IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A.)

CIVIL APPEAL NO.283 OF 2015

BETWEEN

REBECCA MIJIDE MUNGOLE

CLEOPHAS ONGAU OMWENGA...APPELLANTS

AND

KENYA POWER & LIGHTING COMPANY LTD................1ST RESPONDENT

ATLAS COPCO EASTERN AFRICA LTD.........................2ND RESPONDENT

FALCON SIGNS LTD...3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Sergon, J.), dated 29th September, 2015

in

Civil Appeal No.42 of 2013)

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JUDGMENT OF THE COURT

James Omolo Mamutenda had been assigned by his employer, Falcon Signs Ltd, the 3rd respondent, to take measurements of an existing billboard on top of a building within the premises belonging to Atlas Copco E. A. Ltd, the 2nd respondent. While returning to the motor vehicle owned by the 3rd respondent the aluminium ladder he was carrying accidentally caught live electric wires laid by the Kenya Power and Lighting Co. Ltd, the 1st respondent, inflicting severe burns on him. The deceased sued the respondents jointly and severally in the Chief Magistrate Court Civil Suit No.2356 of 2006 to recover damages for these injuries.

He unfortunately died on 17th October, 2007 before the hearing and determination of his case. Following his death a limited grant of letters of administration *ad litem* was applied for on 25th May, 2012 and issued on 9th October, 2012 jointly to

Rebecca Mijide Mungole and ***Cleophas Ongau Omwenga***, the appellants. The grant was, from those dates, issued almost five years after the death of the deceased.

On 12th October, 2012, for those reasons the appellants took out a notice on motion praying that the suit, which obviously had abated in terms of ***Order 24, rule 3*** of the Civil Procedure Rules be revived and a complementary prayer that the appellants be made parties in the suit in place of the deceased. The only reason proffered for the delay in bringing the application after a delay of nearly five years was that the local chief of the location from which the appellants came refused to issue the 1st appellant with a letter confirming her marriage to the deceased because she had declined to undergo certain traditional and customary rites; and that after sometime she had to obtain the letter from a chief in Nairobi.

The learned magistrate accepted the explanation and allowed the application relying on the decisions in ***Anne Muthige Muasya & 2 Others v. Muhungi & Another, H.C.C.A No. 683 of 2007*** and ***Soni v. Moha's Dairy (1968) EA 58***, for the proposition that since no time was fixed by the rules for applying for revival of an abated suit, an application can be made within six years after the death of a party to a suit. He allowed the application since it was brought before the expiration of six years following the death of the deceased.

The 1st and 2nd respondents were aggrieved by that conclusion and filed two separate appeals in the High Court which were subsequently consolidated into HCCA No 42 of 2013. Sergon, J who heard that first appeal observed that the application for revival of the suit ought to have been preceded by an application for extension of time within which to apply for revival and substitution under ***Order 24*** **rule 3(2)** of the Civil Procedure Rules. In overturning the decision of the magistrate and allowing the appeal, the learned Judge said;

> ***"… I'm persuaded that the appeal should succeed on the ground that the Respondents proceeded to file an application for revival of the suit and substitution without making an application for extension of time under Order 24 rule 3(2) of the Civil Procedure Rules. In the case of Gachuhi Muthanji v. Mary Wambui the Court of Appeal stated inter alia as follows:***
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> ***"That the learned judge of the High Court had misdirected himself in this case by allowing the application for substitution. The Respondent in the said Court of Appeal case also conceded that an application for extension of time to revive the abated suit had never in fact been made."***
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> ***It is clear in my mind that the Respondents missed a very important step before making the application for revival of the suit. The learned Senior Principal Magistrate therefore misdirected himself when he made the application reviving the suit yet the Respondent had not sought for leave to do so prior to lodging the application".***

The appellants now bring this second appeal on the grounds that the learned Judge erred in insisting that the application for extension of time was a condition precedent to an application for revival of an abated suit; that he failed to address his mind to the relevant question, namely whether the appellants had shown sufficient cause to justify revival of the suit; that the learned Judge ought to have considered whether the learned Magistrate properly exercised his discretion in granting the application for revival of the suit.

In their written submissions the appellants have urged us to allow the appeal because there was no fault in the manner the learned magistrate exercised his discretion under ***Order 24*** aforesaid and the learned Judge ought to have so found; that under ***Order 24,*** after the suit abated the appellants were only expected to apply for its revival by showing that they were prevented by some sufficient cause from continuing the suit; that upon that proof the suit would be revived on terms that the court thinks fit; that there is no requirement under ***rule 7(2)*** for extension of time; and that we should not follow this Court's decision in **Joseph Gachuhi Muthanji** (supra) as the point relied on by the learned Judge was *orbiter dicta.*

The 2nd respondent fully adopted the submissions of the 3rd respondent, which were that the learned Judge correctly applied the provisions of **Order 24** and properly allowed the appeal because the appellants had overlooked a critical step before an application for revival of an abated suit could be

granted; that the decisions of this Court in **Joseph Gachuhi Muthanji** (supra) and **Said Swailem Gheithan Saanum v. Commissioner of Lands** ***(sued through the Attorney General)*** **& 5** ***Others Mld Civil Appeal No. 16 of 2015***, support that position; that **Soni v. Mohan** (supra) was decided under the repealed ***Order 23 rule 8(2)*** of the Civil Procedure (Revised) Rules, 1948; and that under ***Order 24*** the consideration is one year from the death of a party.

The question in the appeal is essentially whether in seeking to revive an abated suit, the applicant must, in the first place seek extension of time within which to do so. This is a question of construction of ***Order 24*** which provides for the procedure in case of death of one of several plaintiffs or of a sole plaintiff. Because of its importance we reproduce here below the pertinent part of that provision;

"24. 1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.

> ***2 …………***
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> ***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 an 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.***
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> ***(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 the 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 reason on application, extend the time.***
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> ***4. ………***
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> ***5. ………***
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> ***6. ………***
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> ***7. (1) Where a suit abates or is dismissed under this Order, no fresh suit shall be brought on the same cause of action.***
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> ***(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".***

The sequence of the application under this procedure of what should happen in case of the death of a plaintiff and the cause of action survives or continues, is plain. Speaking generally, by operation of the law, a suit will automatically abate where a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues if no application is made within one year following his death. According to ***rule 3(2)*** the defendant is only required to apply for an award of costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff. But as was observed by this Court in **Said Sweilam** (supra) the fact of abatement has to be brought to the notice of the court, proved and accordingly recorded in order for the defendant to apply for costs. It means that even though the legal effect of abatement may have already taken place, for convenience, an order of the court is necessary for a final and effectual disposal of the suit.

Where a suit abates, no fresh suit can be brought on the same cause of action because it is extinguished and cannot be maintained in the form it was originally presented. Because the suit will only abate where, within one year of the death of the plaintiff no application is made to cause the legal representative of the deceased plaintiff to be joined in the proceedings, it is imperative and we may add, logical, where the legal representative is not so joined within one year, that an application be made for extension of time to apply for joinder of the deceased plaintiff's legal representative. It is only after the time has been extended that the legal representative can have capacity to apply to be made a party. ***Order 24*** must be construed by reading it as a whole and the sequence in which it is framed must be followed without short circuiting it. The proviso to ***rule 3(2)*** to the effect that the court may, for good reason on application, extend the time goes to show that without time being extended, no application for revival or joinder can be made. It is the effluxion of time that causes the suit to abate. It is that time that must, first be extended. Once time has been enlarged, only then can the legal representative bring an application to be joined in the proceedings. Again it is only after the legal representative has been joined as a party that he can apply for the revival of the action. In our view there is nothing objectionable to making an omnibus application for all the three prayers. But it is incompetent to seek joinder or revival when the prayer for more time to apply has not been granted. The learned Judge, supported by the authority of **Joseph Gachuhi Muthanji** (supra) was therefore right in dealing with that aspect of the application in the manner he did.

After time to apply has been enlarged and the legal representative has been joined, the focus and burden shifts to him to show cause why the abated suit should be revived. A prayer for the revival of the suit cannot be allowed as a matter course or right. If the applicant demonstrates and the court is satisfied that he was prevented by any sufficient cause from continuing the suit, the court will allow the revival of the suit upon such terms as to costs or otherwise as the court may think fit. The operating phrase in ***rule 7(2)*** "sufficient cause" has been broadly and liberally defined, in order to advance substantial justice. Liberal construction should not be done with the result that one party is thereby prejudiced. When the delay is on account of any dilatory tactics, want of *bona fides*, deliberate inaction or negligence on the part of the applicant, the court will not revive the abated suit. If a party has been negligent or indifferent in pursuing his rights and remedies, it will be equally unfair to deprive the other party of a valuable right that has accrued to him in law. The explanation has to be reasonable and plausible, so as to persuade the Court to believe that the explanation rendered is not only true, but justifies exercising judicial discretion in favour of the applicant.

The learned Judge, as we have demonstrated did not deal with the question whether the appellants had discharged the burden of showing that he was prevented by sufficient cause from continuing the suit. He instead allowed the appeal only on the ground that time to bring an application for joinder and revival of suit had not been extended. For our part, we note, first that the application was brought after considerable delay. The Court in ***Charles Wanjohi Wathuku v. Githinji Ngure & Another Civil Application No. 9 of 2016*** stressed the importance of strict application of timelines set by the law stating that;

> ***"Timelines are not technicalities of the procedure which may be accommodated under Article 159 of the Constitution or section 3A and 3B of the Appellate Jurisdiction Act".***

This was reiterated in ***John Mutai Mwangi & 26 Others v. Mwenja Ngure & 4 Others, Civil Appl. No 126 of 2014***, cited by learned counsel for the respondent, where it was held, in relation to ***rule 82*** of the Court of Appeal Rules that;

> ***"That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner".***

In any case the burden of showing that there was sufficient cause for condonation of delay by the court was upon the appellants.

It took six years between the date the deceased died and time when the application was presented. Except for the general averment that the local chief of the location where the deceased came from refused to

issue the1st appellant with a letter confirming her relationship with the deceased, no other justifiable reason was advanced by the appellants. Although there is no law that requires that the relationship of any party with a deceased person be proved by the local chief, under ***Section 46*** Law of Succession Act, the chief, in whose location free property of a deceased person is found is required to take all necessary steps to protect that property. He is also expected to ascertain if other free properties of the deceased exists in the area and all persons appearing to have any legitimate interest in the succession to or administration of his estate. This duty is limited only to situations where the property of a deceased person is situated in the location of the chief. It was not claimed that there was such property in the location concerned. In any case the 1st appellant was able nonetheless to obtain the letter from a chief in Nairobi. It is inconceivable that it would take six years to get a grant of probate on such a ground as advanced by the appellants.

Even on this aspect of the appeal, we come to the conclusion that the delay was inordinate and no sufficient cause was shown.

The appeal, for these reasons must fail. It is accordingly dismissed with costs.

Dated and delivered at Nairobi this 12th day of May, 2017.

ASIKE - MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR