the applicant will have to start the process of substituting the 2nd defendant with his legal representative, a process that will require time.

15. In view of what I have stated herein above, I find the application to be without merit and dismiss it with costs to the respondents.

Dated, Signed and Delivered at Nyeri this 19th day of November, 2015.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Karingithu h/b for Mr. Kamanda for the applicant

Mr. Makeri for the 1st defendant

Ms. Wambui h/b for Gachiri Kariuki for the 2nd defendant

N/A by Lawrence Maina Murithi

Court assistant - Lydia