IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: OKWENGU, KIAGE & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO.199 OF 2010

BETWEEN

KISHOR KUMAR DHANJI VARSANI.....APPELLANT

AND

AMOLAK SINGH.....1ST RESPONDENT

KENNETH NDUNGU.....2ND RESPONDENT

ONESMUS MATHERI.....3RD RESPONDENT

DANIEL NJOROGE.....4TH RESPONDENT

NDEFFO LIMITED.....INTERESTED PARTY

(Being an appeal from the Ruling and Order

of the High Court of Kenya at Nakuru

(Ouko, J), dated 29th April, 2010

in

H.C.C.C. No.247 of 2002)

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RULING OF THE COURT

[1] On 29th April 2010, the High Court at Nakuru (Ouko, J. as he then was), allowed an application brought by way of chamber summons dated 4th December, 2008. The application was for revival of Nakuru HCCC No.247 of 2002 that had been filed by ***Amolak Singh*** (herein after referred to as the deceased), against ***Ndeffo Limited*** (now the interested party), and ***Kishor Kumar Dhanji Varsani*** (now the appellant). The suit was for an order of perpetual injunction restraining the defendants, their servants

or agents from evicting the deceased or in any way interfering with his quiet possession and enjoyment of his leasehold interest in Bahati/Kabatini Block 2806 (the suit property); a declaration that the purported transfer of the suit property from the interested party to the appellant without taking the deceased's interests into account is illegal, null and void as against the deceased; and the cancellation of the appellant's illegally obtained title. The suit abated one year after the death of the deceased who died on 4th August, 2005.

[2] Three years after the death of the deceased, his wife ***Punny Balbir Kaur*** (***Punny***) lodged an application for revival of the suit. She swore that she did not have advice on the succession matters and did not realize the need to follow-up on her husband's estate as her son who owns 40% of the business continued doing the business.

[3] Upon hearing the application and the grounds of opposition raised by the respondents, the learned Judge exercised his discretion in the applicant's favour, and granted the order for revival of the suit. The Judge further ruled that the issue of the applicant's capacity; whether the plaintiffs were properly on record and whether the suit property had ceased to exist (issues that had been raised by the appellant and the interested party), were issues that could only be canvassed after the suit was revived.

[4] Being aggrieved by that ruling, the appellant lodged an appeal before this Court challenging the ruling on ten grounds. These included the fact that the learned Judge erred: in finding that there was sufficient cause to warrant reinstatement of the suit; in reinstating a suit in which the subject matter had ceased to exist; in failing to address the fact that the leasehold interest in the suit property ceased to exist upon ratification and creation of Bahati/Kabatini/10586; in holding that ***Punny*** had a legal interest in an unregistered lease which had expired before her application was filed; and holding that a person can be a party to a suit without having filed pleadings in a suit which is not a representative suit.

[5] Following directions given by the Court, written submissions were duly filed and exchanged by the parties. Learned counsel Mr. Opondo from the firm of Odhiambo and Odhiambo Advocates represented the appellant, the respondents were represented by Dr. Kamau Kuria, SC, whilst learned counsel Mr. Waiganjo Mwangi represented the interested party. All the counsel appeared before the Court, and were given opportunity to highlight the submissions.

[6] For the appellant, it was submitted that the appeal raises two issues, namely: whether the abated suit ought to have been revived and whether the parties were properly enjoined. It was submitted that under **Order XXIII Rule 3(1) & (2**) of the former edition of the Civil Procedure Rules (now **Order 24 Rule 3(1) & (2)** of the Civil Procedure Rules 2010), a suit abates 12 months after the death of a plaintiff if no application is filed for purposes of substituting him, and the court can only cause the legal representative of the deceased to be made a party to the proceedings if an application is made within one year before the suit abates.

[7] It was argued that the suit filed by the deceased abated automatically as no application was made for substitution within one year from the time of his death. In support of that submission, ***John Maskana Masamba vs Toya Juma Lukoya [2005] eKLR*** and ***Sweilem Gheithan Saanum vs Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR*** were relied upon.

[8] The learned Judge was faulted for reviving the suit when the reasons given for failure to move the court within the required time were not "sufficient cause" as required under Order 23 Rule 8 of the Civil Procedure Rules. Relying further on ***Titus Kiragu vs Jackson Mugo Mathai & Another [2013] eKLR***, it was contended that the suit abated automatically as a matter of law; that there was therefore no suit in regard to which an application for substitution could be made; and that the court could not act in vain by making an order in favour of the deceased's wife in the absence of any suit. Further, that the averments made by the deceased's wife did not reveal reasonable cause, but only showed laxity on the part of the deceased's widow, her son and their counsel.

[9] In addition, the ***Honouarable Attorney General vs the Law Society of Kenya & Another Civil Application No.133 of 2011*** was cited for the proposition that:

"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 Blacks Law Dictionary, 9th Edition page 521), sufficient cause must be rational, plausible, logical, convincing, reasonable and truthful. It should not therefore be an explanation that leaves doubt in the Judges mind. The explanation should not leave unexplained gaps in the sequence of events."

[10] In regard to the cause of action, it was submitted that the deceased's suit involved an unregistered lease agreement that is contractual and is required by statute to be in writing; that only parties that are privy to the written agreement can lay a claim on it; that the deceased's cause of action being anchored on contractual rights and the same having abated no other person could enforce any rights under the contract. It was reiterated that the issues concerning the questions of rights under the expired lease only concerned the deceased and the 1st respondent and therefore it was not enforceable by any other party. In support of that contention, ***Agricultural Finance Corporation vs Lengetia Ltd [1985] KLR 765***, was relied upon.

[11] In addition, it was argued that the orders in Succession Cause No.2569 of 2008 and 21 of 2008 showed that ***Punny*** was granted a limited grant to prosecute several suits as well as a grant *ad coligeda bona defuncti* none of which included Nakuru HCCC No.247 of 2002, the abated suit. The Court was therefore urged to find that the order made by the learned Judge for the revival of the suit was not warranted as the applicant did not show or exhibit sufficient grounds. That in addition, the orders issued on 16th April, 2004 to have ***Kenneth Ndungu, Onesmus Matheri Ndegwa*** *and* ***Daniel Njoroge*** enjoined as the 2nd, 3rd and 4th plaintiffs, were issued illegally as the application for enjoinment of the parties dated 19th January, 2003 had not been canvassed, nor did the motion dated 16th April, 2004 seek prayers for enjoinment of parties.

[12] ***Richard Satia and Partner & Another vs Samson Sichangi [1997] eKLR,*** was relied upon for the proposition that a Judge had no power or jurisdiction to decide an issue that has not been raised before him. In conclusion, the appellant urged the Court to interfere with the exercise of the learned Judge's exercise of judicial discretion as the Judge misdirected himself on the law and his decision was made in error of both law and fact.

[13] The respondents also filed written submissions in which it was pointed out that the record of appeal has two mistakes; first, that the 1st respondent is ***Punny*** and not her late husband; secondly that ***Ndeffo Ltd*** that is described as the 1st defendant is actually the 5th respondent in the appeal, and that there was an order made on 16th April, 2004 to enjoin the 2nd to 4th respondents as plaintiffs.

[14] It was submitted that for the appellant to succeed in challenging the exercise of judicial discretion by the learned judge of the High Court, the appellant had to meet the requirements laid down in ***United India Insurance Company Ltd, Kenindia Insurance Company Limited & Oriental Fire and General Company Limited vs East African Underwriters (K) Ltd [1982-88]1KLR 639***. The requirements are: that the Judge misdirected himself on the law; or misapprehended the facts; or that he took into account considerations of which he should not have taken account; or that he failed to take into account considerations of which he should have taken account; or that his decision albeit a discretionary one was plainly wrong. It was contended that the learned Judge did not misdirect himself on the law. That he clearly understood the facts and took into consideration what he was required to take into account, and therefore there were no circumstances justifying the interference with the exercise of the learned Judge's discretion.

[15] In addition reliance was placed on ***Murai vs Wainaina [1982] KLR 38***, for the proposition that a mistake of law made by a client or advocate may amount to sufficient reason for extending time as per Rule 4 of the Court of Appeal Rules, and this can equally be applied to the respondent's position.

[16] It was argued that since the appellant had not appealed against the order of Justice Kamau made on 16th April, 2004, in regard to enjoinment of parties, it was not open to the appellant to raise the matter on

appeal; that the 2nd to 4th respondents are persons who stand to be affected by the decisions made by the learned Judge and therefore, ought to be given a chance to be heard and were therefore rightly enjoined in the suit. ***Mradula S. Kantaria vs Suresh Kantaria, Court of Appeal at Nairobi Civil Application No. 277 of 2005 (UR)*** was cited.

[17] It was submitted that **Punny**, filed an application in her capacity as the legal representative of her late husband; that under ***Order XXIII Rule 8*** of the former edition of the Civil Procedure Rules (now ***Order 24 Rule 7(2)*** of the Civil Procedure rules 2010), a legal representative of a deceased plaintiff or a person claiming to be a legal representative can apply for an order for revival of a suit which has abated or apply to set aside an order of dismissal, provided it is established that he/she was prevented by sufficient cause from continuing with the suit.

[18] It was further submitted that grounds (2), (3), (4), (5), (7), (8) and (9) in the appellant's memorandum of appeal, raised issues concerning matters that the learned Judge of the High Court declined to rule on and therefore the matters were still pending for determination in the High Court suit and ought not to be canvassed in this appeal. It was reiterated that the learned Judge rightly exercised his discretion in the respondent's favour as the respondent established sufficient cause to justify the suit being revived and that the appellant was relying on outdated laws that elevated technicalities over substance.

[19] In response to the interested party's submissions, on the description of ***Ndeffo Ltd*** as an interested party although it is the 5th respondent, it was argued on behalf of the respondents that the description supports the ruling made by the learned Judge of the High Court. The Court was therefore urged to dismiss the appeal.

[20] The interested party was represented in the appeal by learned counsel Mr. Waiganjo Mwangi. In the written submissions that were duly highlighted by the learned counsel, it was submitted that the learned Judge in the trial court had unfettered discretion to revive the suit on condition that sufficient cause was shown; that the burden of proving sufficient cause was on the person seeking the revival of the suit; that the 1st respondent explained that after the death of her husband she left the country for Britain leaving her son ***Kalwinder Singh*** running the deceased's business until 2008 when the business was closed down following a court order. This necessitated her seeking legal advice, and it was then that she learnt that she needed to obtain a grant to enable her defend her husband's interests; that the learned Judge acknowledged that the 1st respondent acted promptly immediately she obtained appropriate advice; that the contention that the 1st respondent's grant was limited for purposes other than pursing the deceased's suit was not raised before the learned Judge, nor was it a ground raised in the memorandum of appeal, and cannot therefore be entertained at this stage; and that the learned Judge was right in reviving the suit so that it could be determined on merit.

[21] In regard to the joinder of the parties, it was pointed out that the order for joinder of the parties was made by Kamau, J, on 16th April, 2004 and no application having been made for the order to be set aside or reviewed, the order remained in force. It was argued that the appellant is estopped from challenging the joinder.

[22] The respondent's application for revival of the suit was made under ***Order XXIII Rule 8*** of the former edition of the Civil Procedure Rules (now ***Order 24 Rule 7(2)*** of the Civil Procedure rules 2010). That Rule states as follows:

> ***"The plaintiff or the person claiming to be the legal representative of the 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 he thinks fit."***

[23] The issue in this appeal is simple. That is, whether the 1st respondent established sufficient cause for failing to continue with the suit after the death of the deceased, to justify the learned Judge of the High

Court exercising his discretion in allowing the revival of the suit following its abatement. In his judgment, the learned Judge took into account the object of limitation enactments as stated in ***Mehta vs Shah [1965] EA 321***:

> ***"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand and on the other hand to protect a defendant after he has lost the evidence of his defence from being disturbed after a long lapse of time.***

[24] The learned Judge also took into account the explanation given by ***Punny***. This is how the learned Judge rendered himself:

> ***"…The applicant has been candid that she did not know that she was required to do anything in relation to the case …… is this candid admission the same thing as sufficient cause? It may be that ignorant of law is no defence. In my humble view that may apply more to criminal matters than civil litigation. There are many Kenyans even the educated who may not unlike lawyers be aware of the existence of Order 23 Rule 8. It is clear that immediately the applicant became aware, she applied and obtained the grant and without further delay brought the instant application. Her claim cannot be described as stale nor can it be said the 2nd respondent has lost his defence. After all there are still three plaintiffs in the matter. They we joined by an order of this court (Kamau, J) which order has not been set aside.***
>
> ***In view of the contest in this matter, it would be unconscionable to lock out a party who has expressed serious keenness in proceeding with the case. The questions regarding her capacity, whether the other plaintiffs are properly on record or whether the suit property has ceased to exist can only be canvased after the suit is revived and the applicant joined. For those reasons, I allow the application dated 4th December, 2008 and order that the 1st plaintiff's suit be and is hereby revived….."***

[25] In our view the above extract demonstrates that the learned Judge took into account all relevant factors in arriving at his decision to exercise his discretion in favour of ***Punny***. The learned Judge rightly directed his mind to the reasons for the limitation period and the need for ***Punny*** to establish "the sufficient cause that prevented her" from continuing with the suit. The applicant sufficiently explained the reasons for her failing to pursue the suit before it abated and the learned Judge accepted the explanation as candid and plausible. Although the appellant attempted to make hay of the failure by the deceased's son to take action in proceeding with the suit before it abated **Punny** could not be penalized for this failure. Being the deceased's wife **Punny** has a greater interest in the deceased's affairs and she has explained why she failed to take action.

[26] We find no reason to fault the Judge. He addressed himself properly on the law and took into account relevant factors. The issue of enjoinment was adverted to by the Judge as a relevant factor in considering whether the deceased's claim was stale, Nonetheless the learned Judge did not make any definitive findings in this regard but relied on the findings and orders that were already on record. Those findings and orders were not challenged and cannot therefore be subject of this appeal.

[27] The issue of the capacity of the appellant to revive the suit was not for determination before the learned Judge as under Order XXIII Rule 8 of the former edition of the Civil Procedure Rules ***"The plaintiff or the person claiming to be the legal representative of the deceased plaintiff***" can make an application for the revival of the suit. Therefore, it was enough that ***Punny*** was "claiming" to be the legal representative of the deceased.

[28] In conclusion, we find that there is no justification for us to interfere with the exercise of the learned Judge's discretion. Accordingly, we dismiss this appeal with costs.

Dated and Delivered at Nakuru this 8th day of December, 2016.

H. M. OKWENGU

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a

True copy of the original

DEPUTY REGISTRAR